

CCEPL

Copyrighted Material

THE COMMON CORE OF EUROPEAN PRIVATE LAW

Personality Rights in European Tort Law



EDITED BY
GERT BRÜGGEMEIER, AURELIA COLOMBI CIACCHI AND
PATRICK O'CALLAGHAN

CAMBRIDGE

Copyrighted Material

Personality Rights in European Tort Law

This volume provides a comprehensive analysis of civil liability for invasion of personality interests in Europe. It is the final product of the collaboration of twenty-seven scholars and includes case studies of fourteen European jurisdictions, as well as an introductory chapter written from a US perspective. The case studies focus in particular on the legal protection of honour and reputation, privacy, self-determination and image. This volume aims to detect hidden similarities (the 'common core') in the actual legal treatment accorded by different European countries to personal interests which in some of these countries qualify as 'personality rights', and also to detect hidden disparities in the 'law in action' of countries whose 'law in the books' seem to protect one and the same personality interest in same way.

GERT BRÜGGEMEIER is Professor (Emeritus) of Civil Law, European Economic Law and Comparative Law at the University of Bremen.

AURELIA COLOMBI CIACCHI is Senior Researcher in Private Law at the University of Bremen and Lecturer at the Hanse Law School, Bremen.

PATRICK O'CALLAGHAN is Lecturer in Law at Newcastle University.

THE COMMON CORE OF EUROPEAN PRIVATE LAW

General Editors

Mauro Bussani, University of Trieste

Ugo Mattei, University of Turin and University of California, Hastings College of Law

Honorary Editor

Rodolfo Sacco, University of Turin

Editorial Board

James Gordley, W. R. Irby Chair in Law, Tulane University Law School

Antonio Gambaro, Professor of Law, University of Milano; President of the Italian Society of Comparative Law

Franz Werro, University of Freiburg and Georgetown University Law Center

Rodolfo Sacco, President of the International Association of Legal Science (UNESCO)

For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union Member States. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

Books in the series

Personality Rights in European Tort Law

edited by Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan
978 0 521 19491 4

Precontractual Liability

edited by John Cartwright and Martijn Hesselink
978 0 521 51601 3

Environmental Liability and Ecological Damage in European Law

edited by Monika Hinteregger
978 0 521 88997 1 Hardback

The Enforcement of Competition Law in Europe

edited by Thomas M. J. Möllers and Andreas Heinemann
978 0 521 88110 4 Hardback

Commercial Trusts in European Private Law

edited by Michele Graziadei, Ugo Mattei and Lionel Smith
978 0 521 84919 7

Mistake, Fraud and Duties to Inform in European Contract Law

edited by Ruth Sefton-Green

0 521 84423 1 Hardback

Security Rights in Movable Property in European Private Law

edited by Eva-Maria Kieninger

0 521 83967 X Hardback

Pure Economic Loss in Europe

edited by Mauro Bussani and Vernon Valentine Palmer

0 521 82464 8 Hardback

The Enforceability of Promises in European Contract Law

edited by James Gordley

0 521 79021 2 Hardback

Good Faith in European Contract Law

edited by Reinhard Zimmermann and Simon Whittaker

0 521 77190 0 Hardback

Personality Rights in European Tort Law

Edited by

Gert Brüggemeier, Aurelia Colombi Ciacchi and
Patrick O'Callaghan



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521194914

© Cambridge University Press 2010

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2010

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Personality rights in European tort law / [edited by] Gert Brüggemeier, Aurelia
Colombi Ciacchi and Patrick O'Callaghan.

p. cm.

Includes index.

ISBN 978-0-521-19491-4 (hardback)

1. Personality (Law)–Europe. 2. Privacy, Right of–Europe. 3. Torts–
Europe. 4. Personality (Law)–United States. 5. Privacy, Right of–United
States. 6. Torts–United States. I. Brüggemeier, Gert, 1944– II. Ciacchi, Aurelia
Colombi III. O'Callaghan, Patrick.

KJC1646.P47 2010

346.2403'3–dc22 2009052177

ISBN 978-0-521-19491-4 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

Contents

<i>List of contributors</i>	x i
<i>National reporters</i>	xiii
<i>General editors' preface</i>	xiv
<i>Preface</i>	xvi
<i>Editorial note</i>	xviii
<i>List of abbreviations</i>	xxi
Part I Mapping the legal landscape	1
1 General introduction	3
2 Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms	5
GERT BRÜGGEMEIER	
1 Introduction	5
2 Two distinct paths of civil law of delict	10
A France	10
B Germany	18
3 Two different paths of liability law	25
A Common law of torts and statutory law: England	25
B Scandinavian law: Sweden	28
4 A European perspective – Art. 8(1) ECHR	30
3 American tort law and the right to privacy	38
JOSEPH A. PAGE	
1 Introduction	38
2 The birth of a tort	41
3 The first steps	45

4	Evolution of a tort	48
5	Additional protection for peace of mind	56
6	The academic backlash	57
7	The United States Supreme Court intervenes	59
8	The present status of the unwarranted-disclosure privacy tort	61
9	The present status of the intrusion privacy tort	66
10	The present status of the false-light privacy tort	68
11	The present status of the misappropriation privacy tort	69
12	Conclusion	70
Part II Case studies		73
4	Case 1: The corrupt politician	75
	Case	75
	Discussions	75
	Comparative remarks	140
5	Case 2: Convicted law professor	149
	Case	149
	Discussions	149
	Comparative remarks	175
6	Case 3: The paedophile case	178
	Case	178
	Discussions	178
	Comparative remarks	203
7	Case 4: An invented life story?	206
	Case	206
	Discussions	206
	Comparative remarks	225
8	Case 5: A former statesman's family life	228
	Case	228
	Discussions	228
	Comparative remarks	253

9	Case 6: A satirical magazine	257
	Case	257
	Discussions	257
	Comparative remarks	272
10	Case 7: A snapshot of a person	275
	Case	275
	Discussions	275
	Comparative remarks	308
11	Case 8: A paparazzo's telephoto lens	317
	Case	317
	Discussions	317
	Comparative remarks	343
12	Case 9: Naked.Little.Girl.Com	348
	Case	348
	Discussions	348
	Comparative remarks	372
13	Case 10: The late famous tennis player	375
	Case	375
	Discussions	375
	Comparative remarks	408
14	Case 11: The popular TV presenter	413
	Case	413
	Discussions	413
	Comparative remarks	431
15	Case 12: Copied emails	433
	Case	433
	Discussions	433
	Comparative remarks	453
16	Case 13: Brigitte's diaries	457
	Case	457
	Discussions	457
	Comparative remarks	473

17	Case 14: Tape recordings of a committee meeting	476
	Case	476
	Discussions	476
	Comparative remarks	489
18	Case 15: 'Light cigarettes reduce the risk of cancer'	492
	Case	492
	Discussions	492
	Comparative remarks	507
19	Case 16: Doctor's non-disclosure of a foetal disease	511
	Case	511
	Discussions	511
	Comparative remarks	540
20	Case 17: WAF - A gang of incompetents?	543
	Case	543
	Discussions	543
	Comparative remarks	562

Part III A common core of personality protection 565

21	A common core of personality protection	567
	GERT BRÜGGEMEIER, AURELIA COLOMBI CIACCHI AND PATRICK O'CALLAGHAN	
1	Dignity and honour	568
2	Privacy	569
3	Right to one's image and likeness	570
4	Commercial appropriation of personality	572
5	Right to personal identity	573
6	Self-determination	574
7	Protection of personality of legal persons?	575
8	Personality violations through the internet	575
9	Conclusion	576

Contributors

JOHAN BÄRLUND, LL.D., M.Sc., Professor of Civil and Commercial Law, University of Helsinki, Finland

GERT BRÜGGEMEIER, DR IUR., Professor (Emeritus) of Civil Law, European Economic Law and Comparative Law, University of Bremen, Germany

VAL CORBETT, BCL, LL.M., Head of Law School, Independent College Dublin, Ireland

AURELIA COLOMBI CIACCHI, DR IUR., Dottore di ricerca, LL.M., Senior Researcher in Private Law, University of Bremen, Germany, and Lecturer, Hanse Law School, Bremen, Germany

NUNO FERREIRA, DR IUR., Lecturer in Law, University of Manchester, United Kingdom

CARLOS GÓMEZ-LIGÜERRE, DR IUR., Professor of Private Law, Universitat Pompeu Fabra, Barcelona, Spain

AXEL HALFMEIER, DR IUR., Professor of Private and Economic Law, Frankfurt School of Finance & Management, Frankfurt am Main, Germany

UTE HAMMERSCHALL, Magistrate, Barrister, (formerly) Researcher in Law, University of Graz, Austria

GERAINT HOWELLS, LL.B., Barrister, Professor of Commercial Law, University of Manchester, United Kingdom

AGNÈS LUCAS-SCHLÖTTER, DR IUR., Lecturer in French Legal Terminology, Ludwig-Maximilians University of Munich, Germany

PATRICK O'CALLAGHAN, DR IUR., Lecturer in Law, Newcastle University, United Kingdom

JOSEPH A. PAGE, PHD, BA, LLB, LL.M., Professor of Law, Director of the Center for the Advancement of the Rule of Law in the Americas, Georgetown Law School, Washington DC USA

PEDRO PAIS DE VASCONCELOS, DR IUR., Professor of Private Law, University of Lisbon, Portugal

KARL-NIKOLAUS PEIFER, DR IUR., Professor of Civil Law, Intellectual Property Law and Economic Law, University of Cologne, Germany

GIORGIO RESTA, DOTTORE DI RICERCA, Associate Professor of Private Comparative Law, University of Bari, Italy

PANAGIOTIS RIGOPOULOS, DR IUR., lawyer at the European Patent Office, Munich, Germany

PETER ROTT, DR IUR., Junior Professor of Private Law with a focus on European Private Law, University of Bremen, Germany

JUAN ANTONIO RUIZ GARCIA, DR IUR., Barrister, Researcher in Law, Universitat Pompeu Fabra, Barcelona, Spain

BERND SCHILCHER, DR IUR., Professor (Emeritus) of Private Law, Foreign and International Private Law, University of Graz, Austria

PETER SCHWARZENEGGER, DR IUR., Assistant Professor of Private Law, Foreign and International Private Law, University of Graz, Austria

CARLA H. SIEBURGH, DR IUR., Professor of Private Law, University of Nijmegen, The Netherlands

LESLEY JANE SMITH, DR IUR., Professor of International and European Economic Law, University of Lüneburg, Germany

SYLVIA STAVRIDOU, DR IUR., Lecturer in Private Law, Democritus University of Thrace, Greece

FREDERIK SWENNEN, DR IUR., Professor of Persons and Family Law, University of Antwerp, Belgium

ALEXANDER WARZILEK, Magistrate, Lawyer, (formerly) Researcher in Law, University of Graz, Austria

FRANZ WERRO, DR IUR., LL.M., Professor of Law of Obligations and European Private Law, University of Fribourg, Switzerland, and Professor of Law, Georgetown Law School, Washington DC, USA

BRITT WEYTS, DR IUR., Professor of Civil Law, University of Antwerp, Belgium

National reporters

AUSTRIA:	Ute Hammerschall, Bernd Schilcher, Peter Schwarzenegger and Alexander Warzilek
BELGIUM:	Frederik Swennen and Britt Weyts
ENGLAND:	Geraint Howells and Peter Rott
FRANCE:	Agnès Lucas-Schlötter
FINLAND:	Johan Bärlund
GERMANY:	Axel Halfmeier and Karl-Nikolaus Peifer
GREECE:	Panagiotis Rigopoulos and Sylvia Stavridou
IRELAND:	Val Corbett
ITALY:	Aurelia Colombi Ciacchi (Cases 1, 2, 3, 4, 6, 15, 16, 17) and Giorgio Resta (Cases 5, 7, 8, 9, 10, 11, 12, 13, 14)
NETHERLANDS:	Carla Sieburgh
PORTUGAL:	Nuno Ferreira and Pedro Pais de Vasconcelos
SCOTLAND:	Lesley Jane Smith
SPAIN:	Juan Antonio Ruiz Garcia and Carlos Ignacio Gomez Liguerra
SWITZERLAND:	Franz Werro

General editors' preface

This is the twelfth book in the series *The Common Core of European Private Law* published within the *Cambridge Studies in International and Comparative Law*. The project was launched in 1993 under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the project is still unparalleled. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for a fully-fledged and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to the already published volumes, and those who are working hard to achieve future results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the scholarly outputs of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The Italian Ministry of Scientific Research is funding the project, having

recognised it as a 'research of national interest'. The International University College of Turin with the Compagnia di San Paolo and the Consiglio Nazionale del Notariato allow us to organise the General Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Programme. The University of Torino, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, the Centro Studi di Diritto Comparato of Trieste, have all contributed to the funding, and/or the success of this project.

Our home webpage is at www.iuctorino.it. There you can follow our progress in mapping the common core of European private law.

General Editors

MAURO BUSSANI (University of Trieste)

UGO MATTEI (University of Turin and University of California, Hastings College of Law)

Honorary Editor

RUDOLFO SACCO (University of Turin)

Late Honorary Editor

RUDOLF B. SCHLESINGER (Cornell University - University of California, Hastings)

Preface

Comparative legal studies performed by a large network of academics from many different countries usually require many years of work and indeed a great deal of patience from all persons involved. This book, like most volumes of the Common Core series, is no exception to this rule. A first draft questionnaire on civil liability for the violation of personality rights was presented by Gert Brüggemeier and Aurelia Colombi Ciacchi and discussed in Trento in 2001. After settling on the final version of the questionnaire, first draft country reports were completed between 2002 and 2004. In August 2004, Patrick O'Callaghan joined the editors' team. Draft comparative remarks and an introductory chapter were written in 2005–06. Then the last missing country reports were drafted and the review of the other reports and the drawing of our conclusions for this project continued until early 2007, followed by final editing and proofreading until 2008.

We would like to express our deepest thanks to all national reporters and contributors for their enthusiasm and long-term commitment to this project, which did not provide any other remuneration but for the publication itself and the enjoyment of wonderful meetings in both Trento and Turin.

We are grateful to the general editors of the Common Core project, Mauro Bussani and Ugo Mattei, for their constant support. An enormous thank you to the chairs of the Tort session of the Common Core project, Mathias Reimann (until 2002) and Franz Werro (since 2003), and all participants to the annual meetings of the Tort sessions for their valuable comments and suggestions.

Our thanks to Carol Forrest for her help in editing this book. We would also like to thank Eric Engle for his collaboration in this project between 2002 and 2004. Last but not least, we are indebted to Carla Boninsegna for her precious help in organising our meetings, and

to Jodie Barnes, Sinéad Moloney and Finola O'Sullivan at Cambridge University Press who so kindly helped to bring this project to a good end.

GERT BRÜGGEMEIER *University of Bremen*
AURELIA COLOMBI CIACCHI *University of Bremen*
PATRICK O'CALLAGHAN *Newcastle University*

Editorial note

Most of the following country reports were completed in 2007 but for reasons of the work schedule we were unable to make major updates to the reports before publication. Naturally, there have been developments since 2007, some of a relatively minor nature and some which are clearly quite significant. In England, while *Campbell v. MGN* remains the leading authority for the fledgling informational privacy tort, there have been some decisions of the lower courts, which should be mentioned here, namely *McKennitt v. Ash*,¹ *Murray v. Express Newspapers plc*² and *Mosley v. News Group Newspapers Ltd.*³ In Germany, as set out in Case 7, courts and scholars traditionally regarded pictures of public figures as pictures of contemporary history.⁴ But the German reporters inform us that the legal landscape has changed following the decision of the European Court of Human Rights in *von Hannover*.⁵ Courts in Germany now allow publication of pictures of public figures only when they are deemed newsworthy. The newsworthiness may be due to the fact that the person is depicted in an official function or if there is a story to the photo which is of public interest.⁶ The public interest may also follow from a text added to the photo.⁷

¹ [2008] QB 73.

² [2008] 3 WLR 1360.

³ [2008] EMLR 20.

⁴ *Personen der Zeitgeschichte*, see H. Neumann-Duesberg, 'Bildberichterstattung über absolute und relative Personen der Zeitgeschichte' (1960) JZ 114-18. Cf. KG Berlin ZUM-RD 2006, 552; LG Berlin ZUM-RD 2006, 571.

⁵ ECHR decision of 24 June 2004 - 59320/00, GRUR 2004, 1051; (2005) 40 EHRR 1.

⁶ BGHZ 171, 275; 158, 218, 222; NJW 2008, 3134; BVerfGE 101, 361, 389.

⁷ BGH NJW 2008, 3141.

But perhaps the most extensive changes have occurred in Ireland. Val Corbett, the Irish reporter, has kindly provided the following overview of these changes:

Since the time of writing, there have been significant developments in Irish defamation and privacy law which will alter the advice provided in many of the cases contained within the text.

First, the Defamation Bill was enacted in the form of the Defamation Act 2009 and took effect from 1 January 2010. The Act applies to all causes of action accruing before its commencement.⁸ Much of the reform introduced by the Act is procedural in effect. Many of its provisions have simply put the common rules relating to defamation on a statutory footing. For example, the common law of justification has been abolished and replaced with the similar defence of truth.⁹ Furthermore, the common law defences of absolute privilege,¹⁰ qualified privilege,¹¹ consent¹² and offer to make amends¹³ are put on a statutory footing. The legislation alters the common law defence of 'fair comment' to a statutory one of 'honest opinion'.¹⁴ A new defence of 'innocent publication' has also been introduced.¹⁵ This defence will be welcomed by publishing houses (and possibly internet service providers) who – under the old regime – could be potentially liable for defamation even though they may have only innocently facilitated the publication of the defamatory material. Equally welcome is the provision which allows the defendant to give evidence in mitigation of damage where [s]he published (or offered to publish) an apology and crucially provides that any such apology is not admissible in any civil proceedings as evidence of liability in defamation proceedings.¹⁶

Much of the criticism of Irish defamation law derived from the fact that the tort was essentially one of strict liability, i.e. there was no defence if the defamatory statement was mistakenly – although not negligently or recklessly – published. The Act has introduced a new defence of 'fair and reasonable publication on a matter of public interest' to fill this lacuna.¹⁷ The stated purpose of this defence is to allow reasonable and fair publication of material which is considered to be in the 'public interest' even where it is capable of being defamatory. While it remains to be seen how this defence will be interpreted by the courts, there is concern that, as drafted, the defence is unduly

⁸ Section 3 of the Defamation Act 2009.

⁹ Section 16 of the Defamation Act 2009.

¹⁰ Section 17 of the Defamation Act 2009.

¹¹ Section 18 of the Defamation Act 2009.

¹² Section 25 of the Defamation Act 2009.

¹³ Section 22 of the Defamation Act 2009.

¹⁴ Section 20 of the Defamation Act 2009.

¹⁵ Section 27 of the Defamation Act 2009.

¹⁶ Section 24 of the Defamation Act 2009.

¹⁷ Section 26 of the Defamation Act 2009.

narrow and could be practically unworkable. Furthermore, the introduction of this defence could be seen as a retrograde step for proponents of freedom of expression as it expressly replaces¹⁸ innovative defences which have been developed by the Irish courts in recent years.¹⁹

The second development in Irish law is that breach of privacy claims as between private parties are now recognised under Irish law. While claims for breach of privacy by the State have long been recognised by the Irish courts,²⁰ it was not until the recent High Court decision of *Herrity v. Associated Newspapers (Ireland) Limited*,²¹ that it was explicitly recognised that a cause of action for breach of privacy could exist between private parties.

Once again we would like to express our gratitude to the individual authors for all of their hard work and effort.

Gert Brüggemeier
Aurelia Colombi Ciacchi
Patrick O'Callaghan
January 2010

¹⁸ Section 15 of the Defamation Act 2009.

¹⁹ In particular, the defence of public interest developed in *Leech v. Independent Newspapers (Ireland) Ltd* [2007] IEHC 223.

²⁰ See *McGhee v. Attorney General* [1974] IR 384; *Norris v. Attorney General* [1984] IR 36; *Kennedy v. Ireland* [1987] 1 IR 587.

²¹ [2008] IEHC 249.

Abbreviations

General abbreviations

§	paragraph
§§	paragraphs
Art.	Article
CC	Civil Code
cf.	confer
ch.	chapter
COM	Document of the European Commission
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	Reports of the Decisions of the European Court
ECtHR	European Court of Human Rights
ed.	editor
edn.	edition
eds.	editors
e.g.	<i>exempli gratia</i>
EHRH	European Human Rights Reports
ERPL	European Review of Private Law
<i>et al.</i>	<i>et alia</i>
<i>et seq.</i>	<i>et sequitur</i>
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
<i>ibid.</i>	<i>ibidem</i>

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
i.e.	<i>id est</i>
p.	page
PC	Penal Code
pp.	pages
TEU	Treaty establishing European Union
UN	United Nations
v.	versus
Vol.	volume
Vols.	volumes

Abbreviations by Country

Austria

ABGB	Allgemeines Bürgerliches Gesetzbuch
ASVG	Allgemeines Sozialversicherungsgesetz
BlgNR	Beilage(n) zu den stenographischen Protokollen des Nationalrates
ECG	E-Commerce Gesetz
EO	Exekutionsordnung
EvBL	Evidenzblatt der Rechtsmittelentscheidungen des Obersten Gerichtshofs
MedienG	Mediengesetz
MR	Medien und Recht
OGH	Oberster Gerichtshof
ÖJZ	Österreichische Juristen-Zeitung
RV	Regierungsvorlage
StGB	Strafgesetzbuch
UrhG	Urheberrechtsgesetz
UWG	Gesetz gegen den unlauteren Wettbewerb

Belgium

AJT	Algemeen Juridisch Tijdschrift
AM	Auteurs et Média
Cass.	Cour de cassation (belgique)

C.civ.	Code civil
JLMB	Jurisprudence de Liège, Mons et Bruxelles
JT	Journal des tribunaux
Rec.Cass.	Recente Arresten van het Hof van Cassatie
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht

England

AC	Law Reports, Appeal Cases
All ER	All England Law Reports
CA	Court of Appeal
Ch	Law Reports, Chancery Division
EMLR	Entertainment & Media Law Reports
EWHC	England and Wales High Court
FSR	Fleet Street Reports
HL	House of Lords
HRA	Human Rights Act
KB	Law Reports, King's Bench
LR	Law Reports
QB	Law Reports, Queen's Bench
TLR	Times Law Reports
WLR	Weekly Law Reports

Finland

FIM	Finnish Markka
-----	----------------

France

Ann.prop.ind.	Annales de la propriété industrielle, artistique et littéraire
Ass. plén.	Assemblée plénaire
Bull. civ.	Bulletin des arrêts de la Cour de cassation (chambres civiles)
Bull. crim.	Bulletin des arrêts de la Cour de cassation (chambre criminelle)
Cass	Cour de cassation
Cass. I civ.	Cour de cassation (1ère chambre civile)
Cass. II civ.	Cour de cassation (2ème chambre civile)
Cass. III civ.	Cour de cassation (3ème chambre civil)
Cass. comm.	Cour de cassation, chambre commerciale
Cass. crim	Cour de cassation, chambre criminelle
CC	Conseil constitutionnel

C. civ.	Code civil
CE	Conseil d'Etat
chr.	chronique
D	Dalloz
DC	Décision du Conseil constitutionnel
Décl./DDHC	Déclaration des droits de l'homme et du citoyen
DP	Dalloz Périodique
Gaz. Pal.	Gazette du Palais
IR	Informations rapides
JCP	JurisClasseur Périodique (Semaine juridique)
RDP	Revue du droit public et de la science politique en France et à l'étranger
rec.	Recueil
Rev. Trim. Droit Civ.	Revue trimestrielle du droit civil
somm.	Sommaire(s)
TGI	Tribunal de grande instance
Trib. civ.	Tribunal civil
<i>Germany</i>	
AG	Amtsgericht
ArbG	Arbeitsgericht
BAG	Bundesarbeitsgericht
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
EuGRZ	Europäische Grundrechte-Zeitschrift
GG	Grundgesetz
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
JZ	Juristen-Zeitung
KUG	Kunsturhebergesetz
LG	Landgericht
NJW	Neue Juristische Wochenschrift

NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport
OLG	Oberlandesgericht
RG	Reichsgericht
RGBL.	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
StGB	Strafgesetzbuch
<i>Greece</i>	
-	
<i>Ireland</i>	
IEHC	The High Court of Ireland Decisions
IR	Irish Reports
<i>Italy</i>	
App.	Corte d'appello
Arch. civ.	Archivio civile
Cass.	Corte di Cassazione
Cass. pen.	Cassazione penale
CC	Codice civile
Corriere giur.	Corriere giuridico
Corte cost.	Corte costituzionale
Cost.	Costituzione della Repubblica Italiana
CP	Codice penale
Danno e resp.	Danno e responsabilità
Dir. Aut.	Diritto d'autore
Foro it.	Foro italiano
Giur. cost.	Giurisprudenza costituzionale
Giur. it.	Giurisprudenza italiana
Giust. civ.	Giustizia civile
Nuova giur. civ. comm.	Nuova giurisprudenza civile commentata
Rass. dir. civ.	Rassegna di diritto civile
Resp. civ.	Responsabilità civile e previdenza
Riv. crit. dir. priv.	Rivista critica del diritto privato
Riv. dir. civ.	Rivista di diritto civile
Riv. trim. dir. proc. civ.	Rivista trimestrale di diritto e procedura civile

The Netherlands

BW	Burgerlijk Wetboek
HR	Hoge Raad
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJV	Nederlandse Juristenvereniging

Portugal

Ac. STJ	Acórdão do Supremo Tribunal de Justiça
Ac. TC.	Acórdão do Tribunal Constitucional
BMJ	Boletim do Ministério da Justiça
CC	Código Civil
CP	Código Penal
CPC	Código de Processo Civil
CPP	Código de Processo Penal
Cpub	Código da Publicidade
CRP	Constituição da República Portuguesa
EJ	Estatuto do Journalista
LI	Lei de Imprensa
STJ	Supremo Tribunal de Justiça

Scotland

SC	Session Cases
SLT	Scottish Law Times

Spain

ADC	Anuario de Derecho Civil
CC	Código civil
CE	Constitución Española
LO	Ley Orgánica
RTC	Repertorio del Tribunal Constitucional
STC	Sentencia del Tribunal Constitucional
STS	Sentencia del Tribunal Supremo
STSJ	Sentencia del Tribunal Superior de Justiça
TC	Tribunal Constitucional

Switzerland

ATF/BGE	Arrêts du tribunal fédéral/Entscheidungen des Bundesgerichts
---------	--

CC/ZGB	Code Civil/Zivilgesetzbuch
CO/OR	Code des Obligations/Obligationenrecht
JAAC	Jurisprudence des autorités administratives de la confédération
JdT	Journal des tribunaux
JTPI	Journal des tribunaux de première instance
RS/SR	Recueil systématique du droit fédéral/ Systematische Sammlung des Bundesrechts
RVJ	Revue valaisanne de jurisprudence
SJ	Semaine judiciaire
SJZ	Schweizerische Juristen-Zeitung
TF/BG	Tribunal fédéral/Bundesgericht
USA	
A./Atl. (2d)	Atlantic Reporter (Second Series)
Ala.	Alabama Reports
Amends.	Amendments
App.	Appellate Reports
Cal.	California Reports
cert. den.	certiorari denied
Cir.	Circuit (Federal Courts of Appeal)
Const.	Constitution
D.	District (Federal Courts)
D.C.	District of Columbia
F.	Federal Reporter
Ga.	Georgia Reports
Kan.	Kansas Reports
Ky.	Kentucky Reports
La.	Louisiana Reports
Md.	Maryland Reports
Mich.	Michigan Reports
Minn.	Minnesota Reports
Mo.	Missouri Reports
N.C.	North Carolina Reports
N.E.	North Eastern Reporter
N.H.	New Hampshire Reports
N.W.	North Western Reporter
N.Y.	New York Reports

N.Y.S.	New York Supplement
N.Y. Sess.	New York Session Laws
N.Y. Sup. Ct.	New York Supreme Court of Judicature (State Court of First Instance (1848–date))
P./Pac.	Pacific Reporter
R.I.	Rhode Island Reports
S.Ct.	U.S. Supreme Court Reports
S.E.	South Eastern Reporter
So.	Southern Reporter
S.W.	South Western Reporter
Tex.	Texas Reports
U.S.	U.S. Supreme Court Reports
Wis.	Wisconsin Reports

PART I MAPPING THE LEGAL
LANDSCAPE

1 General introduction

'Personality rights' is not an obvious topic of comparative legal research. One may argue that the title of this volume reveals a typically continental European approach to the legal protection of personality interests. Is this terminological choice really compatible with the commitment of the Common Core project to a factual, bottom-up approach¹ and with the requirement of equal treatment of different legal cultures, which should inspire every high-quality comparative law exercise? We maintain that it is for at least three reasons.

First of all, the rights-based approach in legal matters such as privacy and self-determination has become a truly common European feature through the European Convention on Human Rights (ECHR), the jurisprudence of the European Court of Human Rights (ECtHR) and the established case law of the European Court of Justice (ECJ) on Community fundamental rights, which are already in force as general principles of EC law.²

Secondly, legal history shows that the recognition of a 'new' human interest as a 'right' always requires a lengthy period of time and intense debates in every legal system. This is a recurring pattern in the history of personality protection in continental Europe, like in other parts of Europe and in the United States.³

Thirdly, it is of great interest for comparative lawyers committed to the Common Core methodology to see how the same human interests

¹ M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' (1997) 3 *Columbia Journal of European Law* 339.

² Cf. G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Vols. I and II (Cambridge: 2010).

³ See G. Brüggemeier, 'Protection of Personality Rights in the Law of Delict/Torts in Europe: Mapping out Paradigms', and J. Page, 'American Tort Law and the Right to Privacy', both in this volume.

which qualify as 'rights' in some legal systems are protected in the legal systems which do not recognise this qualification. Following Sacco's approach,⁴ this volume aims, on the one hand, to detect hidden similarities and 'cryptotypes' in the actual legal treatment accorded by different European countries to personal interests, which qualify as 'personality rights' in some of these countries. On the other hand, this volume aims to detect hidden disparities in the 'law in action' of countries whose 'law in books'⁵ seems to protect one and the same personality interest in a similar fashion.

The working method of this project and the structure of the country reports follows the tripartition 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants' typical of the Common Core methodology:⁶

- (1) The Operative Rules summarise the final result, i.e. the claims given (or not given) in each of the situations described in the individual case of the questionnaire. They also specify the kinds of losses recoverable (economic, non-economic or both).
- (2) The Descriptive Formants comprehensively explain the (legislative or case law) legal bases and the requirement for their applicability in the individual case.
- (3) The Metalegal Formants deal with arguments other than formal legal ones, e.g. policy, economic, sociological, historical arguments, which are determinant for the final result. Often a legal provision is open to different interpretations and each of these is supported by policy arguments; these are discussed, if possible, in the Metalegal Formants. This is also where the authors make any general comments not belonging to the Descriptive Formants.

⁴ R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law*, 1 and 343.

⁵ R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

⁶ See Bussani and Mattei, 'The Common Core Approach'; Sacco, 'Legal Formants'.

2 Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms¹

Gert Brüggemeier

1. Introduction

‘Personality Rights in European Tort Law’: What exactly are we talking about here? Both the term *personality right* and the term *European tort law* are misleading and need clarification right from the outset.

There is actually no such thing as ‘European tort law’. The ‘pigeon-hole’ approach of individual torts is a particularity of the common law tradition, which finds no counterpart in the civil law. The term ‘law of delict’ is well-established with regard to the civil law systems, which claim ‘non-contractual liability for damage caused to another’, based on the general principle of *neminem laedere*.

As for the notion of ‘personality right’, in modern civil law there are two clear-cut notions of ‘rights’: *public law* recognises fundamental rights, be they classic human rights declaring the freedom of citizens from state intervention² or be they social or economic rights requesting assistance and performances for citizens from public authorities. These are ‘innate’ and inalienable rights of human beings as such or of the citizens of the respective political entity, and are mostly enshrined in written constitutions. *Private law* provides for subjective rights:³

¹ An earlier and partly different version of this chapter was published in N. R. Whitty and R. Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: 2009).

² These national or European fundamental rights are also capable of developing *states’ duties of protection*. On the European level see ECJ, 15.12.1995, case C-415/93 *Bosman* [1995] ECR I-4921; for a leading German monograph, see J. Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (2nd edn., Berlin: 2005).

³ *Droits subjectifs/diritti soggettivi*. On this civilian category, alien to common lawyers, see H. Coing, ‘Zur Geschichte des Begriffs “subjektives Recht”’, in *Gesammelte Aufsätze*, Vol. 1 (Frankfurt/M.: 1982), p. 241; F. H. Lawson, ‘“Das subjektive Recht” in the English Law of Torts’, in *Selected Essays*, Vol. 1: Many Laws

(absolute) property rights in corporeal things or intellectual achievements and (relational) obligations (*Forderungen*), e.g. a creditor's right to claim money from a debtor. These subjective rights are, by definition, alienable, heritable and of monetary value. They constitute the assets of a person. Civil *personality rights* do not fit into this dichotomy. They are hybrids, sort of *private human rights*. They function as a metaphor for non-physical aspects of the persona and this nomenclature has helped them to be recognised by private law. The law of delict protects both the 'have' and the 'being' of individuals. The protection of the 'being' was traditionally restricted to both the guarantee of bodily (psycho-physical) integrity and the guarantee of honour and reputation against defamation.⁴ The law of defamation is a well-established field of – criminal and private – law in almost every legal system. However, *new* non-bodily aspects of the persona appeared within the scope of the law of delict/tort under the guise of personality rights. These include dignity, autonomy, privacy etc. These are what *personality rights* or an overarching *general personality right* are. Under this terminological umbrella, legitimate personality interests are developed and protected by the law of delict. One has to lift this metaphorical veil to get to the substance – the diversity of personality interests and the specificity of their scope of protection.⁵ A special and controversial case in this respect is the 'right' to one's likeness. It supposedly has a double nature. It can be an inalienable personality 'right' or an alienable and descendible property right ('right to publicity').⁶

(Amsterdam: 1977), p. 176; G. Samuel, '“Le Droit Subjectif” and English Law' (1987) 46 *Cambridge Law Journal* 264.

⁴ This has already been the scope of protection of the Roman *actio iniuriarum*. On its impact on the modern law, see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town: 1990), Ch. 31 and below in the text.

⁵ The attempts in Anglo-American tort law to focus exclusively on 'a' privacy tort and to define privacy comprehensively are misleading. See, as a recent example, D.J. Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477. These attempts seem to be strongly indebted to the traditional pigeon-holing approach of the common law of torts. Instead, the protection of personality interests is an open textured concept. See already R. Pound, 'Interests of Personality' (1915) 28 *Harvard Law Review* 343/445 (sociological jurisprudence) and recently J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: 2006), Ch. 11 (philosophical jurisprudence); see also C. van Dam, *European Tort Law* (Oxford: 2006), p. 149.

⁶ On the US, see J.T. McCarthy, *The Rights of Publicity and Privacy*, 2 Vols., (2nd edn., Eagan: 2002); for Europe see H. Beverly-Smith, A. Ohly and A. Lucas-Schloetter, *Privacy, Property and Personality. Civil Law Perspectives on Commercial Appropriation* (Cambridge: 2005). The leading German monograph is H.P. Götting, *Persönlichkeitsrechte als Vermögensrechte* (Tübingen: 1995).

The notion '*persona*', *personnalité* or *persönlichkeit* appeared in the legal world at two different periods in history and in two different forms – firstly through the Institutes of Gaius in the second century AD,⁷ which later inspired the *Institutiones* of Justinian's *Corpus Iuris Civilis* in the sixth century AD (a legal transfer from Rome to Byzantium). Book I of Justinian's *Institutiones* developed the formalistic understanding of the natural person as a subject of the law (*Rechtssubjekt*; *soggetto di diritto*), of his or her legal capacity and of his or her social status in inter-personal relationships (marriage, parenthood, adoption, guardianship). Most nineteenth-century Civil Code drafters took this conventional notion as a model and a starting point for their own structuring of private law. French and German civil law also share this as a common heritage.

Secondly, another concept of *persona* was then fully worked out by the Enlightenment philosophy and natural law theories at the time of the transition from traditional to modern society in the seventeenth and eighteenth centuries. Building on Christian ethic and Canon law, it was through the works of *Grotius*, *Thomasius*, *Pufendorf* and others that the idea of human dignity as a characteristic feature of the *persona* that must be recognised in every individual came to the fore, as well as the concept of innate human rights and duties belonging to the *persona* as such (*iura connata*).⁸ The ways and the extent to which the continental European law of delict tackled the problem of protection of personality interests from the nineteenth century onwards seemingly depended on their adherence to the latter of these two traditions.

The civil law of delict has two distinct but paradigmatic paths concerning the protection of personality interests in nineteenth- and twentieth-century continental Europe – the *French* law and the *German* law.⁹ Austria and Italy are examples of civil law systems which shifted between these two regimes before developing their own shape. A path

⁷ See Book I (8) of Gaius' *Institutiones*: 'All the law which we make use of has reference either to persons, to things, or to actions. Let us first consider persons.' (English translation available at <http://faculty.cua.edu/pennington/Law508/Roman%20Law/GaiusInstitutionesEnglish.htm>).

⁸ For this scholastic and natural law legacy in greater detail and from a comparative perspective, see J. Gordley, *Foundations of Private Law*, Ch. 11, and as *locus classicus*: F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn., Göttingen: 1967), Ch. 4 (in English: F. Wieacker, *A History of Private Law in Europe* (Oxford: 1995)) with further references.

⁹ A different view is presented by the legal historian and comparativist J. Whitman, equalising French and German law in their preferred protection of honour in contrast to the US law focusing on protection of liberty. J. Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 *Yale Law Journal* 1151.

of their own, in form and content, was pursued by both the *common law of torts* in England, Ireland and the mixed jurisdiction of Scotland, and by the law of the *Nordic States*.

(1) One line of thought is characterised by the reception of natural law's general clause of the law of delict (*neminem laedere*). Together with the heritage of the *actio iniuriarum* of the *Ius Commune*, this reception by the French drafters of the *Code Civil* made the equal treatment of economic and non-economic loss in the law of damages possible, which was alien to Roman law. Under the general law of delict in the *Code Civil*, compensation of non-economic loss in cases concerning the infringement of the personality was awarded from 1804 onwards. The French model was followed in the nineteenth century by Belgium, the Netherlands, Spain, Switzerland,¹⁰ and initially by Austria¹¹ and Italy.

(2) In nineteenth-century Germany, the Historical School instead wanted to revert to the original sources of Roman law not alienated by Canon and natural law. Scholars worked on a system of private law focusing on freedom of contract, economic rights and compensation of pecuniary loss. The protection of honour and reputation was submitted to criminal law; a civil law remedy of damages was no longer available in this field of law. The *actio iniuriarum* was formally repealed. This German law path was followed in the twentieth century by other states such as Austria, Greece and Italy.

The BGB law of delict was then later forced to recognise these suppressed personality interests and to integrate them into a system which was not suitable for them: monetary compensation was only awarded in cases of severe infringement and where there was no other remedy at hand to resolve the infringement.

(3) In the English common law of torts the protection of a person's honour and reputation by the law of defamation has had a long but intricate history. Beyond defamation law, other personality interests such as dignity, autonomy and privacy are protected by a legal patchwork of common law, equity law and statutory law, if at all. Unlike

¹⁰ Cf. Art. 55 Swiss Law of Obligations (OR) of 1881 and now Art. 28 Swiss Civil Code (ZGB) of 1907 and Art. 49 OR of 1911. Art. 28(1) ZGB affords legal protection to anyone who suffers an unlawful infringement of his/her personality.

¹¹ Cf. § 16 Austrian General Civil Code (ABGB) of 1811: 'Each human being has inborn rights, apparent from reason, and is accordingly to be regarded as a persona.'

the common law in the United States,¹² English common law has not yet formally recognised a tort of violation of privacy. However, with the influence of the Human Rights Act (1998) things have begun to change.¹³ Scots law, being the unique example of a mixed jurisdiction in Europe, intertwining both the Roman law-rooted civil law of delict (*actio iniuriarum*) and the common law of torts (defamation), tries to pursue an independent path.

(4) The Nordic countries encompass legal systems which still adhere to the old tradition of the protection of personality interests (honour and reputation) through criminal law. No civil personality rights are acknowledged. Tort law remedies (damages) are only available in connection with some types of criminal acts regulated by the general Penal Code and by special legislation in respect of the media. Recently, under the influence of the European Convention on Human Rights (ECHR), the legal protection of the personality seems to have developed further.¹⁴

(5) In the second half of the twentieth century, another dominant, 'neo-natural law' factor entered onto the continental legal stage supporting the development of private personality rights – *constitutionalism*. After the breakdown of the national socialist and fascist political regimes following the Second World War, new democratic constitutions were inaugurated in most continental European states. These contained binding and judicially enforceable constitutional rights for the first time.¹⁵ In addition, an overarching European Bill of Rights, embracing both capitalist and (then) communist countries, was set in motion – the ECHR of 1950, which has been monitored by the

¹² On the development of US law, see the contribution of J. Page, 'American Tort Law and the Right to Privacy' (in this volume) and the collection of articles in R. Wacks (ed.), *Privacy*, 2 Vols. (Aldershot: 1993) and E. Barendt (ed.), *Privacy* (Aldershot: 2001).

¹³ See, e.g., J. Wright, *Tort Law and Human Rights* (Oxford: 2001); W. V. H. Rogers, 'Tort Law and Human Rights: A New Experience', in H. Koziol and B. C. Steininger (eds.), *European Tort Law 2002* (Vienna/New York: 2003), pp. 35–64.

¹⁴ See A. Lauer and A. Colombi Ciacchi, 'Sweden', in G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union, Vol. I: A Comparative Overview* (Cambridge: 2010 forthcoming), Part 2 § 4 and Part 3 § 3 A.

¹⁵ In France, it was due to the jurisprudence of the Constitutional Council (*Conseil constitutionnel*) and in Italy due to the jurisprudence of the Constitutional Court (*Corte costituzionale*) that non-binding constitutional rights were turned into judicially enforceable constitutional principles from the 1970s onwards. For France, see below Part B I; for Italy, see F. Jorge Ramos, C. Kraus, C. Mak, M. D. Sanchez

European Court of Human Rights (ECtHR) since 1998.¹⁶ The human rights contained therein finally became an integral part of the Law of the European Union. It is due to this process of Europeanisation or constitutionalisation of private law¹⁷ that at the end of the last century the diverse private law traditions of Europe and the adherent national legal systems approximated to a certain extent, at least as far as the protection of personality rights is concerned. Still, in the Nordic countries this approximation process is less visible than in the other Western European countries.

These different paths of private law in Europe – civil law of delict, common law of torts and Nordic law – are sketched below in a four-part analysis covering France, Germany, England and Sweden, supplemented by a section on EU law.¹⁸

2. Two distinct paths of civil law of delict

A. France¹⁹

France was the demiurge of civil society in Europe. It delivered the political philosophy, the fundamental rights and the revolutionary practice. However, during its revolutionary process all the atrocities which modern civilised societies would later face in the nineteenth and twentieth centuries were anticipated. The starting point for the protection of privacy and other personality interests can already be found in the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789. Art. 2 of the Declaration states that the first and greatest commandment of any body politic is to protect the 'natural rights' of human

Galera and S. Wunsch, 'Italy', in G. Brüggemeier *et al.* (eds.) *Fundamental Rights and Private Law in the European Union*, Vol. I.

¹⁶ F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (4th edn., Oxford: 2002); C. Grabenwarter, *Europäische Menschenrechtskonvention* (4th edn., Munich/Vienna: 2009).

¹⁷ For comparative accounts, see K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Oxford: 2007); T. Barkhuysen and S. Lindenbergh (eds.), *Constitutionalisation of Private Law* (Leiden/Boston: 2006) and D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: 2001).

¹⁸ For comparative accounts, see G. Dworkin *et al.*, *Die Haftung der Massenmedien, insbesondere der Presse, bei Eingriffen in persönliche oder gewerbliche Rechtspositionen* (Frankfurt/M.: 1972); H. Koziol and A. Warzilek (eds.), *Persönlichkeitsschutz gegenüber Massenmedien/The Protection of Personality Rights against Invasions by Mass Media* (Vienna/New York: 2005); cf. also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd edn., Oxford: 1998), pp. 685–708.

¹⁹ This section benefits from both the introduction to the French questionnaire report by A. Lucas-Schloetter (on file with the editors) and the French Report to

beings, especially liberty.²⁰ Art. 11 guarantees freedom of expression.²¹ Nevertheless, it was for the legislator to implement and protect these natural rights and to define their limits through statutory acts. The *Code Napoléon* of 1804 was a civil law masterpiece of this legislative implementation. With its liberal principles on freedom of contract and property, as well as its broad scope of protection through the law of delict, the Code became the civil constitution of French bourgeois society.

As early as the middle of the nineteenth century, the *reproduction of a person's likeness* began to attract the attention of jurists and was soon considered to be the subject of a sort of exclusive right of the individual. The judgment of 16 June 1858 in the *Rachel* case is seen as the 'birth certificate' of the right to one's image in France.²² It concerned a famous actress who had been photographed on her deathbed. Unauthorised sketches were then made of the photograph and these were commercially marketed. The outcome of the proceedings was the seizure and destruction of the wrongfully produced sketches and the payment of monetary compensation for non-economic loss (*dommage moral*) to her relatives.

The language applied by the court focused much more on property rights discourse than on personality interests. Nevertheless, from the middle of the nineteenth century onwards it was admitted in France that a person's image, name²³ and likeness were subjects of an exclusive

the EU Research Training Network: C. Herrmann and C. Perfumi, 'France', in G. Brüggenmeier et al. (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I.

²⁰ 'Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression.'

['The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression.']

²¹ 'La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.' ['The free communication of ideas and opinions is one of the rights which is most precious to man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be determined by law.']

²² Trib. civ. Seine, 16 Jun. 1858, D. 1858, 3, 62. In this judgment, the civil court stated that 'no one may, without the express consent of the family, reproduce and make the features of a person on his deathbed available to the public, however famous this person has been and however public his acts during his life. *The right to oppose this reproduction is absolute*; it flows from respect for the family's pain and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.'

²³ Trib. civ. Seine, 15 Feb. 1882, D. 1884, 2, 22 note Labbé; cf. Maillard, 'Du droit au nom patronymique' (1894) *Ann. prop. ind.* 345.

right, the violation of which would lead to seizure and interdict as well as general damages for emotional suffering under the general clause of Arts. 1382, 1383 *Code Civil* ('wrongfully inflicted damage'). Many cases of the 'belle époque era' deal with the conflict between the artist's right to his/her work and the person's right to his/her image and private life.²⁴ The only subject of contention was the question of the legal nature of this 'personality right'.²⁵

In relation to private life (*vie privée*), on the other hand, the situation was quite different. The right of every person to have his or her privacy respected was neither discussed by the civil law courts nor in academic scholarship (*la doctrine*). Interestingly though, in 1819, *Royer-Collard*, a supporter of freedom of press legislation under the Restoration (Second Empire), had already advocated a 'wall of private life' (*mur de la vie privée*) as a borderline to press freedom and thereby concisely expressed the long dominant view of a spatial sphere of privacy linked to the domestic arena. The first Press Act was passed in 1868. S. 11 provided that 'every publication about privacy in a periodical is treated as a summary offence punishable with a fine of 500 francs'.²⁶ Only thirteen years later, under the Third Republic, was the Press Act repealed by a Freedom of the Press Act dated 29 July 1881.²⁷ On the contrary, the new Act (Art. 35) provided that only a deliberate infringement of the honour or esteem of another person would be a wrongful act: the crime of defamation (publication of offensive statements) and insult (*injure*). The Act introduced very restrictive procedural requirements, particularly the three-month term of prescription. The remedies for violation were monetary fines. A right of reply (*droit de réponse*) was introduced. The general law of delict is excluded from the scope of application of the Press Act 1881. In this respect, the protection of the persona against any form of defamatory and revelatory publication remained limited. However, this had no implication for the protection of other personality interests founded on the general rules of the law

²⁴ Cf. thereto J. Q. Whitman, 'The Two Western Cultures of Privacy', at 1175 *et seq.* with references.

²⁵ Trib. civ. Seine, 16 Jun. 1858, *Rachel*, D. 1858, 3, 62.

²⁶ This criminal law focus is also to be found in the *Constitution du 3 septembre 1791*, Title III, Ch. V, Art. 17: '*Les calomnies et injures contre quelques personnes, que ce soit relatives aux actions de leur vie privée, seront punies sur leur poursuite.*' ['Calumnies and insults against any persons whomsoever relative to their private life shall be punished in legal proceedings.']

²⁷ *Loi du 29 juillet 1881 sur la liberté de la presse*, Bull. Lois no. 637 p. 125.

of delict (Art. 1382 *c. civ.*). With regard to written correspondence, the rule of inviolability was well-established through the right to the confidentiality of letters.²⁸

By the end of the nineteenth century, diverse non-bodily aspects of the persona seemed to be protected in a satisfactory manner in French law. The protection of name, likeness and confidentiality of correspondence was founded on the general principles of the law of delict. The very extensive formulation of Art. 1382 *Code Civil* and the equal treatment of economic and non-economic loss allowed most of the conflicts arising from the unauthorised use of one's name or likeness to be solved. For this it was not necessary to precisely determine the true nature of the power of self-determination each person has over his or her personal attributes. Private life and honour were protected against invasions by the media – in a restrictive way – through the Press Act 1881.

In the nineteenth century, the development of 'personality rights' remained – internationally – interwoven with the emergence of intellectual property rights – patents, copyright and trademarks. The French discussion was more intense in this respect, as the French copyright doctrine acknowledged the moral right (*droit moral*) of the author or artist from the beginning. In 1900, the Paris Court of Appeal held that an author's right to modify or withdraw his work regardless of any contractual obligations was 'inherent in his personality itself'.²⁹ Thus, in the French tradition, personality rights are within a continuum leading from the alienable commercial copyright through to the inalienable moral right of the creator to the privacy right of the personality.

After the turn of the twentieth century a first clarification was assumed by *Perreau*. In his famous article on '*Des droits de la personnalité*', published in 1909,³⁰ he delivered a taxonomy of these new rights. He made the distinction between the rights concerning the physical individual (life, limbs and health, including consent to medical treatment) and those concerning the moral personality. The latter category encompassed honour, liberty and intellectual works (moral right). These rights concerning the moral personality were characterised by two aspects. They had effect *erga omnes* and could not be evaluated in monetary terms.³¹ As a consequence, they were inalienable, imprescriptible and

²⁸ E.g. Trib. civ. Seine, 11 Mar. 1897, D. 1898, 2, 359, regarding the exchange of letters between George Sand and Alfred de Musset.

²⁹ CA Paris, 1 Feb. 1900, S. Jur. 1900, II, 121. ³⁰ *Rev. Trim. Droit Civ.* 1909, 501.

³¹ *Ibid.* at 514 *et seq.*

inheritable. They could only be exercised and enforced by the ‘owner’ him- or herself.³² Although this was a remarkable step forward, the connotations with intellectual property rights were still present.

The second phase in the history of French privacy law began in the 1950s. In the famous *Marlene Dietrich affair*, a weekly magazine published parts of Ms Dietrich’s alleged memoirs in the form of an invented interview supposedly granted to a German journalist. On Ms Dietrich’s suit the court found for her and awarded damages in the amount of 5,000 French francs (FF). On appeal, the *Cour d’appel de Paris* affirmed the decision. It held that facts and stories ‘concerning the private life are part of the person’s moral property; ... no one may publish them ... without the express and unequivocal authorization of the person whose life is recounted’.³³ The court then raised the damages to 1.2 million FF, considering not only her mental distress, but also her patrimonial interests insofar as she was in fact preparing her own memoirs for publication. This amount remains one of the largest damages awards in French privacy cases to date. With the *Philippe affair*, the remedies available in privacy cases were extended. For the first time, the *Cour de cassation* granted pre-trial interdictal (injunctive) relief to stop publication in order to prevent privacy violations.³⁴ This relief requires an impending ‘intolerable intrusion into private life’.

Due to this flourishing case law development, the legislature decided to reform the Civil Code. The Act of 17 July 1970 ‘intending to reinforce the guarantee of individual rights of the citizen’ marked a milestone in the history of the protection of personality interests in France.³⁵ This holds true even though the French legislature merely codified the case law relating to the protection of the private sphere into the Civil and Criminal Codes. The newly introduced Art. 9(1) Civil Code, the wording of which is similar to that of Art. 8(1) ECHR, reads: ‘*Chacun a droit au respect de sa vie privée.*’ – ‘Each person has the right to respect for his or her private life.’ Thus, privacy, the sanctity of the home and the confidentiality of correspondence are officially recognised as protected personality interests (‘rights’) by the French legislature. Art. 9 provides for

³² *Ibid.* at 514.

³³ Paris, 16 Mar. 1955, M. Dietrich, D.S. Jur. 1955, 295.

³⁴ Cass., 2^e civ., 12 Jul. 1966, G. Philippe, D.S. Jur. 1967, 181.

³⁵ Loi No. 70-643, 17 Jul. 1970, JO 19 Jul. 1970, p. 6751; cf. R. Badinter, ‘Le droit au respect de la vie privée’ (1968) *Jurisclasseur Périodique*, I, 2136; H. Trouille, ‘Private Life and Public Image: Privacy Legislation in France’ (2000) 49 *International and Comparative Law Quarterly* 199.

a two-tiered system of privacy protection: (1) Infringements of private life in general are subject to an independent strict liability regime and to special and general damages after trial. (2) Revelations concerning the intimate core of private life justify pre-trial interdictal/injunctive relief.

A third phase in the legal protection of personality rights in France started in the 1970s. A new branch of law was born: constitutional jurisprudence (*droit constitutionnel jurisprudentiel*). Under the Constitution of the Fifth Republic of 1958, a Constitutional Council (*Conseil constitutionnel*) was established (Arts. 61–64). Through its landmark judgment of 1971³⁶ a body of binding constitutional rules (so-called *bloc de constitutionalité*) was recognised. Core elements of this ‘*bloc de constitutionalité*’ are the text of the Constitution of the Fifth Republic, the 1789 Declaration of Human Rights and the Preamble to the 1946 Constitution with its economic and social rights. Today this body of law is defined as ‘all principles and rules of constitutional rank which are binding on the legislature as well as the executive and, in a general way, on any public authorities, courts, and indeed private parties’.³⁷ By the same judgment, the Constitutional Council assumed its own competence to review the conformity of legislative Acts with these constitutional principles.³⁸

In breaking from a long-established legal tradition, the ordinary courts in France can now directly refer to constitutional principles when adjudicating cases. From 1971 onwards, the avenue for the protection of personality rights was significantly broadened; the method of legislative protection (e.g. amendments to the Civil Code³⁹) is now

³⁶ 16 Jul. 1971, DC 71-44 (*‘Liberté d’association’*).

³⁷ L. Favoreu *et al.*, *Droit des libertés fondamentales* (Paris: 2002), p. 157.

³⁸ This review procedure can only be initiated by the government, the French President, the Presidents of the two chambers of Parliament, and a group of (at least 60) Members of Parliament (Art. 61). Before 1971, the Constitutional Council’s competence was restricted to checking the balance of powers between the executive and the legislature in order to assure respect for the constitutionality of the rule-making process.

³⁹ In 1994, another fundamental constitutional value – human dignity – was concretised by legislation. A new Article (Art. 16) was introduced into the Civil Code: ‘*La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l’être humain dès le commencement de sa vie.*’ [‘The law ensures the primacy of the person, prohibits any infringement of the person’s dignity and safeguards the respect of the human being from the commencement of life.’] Art. 16–17C reads: ‘*Chacun a droit au respect de son corps. Le corps humain est inviolable.*’ [‘Everyone has the right to respect for his body. The human body is inviolable.’]

directly influenced by the national constitutional principles, especially fundamental rights *and* the rights of the ECHR. The ECHR was signed by France on 3 May 1974. According to Art. 55 of the Constitution, European Convention law has supremacy over national legislation. The right to sue the French Republic before the Strasbourg Court was finally recognised in 1981. Public life and private life are traditionally quite separate in France. Since the *Rachel* affair, the right to one's image (*droit à l'image*), for example, has been firmly established in the French general law of delict (Arts. 1382/1383 C. civ.). French courts ruled that it is unlawful to photograph an individual without his/her consent, even if the photograph was not meant for subsequent publication. The victim could claim non-pecuniary damages. This also holds true for celebrities and public figures (*personnalités publiques*), as long as they are not engaged in any public function or professional activity. In addition, a right to one's honour has been firmly established in French law. As far as the media are concerned, however, their protection is still governed by the exclusive and restrictive regime of the Press Act 1881.⁴⁰

After the 'constitutional turn' in French law in 1971, and after the coming into force of the ECHR in 1974, the legal situation changed slowly but dramatically. Today the influence of human rights on private law is evident.⁴¹ Next to family law and labour law, the most important area of private law where fundamental rights exercise an acknowledged effect is in the field of personality rights, and especially the right to privacy. Here, the Press Act 1881 lost, *de facto*, any influence. This is the result of discourse between legislative, jurisprudential and doctrinal formants, which in the meantime had become well-established. Therefore, the Act of 17 July 1970 introducing Art. 9 into the Civil Code, has been reviewed and affirmed constitutionally, first implicitly,⁴² then explicitly in 1999 by the *Conseil constitutionnel*.⁴³ In accordance with the

⁴⁰ Cass., ass. plén., 12 Jul. 2000, D. 2000 somm. 463. Cf. also J. Q. Whitman, 'The Two Western Cultures of Privacy' at 1171 *et seq.*, oversteering the anti-liberal dominance of the protection of honour.

⁴¹ Cf. A. Debet, *L'influence de la Convention européenne des droits de l'homme sur le droit civil* (Paris: 2002) (containing an account of judicial references to the ECHR); J. P. Marguénaud *et al.*, *CEDH et droit privé* (Paris: 2001) and 'Le droit civil français sous influence de la Convention européenne des droits de l'homme' (1996) *Rev Trim Droit Civ* 505; O. Lucas, 'La convention européenne des droits de l'homme et les fondements de la responsabilité civile' (2002) *JCP I*, 111.

⁴² DC 76-75, 12.1.1977; DC, 18.01.1995, *JCP* 1995, 22525.

⁴³ DC 99-422, 21.12.1999. Cf. also DC 2003-467, 13.03.2003: '*Considérant qu'aux termes de l'article 2 de la Déclaration des droits de l'homme et du citoyen le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression; que la liberté proclamé par*

Council's jurisprudence, the *Cour de cassation* held that 'respect de la vie privée' and freedom of expression have the same normative value, as per Arts. 8 and 10 ECHR and Art. 9 Civil Code and Art. 11 of the 1789 Declaration. In cases of conflict between the two principles, the judge shall strike a balance in order to find a solution that may grant protection to the most legitimate interest under the given circumstances in the concrete case.⁴⁴ If the reported issue concerned is of public interest, 'on the bases of Article 10 ECHR and Arts. 9 and 16 Civil Code, freedom of press includes the right to report on a subject of general interest; the limits of this freedom are marked by the respect of human dignity'.⁴⁵ Leaving this situation aside, privacy, especially the right to one's image, is strongly protected by constitutional law (Art. 2 of the 1789 Declaration, Art. 8 ECHR) and by civil law (Art. 9 *C. civ.*).

It is not certain to what extent a 'right to publicity' is acknowledged in French law. It appeared to be introduced by a statute relating to copyright and performing artists' rights in 1985, but was restricted to 'performing artists' (*l'artiste-interprète*).⁴⁶ However a judgment from a court of first instance in 1988 plainly acknowledges a copyright-like 'right to publicity': 'The right to one's image is of a moral and pecuniary nature: the economic right which allows pecuniary gain from commercially exploiting the image is not purely personal and can be passed on to the heirs.'⁴⁷ This has also been acknowledged in a case concerning a non-public figure.⁴⁸

cette article implique le respect de la vie privée. ['It is to be considered that the terms of Art. 2 of the *Déclaration des droits de l'homme et du citoyen* set out that the goal of all political associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression whereby the liberty proclaimed in this article implies respect for private life.']

⁴⁴ Cass., 1 civ., 09.07.2003, D. 2004, 1633; Gaz. Pal. 2004, 3112. This judicial approach is reminiscent of the German constitutional law principle of 'practical concordance', developed by K. Hesse. Cf. K. Hesse, *Grundzüge des Verfassungsrechts* (20th edn., Heidelberg: 1995/reprinted 1999), pp. 142/143; F. Müller and R. Christensen, *Juristische Methodik*, Vol. I (9th edn., Berlin: 2005), no. 392.

⁴⁵ Cass., 1re civ., 04.11.2004, JCP 2004, II, 10186. In balancing these conflicting rights, e.g., dignity has been found to be violated through the publishing of a photograph of the body of a victim to a terrorist attack: Cass., 1re civ., 20.12.2000, D. 2001, 885; Gridel, D. 2001 chron. 872.

⁴⁶ Cf. A. R. Bertrand, 'A New Neighbouring Right to Copyright' (1991) 13 *European Intellectual Property Review* 184.

⁴⁷ Aix-en-Provence, 24.11.1988, JCP 1989, II, 21329, note by J. Henderycksen (quoted from Bertrands, 'A New Neighbouring Right to Copyright' at 186); cf. E. Gaillard, 'La double nature du droit à l'image et ses conséquences en droit français' (1984) D. chron. 26.

⁴⁸ Riom, 26.02.2004, Gaz. Pal. 2004 no. 328, p. 14.

B. Germany⁴⁹

'A general personality right is alien to the [German] civil law' – this was stated by the Imperial Court (*Reichsgericht* – RG) in 1908,⁵⁰ almost at the same time as *Perreau* assumed the categorisation of the French law on personality rights. In fact, the learned drafters of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) deliberately broke from the tradition of the Roman law of injuries (*actio iniuriarum*). Classical Roman law recognised no personality rights; however, alongside the bodily integrity of the free Roman citizen, it also protected his/her 'personality' – *dignitas* and *fama* – against the most varied forms of intentional impairments.⁵¹ In eighteenth and nineteenth century *Ius Commune* the *actio iniuriarum* was restricted to the protection of honour and reputation.

There were various reasons for this decision by the drafters of the BGB. One was the lack of a declaration of civil rights which gave legislative effect to the anti-absolutist doctrines of natural law. Nineteenth-century Germany did not know a revolutionary declaration of human rights such as the 1789 French Declaration or the United States Bill of Rights of 1791.⁵² Attempts to establish a democratic constitution with fundamental rights were undertaken by the 1848 Frankfurt 'Paulskirche Constitution'.⁵³ With the failure of the Revolution in 1848 these attempts remained unfulfilled. The second limitation on the enactment of a constitution was the absence of a nation state.

⁴⁹ Cf. in greater detail H. P. Götting, C. Schertz and W. Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (München: 2008); pp. 264–333; S. Balthasar, *Der Schutz der Privatsphäre im Zivilrecht* (Tübingen: 2006); U. Amelung, *Der Schutz der Privatheit im Zivilrecht* (Tübingen: 2002) (all three with comparative accounts); M. Baston-Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts* (Tübingen: 1997).

⁵⁰ RG, 07.11.1908, RGZ 69, 401, 403 – Nietzsche letters.

⁵¹ There was a general edict of the praetors against *iniuria* and three special delicts, namely *convicium*, *adtemptata pudicitia* and *infamatio*. The civil suit of *actio iniuriarum* aimed at the satisfaction of persons unlawfully brought into public disrespect through an equitable monetary compensation (i.e. solatium for non-material injury) – *quantum iudici aequum et bonum videbitur*. In greater detail see M. Hagemann, *Iniuria. Von den XII-Tafeln bis zur Justinianischen Kodifikation* (Köln: 1998). For an overview in English tracing the history of *iniuria* from its Roman foundations to the modern law of among others Germany, see Zimmermann, *The Law of Obligations* Ch. 31.

⁵² See the first 10 Amendments to the 1787 US Constitution.

⁵³ It provided for political rights and for classical rights aimed at the protection of the privacy of citizens. See H. Scholler (ed.), *Die Grundrechtsdiskussion in der Paulskirche*

In the nineteenth century, Germany was a quilt of diverse kingdoms and principalities which were linked in the German Confederation (*Deutscher Bund*: 1815–1866) as established at the Congress of Vienna as successor to the Holy Roman Empire (800–1806). The German Confederation was incapable of international action to a great extent because it was obstructed by its two largest Member States, Prussia and Austria-Hungary. The unification of Germany, with the exclusion of Austria, occurred much later under the leadership of Prussia following two wars with Austria (1866) and France (1871). The Constitution enacted in Versailles in 1871 was simply an organisational statute for a federation of principalities, named the (Second) ‘German Empire’.⁵⁴ This imperial Constitution did not contain any fundamental rights. Therefore, it was up to *private law* development and codification to secure the contemporary ideals of liberty and equality. This occurred, but with a break from both the natural law concept of the *persona* and the tradition of the Roman law of injuries by the Historical School.⁵⁵ Rights and duties based on human dignity and mutual recognition of the *persona*, as well as the punitive and equitable elements in the *actio iniuriarum* did not fit into a system of civil law which focused on freedom of contract, economic rights (ownership and obligations) and the compensation of pecuniary loss. The development of such a system was a central concern of market-oriented legal science at this point in history.

Imbued with the ideals of nineteenth-century liberalism, Savigny misconceived the personality right as a proprietary right in one’s own body. The German jurists of the nineteenth century literally adopted John Locke’s metaphor when he spoke of a man’s ‘property in his own person’.⁵⁶ A personality right understood as a property right in one’s body does not make sense. There are no pieces of property to be transferred. Moreover, the equivalent to the proprietor’s right to destroy the thing was the individual’s right to commit suicide. This too was rejected by Savigny who made reference to Hegel’s Philosophy of Law

(2nd edn., Darmstadt: 1982); K. Kröger, *Grundrechtsentwicklung in Deutschland* (Tübingen: 1998), pp. 19–27.

⁵⁴ *Verfassung des Deutschen Reiches* of 16.4.1871, Reichsgesetzblatt 1871, p. 64.

⁵⁵ Cf. F. C. von Savigny, *System des heutigen Römischen Rechts*, Vol. II (Berlin: 1840), § 60, p. 2.

⁵⁶ J. Locke, *Two Treatises of Government, Second Treatise* (critical edn. by P. Laslett, Cambridge: 1960), Ch. 4, para. 27. Compare the civil law tradition under which the

to support his refusal of a personality right.⁵⁷ However, Hegel merely succinctly noted that there is no property in the persona.⁵⁸

Accordingly, the notion of persona was reduced to the aspect of legal capacity and personhood: persons, objects (things and rights), and legal relationships – *personae, res, actiones/obligationes* – became the building blocks of this system. At an ideological level, the guiding concepts Europe-wide were liberalism and possessive individualism:⁵⁹ the property ('have') and the bodily integrity ('being') of the individual were the primary, if not the exclusive objects of legal protection. Thus, the BGB law of delict served freedom of contract (private autonomy) and the development of commerce at the same time.⁶⁰ Injuries to the honour and dignity of the persona were avenged through penal law (defamation law: §§ 185 *et seq.* Penal Code (*StGB*) of 1871) insofar as was necessary. The *actio iniuriarum* was formally repealed in 1879. The civil law of damages was restricted to cases of restitution in kind and compensation of economic loss (§§ 249–253 *BGB*).⁶¹ Therefore, the German Civil Code of 1896/1900 did not – in contrast to nearly every other private law system – acknowledge the monetary compensation of non-pecuniary loss in defamation cases. Equitable indemnification for 'intangible' loss (*aequum et bonum*) was only exceptionally provided for in cases of bodily injury (ex § 847(1) *BGB* of 1896/1900: damages for pain and suffering).

Finally, the indeterminacy of the contents of a general personality right was seen in Germany as a grave obstacle to the codification of such a right. Thus, in contrast to the system of subjective economic rights, the field of personality rights and rights of the persona remained underdeveloped.⁶² Only parts of the all-encompassing legal complex of

body of a free person is not susceptible to ownership: D.9.2,13pr (Ulpian) '*dominus membrorum suorum nemo videtur*'.

⁵⁷ However, unlike the drafters of the Civil Code, Savigny adhered to the *actio iniuriarum* as a civil cause of action in cases of infringements of honour and reputation; see C. F. von Savigny, *Das Obligationenrecht als Teil des heutigen Römischen Rechts*, Vol. II (Berlin: 1853), § 84.

⁵⁸ G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, § 70 Supp. (reprint of 1821).

⁵⁹ C. B. Macpherson, *The Political Theory of Possessive Individualism. Hobbes to Locke* (Oxford: 1962).

⁶⁰ On this point see M. Gruber, *Freiheitsschutz als ein Zweck des Deliktsrechts* (Berlin: 1998).

⁶¹ *Motive zu dem Entwurfe eines BGB*, Vol. II (Berlin: 1888), p. 22; *Protokolle der Kommission für die Lesung des Entwurfs des BGB*, Vol. II (Berlin: 1898), pp. 637 and 638. The Reichsgericht even denied taking up the French doctrine of *dommage moral* in the Prussian Rhine provinces where the French Civil Code was in force until 1900: RG, 27.06.1882, RGZ 7, 295.

⁶² Among the minority opinions were K. Gareis, O. von Gierke, J. Kohler and others.

'personality' were regulated in the *BGB*: in particular the right to one's name (*Namensrecht*) under § 12 *BGB*.⁶³

The discourse on personality rights in the nineteenth century was governed internationally through the development of subjective rights which were similar to property rights – the rights to immaterial goods. Intellectual labour should lead to exclusive alienable patrimonial rights similar to property rights. Thus, the personality rights of authors, artists, etc. came into being. In contrast to France, the German doctrine did not recognise the independent moral right of the creator of an intellectual work. Hence, at the turn of the century, intellectual property rights were quite neatly separated from diffuse personality rights – the first acknowledged, the others suppressed. However, there is one exception: In the aftermath of the *Bismarck*-photograph case of 1899,⁶⁴ the protection of the person portrayed, i.e. the right to one's own image, was also introduced into the Artists' Copyright Act (*Kunsturhebergesetz* – *KUG*) of 1907. § 22 *KUG* enshrined the principle that pictures depicting individuals may only be disseminated with the consent of the person pictured. Nevertheless, pictures relating to events from contemporary society or history are exempt from this rule (§ 23(1) 1 *KUG*). This statute led to the firmly established jurisprudence that photographs of 'public figures'⁶⁵ could be taken and published without consent and at any occasion, unless there was an intrusion into these persons' intimate domestic sphere such as houses, flats, private gardens, etc.⁶⁶

The long list of substantive constitutional (civil and economic) rights that adorned the 1919 *Weimar Constitution*⁶⁷ were not judicially enforceable. These were seen as programmatic political goals to be implemented by the legislator. They did not effect the denial of protection of personality interests through the law of delict.

⁶³ Remedies in case of violation are abatement and forbearance.

⁶⁴ RG, 28.12.1899, RGZ 45, 170. Unlike the trial court, the RG denied the personality rights of the children and conventionally referred to the *Ius Commune actio ob iniustam causam*. The story of this case is told and the *Bismarck*-photograph reproduced in G. Brüggemeier, *Haftungsrecht* (Heidelberg: 2006), pp. 297 *et seq.*

⁶⁵ So-called *Personen der Zeitgeschichte* (persons of contemporary society).

⁶⁶ The *Kunsturhebergesetz* was repealed by an all-encompassing Copyrights Act (*Urheberrechtsgesetz*) in 1965. However, the provisions concerning the right to one's image remained in force.

⁶⁷ *Verfassung des Deutschen Reiches* of 11.08.1919, *Reichsgesetzblatt* 1919, pp. 1383 *et seq.*; cf. C. Gusy, *Die Weimarer Reichsverfassung* (Tübingen: 1997); H. C. Nipperdey (ed.), *Die Grundrechte und Grundpflichten der Reichsverfassung*, 3 Vols. (Berlin: 1929/1930).

In Germany, a fundamental change in the protection of personality interests came about after the Second World War.⁶⁸ The Federal Republic of (West) Germany was founded and the *Bonn Constitution* ('*Grundgesetz*' – GG) came into force in 1949.⁶⁹ The Bonn Constitution contained a catalogue of mandatory fundamental rights for the first time, explicitly binding all public powers (Art. 1(3) GG). The recognition of the unassailability of the dignity of a human being is contained right at the beginning. Guarantees relating to the free development of the persona (Art. 2(1)), the confidentiality of letters, post, and telecommunication (Art. 10) and the inviolability of the home (Art. 13) followed. Now the task for the courts, legislature and legal scholarship was to make the *pre-constitutional* nineteenth-century civil law of the BGB compatible with the values of the 1949 Constitution.⁷⁰ This was brought about by a couple of landmark judgments by the highest German courts – the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), inaugurated in 1951,⁷¹ and the Federal Court of Justice (*Bundesgerichtshof* – BGH) as the successor of the *Reichsgericht*. The point of change concerning personality interests was marked by the *Schacht-Leserbrief* judgment of the BGH in 1954.⁷² The case was based on facts which were thoroughly typical of the times: Dr Hjalmar Schacht was the president of the *Reichsbank* (until 1938) during the national socialist era and also temporarily the Minister of the Economy under Adolf Hitler. In 1952, a weekly journal

⁶⁸ However, Whitman claims to have found evidence of the roots of civil personality rights in the time and during the law of National Socialism. See J. Q. Whitman, 'The Two Western Cultures of Privacy', at 1187 *et seq.*

⁶⁹ *Grundgesetz für die Bundesrepublik Deutschland* of 23.05.1949, *Bundesgesetzblatt* 1949, pp. 1 *et seq.*

⁷⁰ For a majority of private law scholars, this apparently did not cause any problems. From their point of view a 'liberal civil law', the BGB, finally found its adequate liberal political and societal framework. *Cf. inter alia* and with further references, J. Rückert, 'Introduction', in M. Schmoeckel, J. Rückert and R. Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB* Vol. I: *Allgemeiner Teil* (Tübingen: 2003).

⁷¹ Most remarkable is the *Lüth*-case of the Federal Constitutional Court: BVerfG, 15.01.1958, BVerfGE 7, 198; NJW 1958, 257; JZ 1958, 119 (affirming an all-embracing 'radiating effect' or 'objectively normative effect' of constitutional principles on every part of German law); on this case see T. Henne and A. Riedlinger (eds.), *Das Lüth-Urteil aus (rechts-)historischer Sicht* (Berlin: 2005). See also K. M. Lewan, 'The Significance of Constitutional Rights for Private Law' (1968) 17 *ICLQ* 571; D. P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Beverly Hills: 1976).

⁷² BGH, 25.05.1954, BGHZ 13, 334; NJW 1954, 1404; JZ 1954, 698 annotated by Coing. The court referred to Ennecerus-Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts* (14th edn., Tübingen: 1952) as the 'book of authority'.

critically investigated the new economic activities of Dr Schacht. The claimant, the legal counsel for Dr Schacht, filed a formal brief for his client, demanding rectification of the article. The weekly magazine printed this legal demand next to other opinions in the rubric 'Letters to the Editor'. Thus, the claimant was cast in a false light as being a sympathiser of both Dr Schacht and national socialism. In this case, the BGH developed a private law 'right of personality' for the first time, as constitutionally guaranteed by Art. 1(1) (respect of human dignity) and Art. 2(1) GG (right to free development of the persona). The person has to be protected against the altered and unauthorised publication of his/her written expressions. Due to the Constitution, the *general right of personality* must be accepted as a constitutionally guaranteed fundamental right, which is not only directed against the State and its public bodies, but also against private parties (individuals, businesses) in their relations *inter se*. This led to the famous doctrine of 'Drittwirkung' ('third party effect'/'horizontal effect').⁷³

In 1957, the general personality right was explicitly recognised as an 'other right' in the sense of § 823(1) BGB.⁷⁴ Notwithstanding this, there is plain evidence that the 'general personality right' is *not* an absolute property right which is regulated under § 823(1).⁷⁵ The civil law protections of the personality were consolidated in a short period of time: through another landmark judgment in 1958, equitable monetary compensation (solatium/damages for pain and suffering/*Schmerzensgeld*) was made available in cases where the personality was gravely infringed;⁷⁶ and interdictal/injunctive relief was made possible under § 1004 BGB.⁷⁷ Efforts to codify this new law on the protection of the

⁷³ The term was coined by H. P. Ipsen, 'Gleichheit', in F. L. Neumann, H. C. Nipperdey and U. Scheuner (eds.), *Die Grundrechte*, Vol. II: *Die Freiheitsrechte in Deutschland* (Berlin: 1954), pp. 111 *et seq.* (143); H. C. Nipperdey, *Grundrechte und Privatrecht* (Krefeld: 1961): a prominent supporter of the doctrine of direct horizontal effect in the 1950s; he later completely relinquished this term; C. W. Canaris, *Grundrechte und Privatrecht. Eine Zwischenbilanz* (Berlin: 1999) (trying to dispose of the doctrine of Drittwirkung by replacing it with the State's duty to protect its citizens); for a European account with further references see G. Brüggemeier *et al.* (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I.

⁷⁴ BGH, 02.04.1957, BGHZ 24, 72; NJW 1957, 1146 – Medical health certificate; refusing to acknowledge a general personality right, see K. Larenz, 'Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen' (1995) NJW 521.

⁷⁵ Medicus still calls the personality *right* 'eine juristische Mißgeburt' (a juristic monstrosity). D. Medicus, *Bürgerliches Recht* (21st edn., Cologne: 2007), p. 375.

⁷⁶ BGH, 14.02.1958, BGHZ 26, 349; NJW 1958, 827; JZ 1958, 571 – Herrenreiter.

⁷⁷ BGH, 18.03.1959, BGHZ 30, 7; NJW 1959, 1269 – C. Valente.

personality had been attempted since the end of the 1950s, however these had not prospered.⁷⁸

The second constituent⁷⁹ of this ground breaking ‘legal revolution’ – which was in opposition to the systematic schema of the *BGB* – was an undeniable requirement in society to protect the individual in the post-war era. This stemmed from the increased endangerment of a reserved sphere of private life choices through the escalation of state, mixed, and private sector collection and administration of the vital data of individuals; the growing intrusion into and publication of private life issues driven by ever more aggressive advertising and marketing practices; and, last but not least, from the oppressive experience of the total control of individuals and information by the national socialist state which made the protection of a residual area of personal privacy indispensable against access to and transfer of various kinds of private data.

The guarantee of personality rights by the national Constitution⁸⁰ was the starting point. However, private law essentially goes further. The law of delict seeks – in the shadow of constitutional law – to formulate rules for the conduct of private parties in social spheres which are marked by a particular endangerment of the personality. It aims to protect the legitimate interests of the persona. In this respect it must be stressed again that the concept of a *general private law* ‘personality right’ is misleading. On the one hand, it is burdened with a debt to a pre-constitutional legal expression based on subjective property rights (§ 823(1) *BGB*: ‘other right’); on the other, it is borrowed from the constitutional language of fundamental rights. Behind this metaphor a collection of various areas of protection of the persona is concealed.

⁷⁸ Cf. M. Baston-Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts*, p. 166.

⁷⁹ As a further basis of legitimation, the re-discovered *natural law*, which enjoyed a certain renaissance in post-war Germany, came into the picture. On this point, see H. Coing, *Die obersten Grundsätze des Rechts: Ein Versuch zur Neugründung des Naturrechts* (Heidelberg: 1947); H. Welzel, *Naturrecht und materiale Gerechtigkeit* (Göttingen: 1951); G. Boehmer, *Grundlagen der Bürgerlichen Rechtsordnung*, Vol. II/1: *Dogmengeschichtliche Grundlagen des bürgerlichen Rechts* (Tübingen: 1951); H. Hubmann, *Das Persönlichkeitsrecht* (Münster/Köln: 1953); W. Maihofer (ed.), *Naturrecht und Positivismus* (Darmstadt: 1962).

⁸⁰ In the shadow of the national constitution, the ECHR, which was transformed into German Law as ordinary statutory law, remained without relevance. This only began to change recently. See Part 4 below (on ‘European Perspective’). Cf. also R. Ellger, ‘Europäische Menschenrechtskonvention und deutsches Privatrecht’ (1999) 63 *RabelsZ*, 625 (in English: ‘The European Convention on Human Rights and Fundamental Freedoms and German Private Law’ in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*, pp. 161).

On the basis of current case law from both the *BVerfG* and *BGH*, five broad-ranging protected personality interests developed under § 823(1) *BGB*, with their own specific preconditions and sub-categories: (1) the protection of privacy; (2) the right to one's own image, name and likeness; (3) the sphere of publicity or the right to identity; (4) the right of informational self-determination ('right to one's data'); and (5) the protection of dignity, honour and reputation.⁸¹ However, it needs to be stressed again that unlike in cases of ordinary infringements of bodily integrity and damage to property, so far only severe infringements of the personality which cannot be remedied otherwise allow equitable monetary compensation.

3. Two different paths of liability law

A. Common law of torts and statutory law: England

The development in England presents another different case. This is true in respect of both defamation law and privacy law. The law of *defamation* has a long history. Rooted in different traditions there are two distinct torts: written defamation (libel) and oral defamation (slander). Up until now, these have been distinguished and treated differently from one another. In relation to the conflict of reputation versus freedom of expression, in the past, English law has struck a balance in quite the opposite manner than United States law.⁸² Under defamation law, when a libellous statement is made the applicant can claim monetary compensation in the absence of any proof of fault or damage. It is only recently that things have started to change under the influence of the Defamation Act 1996 and the Human Rights Act 1998. In addition, England is unique in Europe as in criminal-like defamation cases *civil juries* still decide whether compensatory damages and *exemplary damages* can also be awarded.⁸³

To this day, English common law does not nominally recognise a general tort of intrusion of privacy, which is all the more surprising since it is probably in this legal system that we find the first ever case

⁸¹ See, in greater detail, G. Brüggemeier, *Haftungsrecht*, pp. 264–333; M. Baston-Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts*.

⁸² That is why it is sometimes held unconstitutional in the US to enforce English judgments on defamation matters. Cf. *Telnikoff v. Matusevich*, 702 A.2d 230 (Md. 1997). On the development of the US law see J. Page, 'American Tort Law' (in this volume).

⁸³ Cf. Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com. no 247, 16 December 1997.

of a court recognising something of a 'right to one's own picture'. In 1848, the English courts passed judgment on a case concerning the publication of drawings which the husband of Queen Victoria, Prince Albert, had made of members of the Royal Family.⁸⁴ He had given them to a printer for replication, and one of the printer's employees had unlawfully passed them on to a third party. An injunction against their publication was granted on the basis of the equitable doctrine of *breach of confidence*.

However, this remained an isolated case. Personality protection *beyond* the law of defamation is still underdeveloped in England today. With regard to the media, freedom of the press is the overriding consideration. In some cases, this lacuna is impossible to overlook.⁸⁵ At present, personality interests are protected through a legal patchwork of common law and equitable remedies, supplemented by self-regulatory mechanisms. In common law, there are basically two torts: malicious falsehood and passing-off; occasionally, and with difficulty, trespass and nuisance are also brought in.⁸⁶ At the same time, self-regulation of the press has been steadily extended. The first step was the founding of a General Council of the Press in 1953. It was re-named the Press Council after a reform in 1963 and dealt with complaints against press releases. In 1991, a Press Complaints Commission (PCC) was set up to alleviate remaining shortcomings in the implementation of press self-regulation. Half of the Commission are public members, the other half are press members.⁸⁷ The PCC works on the basis of a Code of Practice, which has, in the meantime, been appended by a privacy rule. Its definition of a protected private sphere is any 'public or private property where there is a reasonable expectation of privacy'.⁸⁸

However, to this day, *breach of confidence* has remained the most important legal basis for the protection of privacy. Breach of confidence is rooted in equity, which still exists alongside common law as

⁸⁴ *Prince Albert v. Strange* (1849) 1 Mac & G 25, 64 ER 293; cf. also *Pollard v. Photographic Company* [1889] 40 Ch D 345.

⁸⁵ See *Kaye v. Robertson* [1991] FSR 62 (CA).

⁸⁶ *Khorasandjian v. Bush* [1993] QB 727 (harassment by telephone).

⁸⁷ Cf. D. Calcutt, *Review of Self-Regulation* (London: 1993), Cm 2135, and for a comparison of German and English law see H. Münch, *Freiwillige Selbstkontrolle bei Indiskretionen der Presse* (Baden-Baden: 2002).

⁸⁸ '3. Privacy: (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. (ii) The use of long lens photography to take pictures in private places without their consent is unacceptable. (Note: Private places are public or private property where there is a

the second strand of unwritten law. It is defined as the misuse of private information which was confidentially given in writing or orally, and since quite early on this has included photographs of persons.⁸⁹ Its criteria were summarised in *Coco v. AN Clark (Engineers) Ltd*: 'First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'⁹⁰ Nevertheless, it took until 1948 for the remedy of damages to be made available in cases of breach of confidence.⁹¹

In relation to privacy protection, the Human Rights Act (HRA) must be considered a turning point in English law. The HRA, which was passed in 1998 and came into effect in 2000, implemented the European Convention on Human Rights (ECHR) into English law. English courts are now committed to the protection of privacy according to Art. 8(1) ECHR. It remains to be seen whether this will lead to the recognition of a general tort of privacy in English common law. However, sceptics suspect that 'Godot will arrive sooner'.⁹²

In fact there have recently been some spectacular cases which give reason to doubt that such a general tort will be developed in the near future. One of these was *Douglas v. Hello! Ltd*⁹³ which concerned the wedding of Michael Douglas and Catherine Zeta-Jones in the New York Plaza Hotel in November 2000. The couple had sold the exclusive right to photo coverage of the event to *OK!* magazine. A paparazzo gained admittance to the party and, despite an explicit ban on photographs, secretly took some pictures of the bride and groom. These were sold to one of *OK!*'s competitors, the Spanish/English *Hello!* magazine, which is published in England. An action to prevent the publication of the photographs in *Hello!* was rejected by the Court of Appeal. Now, not only *OK!* magazine, the owners of the exclusive rights to the photographs, but also the Douglases decided to sue for damages in England. However, the High Court judge (Chancery Division) also held that with regard to HRA

reasonable expectation of privacy.' – This is followed by a proviso in favour of an overriding public interest.

⁸⁹ *Pollard v. Photographic Co.* [1889] 40 Ch D 345.

⁹⁰ *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

⁹¹ *Saltman Engineering Co Ltd v. Campbell Engineering Ltd* (1948) 65 RPC 203.

⁹² See e.g. R. Wacks, 'Why there will never be an English common law privacy tort', in A. T. Kenyon and M. Richardson (eds.), *New Dimensions in Privacy Law* (Cambridge: 2007), pp. 154 *et seq.* (183).

⁹³ [2003] EWHC 786 (Ch).

regulations their case did not constitute a violation of privacy rights. He viewed the secretly taken photographs as confidential information and affirmed the doctrine of breach of confidence. *OK!* was awarded special damages of over £1 million for violation of their exclusive right by *Hello!*; Douglas and Zeta-Jones were awarded a lesser amount in non-pecuniary damages. In the Court of Appeal, the Douglas/Zeta-Jones verdict was upheld, while *OK!*'s claim for damages was rejected.⁹⁴ The House of Lords reinstated the High Court's judgment. It again saw the ground for *OK!*'s claim in a breach of confidence.⁹⁵

Two other recent decisions by the House of Lords – *Wainwright v. Home Office*⁹⁶ and *Campbell v. MGN Ltd*⁹⁷ – also seem to indicate that the highest British court is not prepared to take that last step towards recognising a new tort of privacy, referring instead to the competence of both the legislature and the government. However, neither of these bodies shows any sign of interest in dealing with this matter. In the House of Lords' judgment in favour of *Naomi Campbell*,⁹⁸ the court's narrow decision to award damages was again based on breach of confidence, although the requirement of a confidential relationship was missing. It seems that in English law, breach of confidence has become a 'de facto tort of privacy' (G. Howells).

B. Scandinavian law: Sweden

In most continental European countries today the protection of personality interests is conducted by the law of delict/tort, supplemented to a separate extent by special legislation on the media. This is *not* true for the Nordic states, taking Sweden as a representative example.⁹⁹ The Swedish Tort Liability Act of 1972, for example, regulates monetary compensation for personal injury, including loss of life (*personskada*)

⁹⁴ [2005] EWCA Civ 595.

⁹⁵ [2007] UKHL 21.

⁹⁶ *Wainwright v. Home Office* [2003] 4 All ER 969 (body search).

⁹⁷ *Campbell v. MGN Ltd* [2004] 2 WLR 1232.

⁹⁸ This concerned a press report containing photographs of the supermodel's visit to Narcotics Anonymous. A 3:2 majority in the House of Lords acknowledged the need for protection against indiscretions by the press. However, the Law Lords did not come to terms with what constitutes a 'private fact'.

⁹⁹ In this section, I refer to S. Strömholm, 'Schwedisches Recht', in G. Dworkin *et al.*, *Die Haftung der Massenmedien*, pp. 73 *et seq.* The leading monograph is still S. Strömholm, *Right of Privacy and Rights of the Personality*, (Stockholm: 1967). On Scandinavian law – Finland and Sweden – in general see M. Bogdan (ed.), *Swedish Law in the New Millennium* (Stockholm: 2000) and J. Uotila (ed.), *The Finnish Legal System* (2nd edn., Helsinki: 1985).

and property damage (*sakskada*). An infringement of personality interests ('civil injury') only triggers liability if the infringement is punishable as a criminal act.¹⁰⁰ This is the general approach in the Nordic states: damages for civil injury presuppose a crime. Civil 'personality rights' such as a right to one's image or a right to privacy are not acknowledged. Private liability in personality interest cases is dependent on criminal law (principle of accessory).

Relevant criminal provisions can be found in the general Penal Code, especially in respect of classic defamation law. These crimes are concretised by special statutes regulating the media. The venerable Swedish Freedom of Press Act of 1766 lists two respective crimes: defamation ('*förtal*') and insulting behaviour ('*förolämpning*'). Modern subjects such as transmissions, technical recording and databases are dealt with in the Fundamental Law of Freedom of Expression of 1991.

When the general conditions of a serious offence and of criminal behaviour (guilt) are met, the civil liability in media torts rests with the responsible editor appointed by the owner of the media company. This is the case with print media, broadcasting and television, as well as film, video recordings, etc. As far as books are concerned, the liability normally lies with the author. The remedy is damages, especially the monetary compensation of non-economic loss ('*kränkningsersättning*').¹⁰¹ Rights to forbearance and injunctions are generally excluded.

Due to the non-applicability of general tort law, remarkable gaps remain in the protection of personality interests in the law of the Nordic countries. Scandinavian doctrines on horizontal effect (of human rights) have only begun to be recently, and somewhat timidly, developed.¹⁰² The constitutional documents encompass political goals which, according to prevalent opinion, are not directly enforceable but need to be implemented by the legislator. The ECHR has been incorporated into domestic law since 1 January 1995. One of the Swedish constitutional documents, the Instrument of Government ('*Regeringsformen*', RF), prescribes that no legislative Act shall be passed that is in conflict with the ECHR. In the second chapter of the RF the protection of private life and family life is guaranteed. In the tradition of classic human rights this protection is restricted to infringements by acts of state power only. It is up to the legislator to introduce a further-reaching

¹⁰⁰ Ch. 2, s. 3 Swedish Tort Liability Act.

¹⁰¹ See *ibid.*

¹⁰² See the Swedish report by A. Lauer and A. Colombi Ciacchi, in G. Brüggemeier *et al.* (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I.

protection of the citizen. This occurred through the Fundamental Law on Freedom of Expression and the Act on Personal Information (1998). When implementing the goals of the Constitution, the Swedish legislator is bound to comply with three principles: the principle of aim, the principle of need and the principle of proportionality. It was not until very recently that the Swedish Supreme Court acknowledged a right to compensation between private parties directly based on the violation of an ECHR right.^{102a}

To the extent that the above-mentioned gaps are not filled by the legislator, in the past, the Swedish judiciary was very hesitant to step in and to develop the law independently. Instead, another mechanism of dispute regulation comes to the fore which is deeply rooted in the culture of the Nordic countries: *private voluntary self-regulation*. Since 1916, an honorary court for the press (*'pressens opinionsnämnd'*) has existed in Sweden. Honorary and professional 'codes of good practice' have been passed by journalist and publisher organisations. In 1970, the Honorary Press Court underwent a reform. Its members are now appointed by press organisations, the representative for the legal affairs of the Parliament and the chairman of the Swedish attorneys' association. It can award monetary fines of up to 2,000 Swedish Krona and can publish its rejecting opinion. In addition, a private press ombudsman (*'pressombudsman'*) was appointed. He/she can initiate investigations, try to find solutions to disputes or pass the case over to the Honorary Court. Similar self regulatory institutions exist for both broadcasting and television.

4. A European Perspective – Art. 8(1) ECHR

The European perspective on the protection of personality interests by the law of delict/torts has many faces. One is represented by political (European Commission; European Parliament) and academic attempts to unify Europe's private laws through restatements and the like.¹⁰³ The *Joint Network on European Private Law* and the *European Group on Tort Law* in Vienna have recently presented drafts of provisions on

^{102a} See B. Dufwa, 'Horizontal effect of the European Convention: Swedish Case Law' in A. Colombi Ciacchi, C. Godt, P. Rott and L. J. Smith (eds.), *Haftungsrecht im dritten Millennium* (Baden-Baden: 2009), p. 85.

¹⁰³ On the so-called Action Plan process and the 'Common Frame of Reference (CFR)', elaborated upon by the Joint Network on European Private Law, see European Commission, 'A More Coherent European Contract Law: An Action Plan', COM(2003) 68 final, and its progress reports (e.g. COM(2007) 447 final); M. W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: 2006).

non-contractual liability.¹⁰⁴ Each of the two proposals contains sections in which personality interests are mentioned as a subject of protection.¹⁰⁵

Another face is the approximation of the national laws of delict and tort of the EU Member States through *constitutionalisation*.¹⁰⁶ In this context, the most relevant constitutional document¹⁰⁷ is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It was passed in 1950 by the Committee of Ministers of the Council of Europe.¹⁰⁸ Signed in Rome in 1950, it came into force in 1953. The ECHR is a veritable *European Bill of Rights*. Its legal status today is twofold: (1) By its very origins the ECHR is international law. As a multilateral international treaty, after ratification it becomes (with or without an additional transposing act by the Contracting State) an integral part of the legal orders of the (now) forty-seven Contracting States of the Council of Europe. The rank acknowledged to the ECHR as a source of law in the domestic hierarchies of norms varies from country to country, according to whether and to what extent the individual legal system follows a monistic or a dualistic approach in the relationship between national and international law. Thus in some countries the ECHR is ranked on the level of domestic constitutional law (e.g. Austria and Switzerland) or even above the domestic constitution (the Netherlands); in some other countries, it is ranked between the national constitution and statutory law (e.g. France, Spain, Portugal); finally, in other countries it has the standing of regular statutory law

¹⁰⁴ C. von Bar, E. Clive and H. Schulte-Nölke *et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich: 2009); cf. J. Blackie, 'The Torts Provisions of the Study Group on a European Civil Code', in M. Bussani (ed.), *European Tort Law, Eastern and Western Perspectives* (Bern: 2007), pp. 55 *et seq.*; and European Group on Tort Law (ed.), *Principles of European Tort Law (PETL). Text and Commentary* (Vienna/New York: 2005).

¹⁰⁵ DCFR, Book VI, Art. 2:203(1) (emphasis added): 'Loss caused to a natural person as a result of infringement of his or her rights to respect for his or her *personal dignity*, such as the rights to liberty and privacy, and the injury as such are legally relevant damage.' This is extended in para. 2 to harm to reputation if national law so provides. European Group, PETL Art. 2:102 Protected Interests (2) (emphasis added): 'Life, bodily or mental integrity, *human dignity and liberty* enjoy the most extensive protection.' Cf. also PETL Art. 10:301(1) Non-Pecuniary Damages.

¹⁰⁶ See T. Barkhuysen and S. Lindenbergh (eds.), *Constitutionalisation of Private Law*; D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*.

¹⁰⁷ Another instrument is the 'International Covenant on Civil and Political Rights' (ICCPR) of 1966, monitored by the Human Rights Committee.

¹⁰⁸ As to its legal bases, organisation and duties see G. Winkler, *The Council of Europe* (Vienna/New York: 2006).

(e.g. Germany, Finland, Italy, Sweden and the UK).¹⁰⁹ The Contracting States and their public bodies (including courts) are obliged to comply with the European Court of Human Rights (ECtHR) judgments in which they were involved (Art. 46(1) ECHR). The enforcement of the ECtHR's judgments by the Contracting States is monitored by the Committee of Ministers (Art. 46(2) ECHR).

(2) In the meantime, the substance of the ECHR has been incorporated by EU/EC law. This took place through the jurisprudence of the European Court of Justice (ECJ) (Luxembourg). The EC Treaty did not contain any fundamental rights; it only provided for the 'four fundamental economic freedoms' (free movement of goods and services, capital, workers and freedom of establishment). The orientation of these four freedoms is the achievement of a single market. In any case, from 1969 onwards the ECJ started to apply fundamental rights as limits to state action under the head of 'general principles of law'.¹¹⁰ These 'general principles' – and thereby fundamental rights – have been understood as part of 'law' in the sense of Art. 220 EC.¹¹¹ This advanced state of ECJ case law has then occasionally been assumed by the EC and EU legislator (Single European Act; Treaty on the European Union). Art. 6(2) EU, for example, explicitly obliges the EU (i.e. EU/EC institutions) to respect the fundamental rights enshrined in the ECHR (and developed by the case law of the ECtHR) and the common constitutional traditions of the Member States.

Three legal consequences are free from doubt:

- (i) The fundamental rights of the ECHR have been transferred into EU law through the jurisprudence of the ECJ. 'Fundamental rights form an integral part of the general principles of law, the observance of which the ECJ ensures. The ECHR has special significance in that respect.'¹¹² In this regard, as an integral part of EU/EC law the

¹⁰⁹ Cf. Grabenwarter, *Europäische Menschenrechtskonvention*, p. 15.

¹¹⁰ Cf. ECJ, 12.11.1969, Case 29/69 *Stauder* [1969] ECR 419; [1970] CMLR 112; 14.05.1974, Case 4/73 *Nold* [1974] ECR 491; [1974] 2 CMLR 338; 13.12.1979, Case 44/79 *Hauer* [1979] ECR 3727; on this ECJ case law, see J. H. H. Weiler and K. Lockart, 'Taking rights seriously': The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *CML Rev* 51/579; H. J. Blanke, 'Protection of Fundamental Rights afforded by the European Court of Justice', in H. J. Blanke and S. Mangiameli (eds.), *Governing Europe under a Constitution* (Heidelberg: 2006), pp. 265 *et seq.*

¹¹¹ Since the judgment of 17.12.1970, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, the jurisprudence of the ECJ has been constant. See, in general, R. Winkler, *Die Grundrechte der Europäischen Union* (Vienna: 2006); A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: 2004); C. Tomuschat, *Human Rights: Between Individualism and Realism* (Oxford: 2005).

¹¹² ECJ, 27.6.2006, Case C-540/03 [2006] ECR I-5769.

fundamental rights of the ECHR are superior to all Member States' law, including national Constitutions (provided that the issue at stake is within the scope of EU law).¹¹³ The coming into force of the EU Charter of Fundamental Rights will not in fact change the legal situation much.

- (ii) It may be questionable whether the EU fundamental rights are binding on the EU Member States. However, as an 'area of freedom, security and justice' a coherence of national and EU fundamental rights has to be assured in the EU.¹¹⁴ Therefore, it makes no difference whether the fundamental rights have been infringed by a Member State or an EU authority.¹¹⁵ This may even hold true for private parties. Like the corresponding national human rights, the EU fundamental rights can exercise horizontal effect.
- (iii) In principle, the scope of protection of these rights must therefore be the same throughout the EU. Every EU citizen enjoys these rights. The concept of a corridor of differentiated national solutions is incompatible with these legal conditions.

In cases of infringements by a public power, a private party can proceed against either the Member State or the EU/EC. The road to the ECtHR in Strasbourg is available as a last resort against infringements by the Member States. Thus, the ECtHR is *de facto* fulfilling a double function: It is primarily operating as the Court of the Council of Europe within the jurisdiction of the ECHR, and at the same time – indirectly – working on behalf of the EU when judging on EU fundamental rights.¹¹⁶

¹¹³ This clash of constitutions raised difficult questions in Germany. Cf. the infamous 'Maastricht' judgment of the Federal Constitutional Court: BVerfG, 12.10.1993, BVerfGE 89, 155; NJW 1993, 3047; commentary by M. Herdegen (1994) 31 *CML Rev* 235; J. H. H. Weiler, "The State "über alles"", in O. Due, M. Lutter and J. Schwarze (eds.), *Festschrift Everling*, Vol. II (Baden-Baden: 1995), pp. 1651 *et seq.* For a recent account in German, see S. Oeter and F. Merli, 'Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte', in S. Von Kadelbach, C. Tietje, E. Pache, T. Gross, *et al.*, 66 *Bundesstaat und Europäische Union zwischen Konflikt und Kooperation (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin: 2007), pp. 361.

¹¹⁴ See W. Hoffman-Riem, 'Kohärenz der Anwendung europäischer und nationaler Grundrechte', in G. Brüggemeier (ed.), *Transnationalisierung des Rechts* (Baden-Baden: 2004), pp. 33 *et seq.*; K. Gebauer, *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?* (Berlin: 2007).

¹¹⁵ On European State liability see ECJ, 05.03.1996, joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame III* [1996] ECR I-1131, no. 42.

¹¹⁶ Cf. G. Ress, 'The Legal Relationship Between the ECtHR and the ECJ According to the ECHR', in H. J. Blanke and S. Mangiameli, *Governing Europe under a Constitution*, pp. 279 *et seq.*

The basic provision in the ECHR which deals prominently with personality interests is Art. 8(1). It reads: 'Everyone has the right to respect for his private and family life, his home, and his correspondence.'¹¹⁷ This fundamental right notoriously conflicts with freedom of expression and freedom of the press, enshrined in Art. 10 ECHR. These two fundamental guarantees are of equal value in principle. The balance between them has been struck differently in the Member States of the EU. In particular, the solutions in French and German law are in direct conflict with one another.¹¹⁸ This Franco-German antagonism in the privacy protection of celebrities has been brought onto the European stage by the spectacular case of *von Hannover v. Germany*.¹¹⁹

Caroline Grimaldi, alias Caroline of Monaco, alias Caroline von Hannover, is the eldest daughter of (the late) Prince Rainier III of Monaco and his wife Grace Kelly. Princess Caroline filed a series of civil law suits against publishers in Germany. German tabloids disseminated paparazzi photographs of the Princess, which were taken without her consent at different locations and at different times. The first batch of photographs were taken during her vacation in southern France. The photographs displayed her in various situations, shopping in the market, on horseback, playing with her children, visiting restaurants with her then lover, a French actor, etc. Applying §§ 22, 23, *Kunsturhebergesetz (KUG)* 1907, the German courts adhered to the long-standing distinction between private and public figures. Private individuals are protected. Pictures can only be published with their express consent. Public figures are subjects of contemporary society *per se* (§ 23(1)(i) *KUG*). Their privacy is restricted to their residential area. Outside their home, photographs can be taken and published without their consent. This pre-constitutional law did not change after the enactment of the (West) German Constitution in 1949. In fact, the now guaranteed 'freedom of the press' (Art. 5(1)(ii) *GG*) supported this legal position. Caroline of Monaco was regarded as an absolute person of contemporary society. Therefore, it came as no surprise that the German trial courts denied her claim. Before the *Bundesgerichtshof (BGH)*, the judges made a move to expand the scope of protection of public figures for the first time.¹²⁰ They accepted that the freedom of celebrities to

¹¹⁷ The wording is identical to Art. II-7(1) of the Treaty on a European Constitution.

¹¹⁸ See above Parts 2A and 2B. For a broader European comparison, see H. Koziol and A. Warzilek (eds.), *Persönlichkeitsschutz gegenüber Massenmedien*.

¹¹⁹ ECtHR, 26.04.2004, [2005] 40 EHRR 1.

¹²⁰ BGH, 19.12.1995, BGHZ 131, 332; NJW 1996, 1128; JZ 1997, 39 with note by Forkel.

decide whether and when pictures of them could be taken does not end when they leave their home. There could be 'secluded areas' outside where public figures can also have a legitimate expectation of privacy. This requires that the place be secluded from the general public and this boundary from the public must be objectively recognisable to third parties. Additionally, the taking of photographs must be secretive, as if through the keyhole, or if the taking of the photographs occurs openly the individual must have been taken by surprise.¹²¹ The *BGH* saw these requirements as being fulfilled with respect to *one* photograph taken from great distance with a long-range lens displaying the claimant with her partner at night in a dimly lit garden restaurant, as her partner kissed her hand.¹²² However, the *BGH* did not object to the taking and publishing of the other photographs from her vacation in France, with her subsequent husband Prince E. A. von Hannover, and from the Monte Carlo Beach Club.

The princess filed a constitutional complaint before the *Bundesverfassungsgericht* (*BVerfG*) alleging that there was an infringement of her personality right through the legalised publication of the other photographs. On the one hand, the *BVerfG* confirmed the restrictive exception made by the *BGH*.¹²³ It even expanded the protection in one aspect - as far as the photographs with her children were concerned.¹²⁴ The familial contact between parents and children is specially protected under Art. 6 of the Constitution. Constant media presence represents a substantial danger for the development of the children. On the other hand, it restated the established line of reasoning in Germany: the basic distinction between private and public figures (§ 23(1)(i) *KUG*); the very narrow exceptions from the rule that public figures can be photographed without permission; freedom of press also applies to tabloids, i.e. no reservation for serious political information; difficulties in delineating private and public spheres in cases involving celebrities.

The princess took an individual application to the ECtHR in Strasbourg alleging that these judgments of the Federal German Courts were in violation of Art. 8(1)ECHR ('private life'). The Chamber of the Strasbourg Court unanimously decided that the restricted protection

¹²¹ BGHZ 131, 332, at 339.

¹²² The photograph is published in G. Brüggemeier, *Haftungsrecht*, p. 304.

¹²³ BVerfG, 15.12.1999, BVerfGE 101, 361; NJW 2000, 1021.

¹²⁴ BVerfGE 101, 361, at 385/386.

of the privacy of public figures by German law is an infringement of Art. 8(1) ECHR.¹²⁵ The judges in Strasbourg chose the opposite starting point to the German courts. It is not an exception to the rule of non-protection that has to be proven, but an exception to the principle of privacy protection. The ECtHR took the basic principle of § 22 KUG seriously and did not follow the line of reasoning in Germany extending 'situations' of contemporary society to 'persons' of contemporary society. In order to be legally published, every photograph and other image depicting an individual person needs the consent of this person. This principle also applies in relation to celebrities. *Every human being has his/her right to privacy.*

With regard to public figures there are two important exceptions:

- (i) when public figures act as persons of contemporary society, i.e. when they perform an 'official function'. This is one main point which has been made by the ECtHR. By doing this it once more stated that French law (Art. 9 *c. civ.*) is in compliance with its Art. 8(1) ECHR jurisprudence. The Court also reasoned that the central legal categories used by the German courts in this context were indeterminate (*absolute Person der Zeitgeschichte*; secluded area/ *abgeschlossener Raum*);
- (ii) the ECtHR stressed that the watchdog function of the press is indispensable for the political process in democratic societies throughout Europe. This function was not at stake in this case. The balance here had to be struck between the freedom of a tabloid publisher who exploits the persona of the princess to satisfy the voyeuristic demands of its customers and the legitimate privacy interests of the individual. In *this* conflict, the balance between the two equal principles of protection of private life and freedom of the press has to be struck in favour of the privacy interest of the individual, however famous this person may be.

This ECtHR judgment was needed to adapt the 100-year-old provisions of the *Kunsturhebergesetz* and the abiding German jurisprudence to the modern civil and constitutional law protection of personality rights in Europe. The highly complicated interweaving of European fundamental rights, domestic fundamental rights, special legislation and general private law has been clarified by this ECtHR judgment

¹²⁵ ECtHR, 24.6.2004, [2005] 40 EHRR 1. The German government did not request that the case be referred to the Grand Chamber (Art. 43(1) ECHR). The parties finally agreed that Germany should pay €115,000 in non-pecuniary damages to the applicant.

but only for *one* typical scenario. This is the normative benchmark for similar cases with similar facts. EU private law systems have to comply with it. Some Member States will introduce new legislation like, for example Ireland;¹²⁶ others will change the jurisprudence of their judiciary (be it that of Constitutional Courts). In Germany there are signs that both the *Bundesverfassungsgericht*¹²⁷ and the *Bundesgerichtshof*¹²⁸ in their recent judgments have been moving very tentatively towards the position of the ECtHR.

¹²⁶ Privacy Bill 2006 (Draft); see P. O'Callaghan, 'The Draft Privacy Bill 2006: Comparative Perspectives on a Super Tort' (2006) 24 *Irish Law Times* 251.

¹²⁷ BVerfG, 26.02.2008, 1 BvR 1602, 1606, 1626/07, available at Beck Online.

¹²⁸ BGH, 06.03.2007, NJW 2007, 1977/1981; BGH, 03.07.2007, GRUR 2007, 902: abandoning the notion of 'person of contemporary society' and focusing on the 'informational value' of the publication.

3 American tort law and the right to privacy

Joseph A. Page

1. Introduction

The remarkable story of the common-law tort of invasion of privacy in the United States begins with a piece of scholarship published in 1890,¹ eventually hailed as ‘the outstanding example of the influence of legal periodicals upon the American law’.² It urged courts to validate an individual’s interest in avoiding exposure to unwanted, unwarranted publicity generated by an increasingly aggressive mass media, and argued that the common law could protect this interest by recognising a new cause of action that would provide compensatory damages for tortious infringements of an individual’s right to remain out of the public eye. As a direct consequence of this single publication, the privacy tort wove its way into the tapestry of American jurisprudence.

However, in the almost dozen decades since the article appeared, the concept of privacy as an interest to be protected by tort law has proved to be both complex and elusive. Courts have had difficulty determining whether to impose liability for a variety of specific violations plaintiffs have alleged; commentators have struggled to extract from the evolving case law a workable definition of the new tort; and the United States Supreme Court has interpreted the constitutional barrier against restricting freedom of the press as seriously restricting the reach of the tort. At the same time, the technological capacity for invasions of privacy has expanded enormously, and societal attitudes about privacy are no longer what they were in 1890.

Some of the decisions, responding to the concerns specifically raised by the 1890 article, did impose liability for the unreasonable

¹ S.D. Warren and L.D. Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

² W.L. Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383.

dissemination of information a plaintiff wished to keep secret.³ But the types of disclosures that gave rise to privacy litigation were not always identical, and the reasons why plaintiffs wished to keep the information from public dissemination varied. Courts also had to confront privacy-denominated claims that the defendant made an unauthorised use of the plaintiff's likeness for commercial purposes.⁴ Like the disclosure cases, these suits also involved invasions of an individual's anonymity, at least in the earliest instances. However, when plaintiffs who enjoyed some degree of fame or notoriety began suing for invasions of privacy, their interest in controlling information about themselves might not always or necessarily amount to an interest in promoting anonymity or defending individuality, since a likeness might have profitable recognition value and hence assume some of the attributes of a marketable commodity.

Other distinct lines of privacy decisions also evolved. One held defendants liable for intrusions or intrusive behaviour held to be unjustifiable and therefore *per se* actionable.⁵ Another protected an interest that went beyond seclusion and anonymity, and responded remedially to allegations that the defendant had communicated to the public something factually untrue in a way that conveyed an erroneous impression about the plaintiff, with a resulting distortion of the victim's sense of self.⁶

Eventually an influential scholar declared that the right to privacy provided the basis for not one but four separate torts, protecting against four separate kinds of invasions of four separate interests.⁷ This approach found some favour in the courts but in turn provoked vigorous debate within the academy from those who saw all invasions of privacy as violating a unitary interest (the definition and scope of which became the focus of further dispute), as well as from those who want to revisit whether tort law was an appropriate mechanism for protecting the interest or interests at stake.⁸

A judicial backlash against the right to privacy did subsequently materialise, but for the most part the academic disputation played only

³ See, e.g., *Melvin v. Reid*, 112 Cal. App. 2d 285, 297 Pac. 91 (1931).

⁴ See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

⁵ See, e.g., *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931).

⁶ See W. Keeton, *Prosser and Keeton on Torts* (5th edn., St. Paul: 1984), pp. 863–66.

⁷ See Prosser, 'Privacy' at 389.

⁸ E.J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962 (privacy tort protects single fundamental interest); H. Kalven, Jr, 'Privacy in Tort Law – Were Warren and

a supporting role. Finding that the privacy tort imposed an unwarranted burden on freedom of the press, the United States Supreme Court placed weighty constitutional restrictions on the liability of the mass media for publishing truthful information.⁹ This lent further encouragement to commentators who wanted to re-examine the merits of the privacy tort.¹⁰

The evolution of the tort did not occur in a vacuum. The explosive growth of modern technology has multiplied and intensified threats to individual privacy, in ways that have motivated courts to interpret various provisions of the federal and state constitutions as protecting citizens from certain governmental invasions of privacy; in addition, legislatures have imposed criminal sanctions and created a panoply of new protections for privacy rights.¹¹ At the same time, social attitudes about privacy have changed dramatically from those prevalent in 1890, with the growth of phenomena such as confessional television programmes and websites feeding obsessions with the lives of celebrities. These developments are beyond the scope of this Chapter, except to the extent that they have inspired fresh scholarly efforts to define the nature of the right being protected,¹² a movement that may eventually impact on the privacy tort.

What follows is a critical account of the evolution of the right to privacy under the American common law, with the goal of helping readers not familiar with it to appreciate the distinctive path it has taken. I shall explain the origins of the American privacy tort and then examine how courts have dealt with different kinds of claims alleging privacy violations, with special emphasis on the impact of the unique characteristics of the common-law process. Finally, I shall offer some comments on the current status and the likely fate of the common-law privacy tort in the United States.

Brandeis Wrong?' (1966) 31 *Law & Contemporary Problems* 326 (privacy interest too trivial to merit legal protection); see also D. L. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort' (1983) 68 *Cornell Law Review* 291 (arguing that privacy tort deserves no more than a proper burial).

⁹ See D. B. Dobbs, *The Law of Torts* (St. Paul: 2000), §§ 417–20; J. T. McCarthy, *The Rights of Publicity and Privacy* (2nd edn., St. Paul: 2004), pp. 565–92.

¹⁰ See, e.g., R. A. Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393; R. A. Epstein, 'Privacy, Property Rights, and Misrepresentations' (1978) 12 *Georgia Law Review* 455; S. W. Halpern, 'Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations' (1991) 43 *Rutgers Law Review* 539.

¹¹ For a discussion of some of these developments, see K. Gormley, 'One Hundred Years of Privacy' (1992) *Wisconsin Law Review* 1335, 1357–1441.

¹² See, e.g., D. J. Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477.

2. The birth of a tort

Although every tort must have originated at some point in time, none has had a beginning so easy to identify as the right to privacy. In 1890, two Boston attorneys who had been classmates at the Harvard Law School published an article that made the case for the judicial protection of an individual's right not to have truthful information about him disseminated in the press or by other means of communication without his consent, unless such a publication would serve the general or public interest.¹³ Samuel D. Warren, a prominent member of the so-called 'Yankee' upper class in the city of Boston, and Louis D. Brandeis, who would later become a distinguished justice of the United States Supreme Court, thereby entered the legal pantheon as avatars of the power of persuasive scholarship to affect the course and content of the common law.

The argument constructed by Warren and Brandeis was simple and straightforward. They first deduced from existing causes of action in tort a judicial willingness to safeguard human feelings from undue interference on the part of others. Then, seeking to establish a factual basis to support the need for additional legal protection, they described the new ways by which an aggressively intrusive mass media could infringe upon these feelings by publishing accurate but personally sensitive information against the wishes of their subjects. From this they drew the conclusion that the common law could and should protect feelings bruised by these novel invasions by fashioning a novel form of tort liability that would provide compensation to victims and thereby deter excessively intrusive conduct in the future. Concluding their *tour de force*, they carefully delineated the parameters of the new cause of action, mainly by listing defences that might be raised against it and other limitations on liability.

After saluting the common law for what they termed its 'eternal youth',¹⁴ a quality that enables it to expand and thus satisfy the changing demands of society, Warren and Brandeis set out to convince readers of the need for the change they were urging. They did so by taking a very cautious, incremental approach. The recognition of a right to privacy in tort, they insisted, would not amount to a radical departure from existing decisional precedents, but rather would amount to an eminently logical extension of them. They examined prior instances in which courts established protections for individuals

¹³ Warren & Brandeis, 'The Right to Privacy'. ¹⁴ *Ibid.* at 193.

against interference with their property, physical integrity and relational well-being, and pointed out that some of these safeguards also secured personal feelings and other intangible interests.¹⁵

Warren and Brandeis drew from these precedents an effort on the part of courts to safeguard what they called the ‘inviolable personality’,¹⁶ a judicial initiative quite distinct from the creation and application of legal doctrines designed to preserve interests in property. The judiciary, they maintained, had already been embracing the general right of individuals to be left alone, or at least to enjoy a certain degree of immunity from intrusive behaviour that would infringe on the essence of their distinctiveness as human beings.

A problem with this part of the argument was that most of the protections the courts were extending to human feelings in the instances the authors cited were merely ancillary to other established interests. An example was the tort of defamation, which was a distinctively relational tort whose purpose was to protect an individual’s ties to his community, and which did not require proof of emotional distress for recovery (although a plaintiff might recover for such harm in addition to the sort of general reputational damage that had to be proven as a prerequisite to recovery).¹⁷

The article also instanced decisions in which courts had found a breach of contract or confidential relationship as bases for providing relief against unwarranted publications or disseminations. However, it argued that these theories did not go far enough, since similar harm might result even where there was no contract or relationship

¹⁵ Examples they listed included the ancient common-law tort of assault, which imposed liability for the intentional creation of apprehension of immediate bodily contact; defamation, which imposed liability for the communication of false factual statements that might damage a person’s reputation; nuisance, which protected a person’s right to the use and enjoyment of his land; and protections afforded intellectual and artistic property by granting to the originator a right to control its dissemination.

¹⁶ Warren & Brandeis, ‘The Right to Privacy’ at 205.

¹⁷ Other instances include the tort of assault, the major purpose of which was to prevent breaches of the peace that might occur if aggrieved individuals could not obtain satisfactory relief from the legal system and therefore resorted to self-redress. Nuisance normally permitted damages for physical harm to land or reductions in its market value, although courts had allowed occupants to recover for personal discomfort caused by intrusions that caused neither actual damage to the property nor a loss of the land’s value. Additionally, the individual’s right to control intellectual or artistic endeavours through doctrines found within the common law of copyright sought to provide incentives for socially useful activity – a quasi-property interest.

of trust between the parties. Moreover, the authors insisted that the essence of the interest being protected in such cases was not proprietary but rather emotional, and could best be promoted by recognition of a right to privacy. Finally, as supplementary support, the article pointed out that French law recognised a limited right to privacy, which protected even public figures from intrusions into their private lives.¹⁸

Warren and Brandeis were premature in identifying what they insisted was a trend in the developing case law. The courts had previously protected feelings, but only to a very limited degree, and most often as an add-on to other safeguards. As the eminent Roscoe Pound would observe twenty-five years later, the practical difficulties of determining the existence and extent of harm to feelings might have made courts reluctant to compensate for this kind of harm.¹⁹ The one prior tort decision that came closest to an explicit recognition of the right the authors were espousing failed to make its way into their article.²⁰

Mass-circulation publications featuring gossip-filled articles and supportive photographs had created what came to be known as ‘yellow journalism’ at the end of the nineteenth century.²¹ The abuses that this phenomenon was spawning might have provided a powerful factual predicate for the article and might have demonstrated the force of the maxim *ex facto ius oritur* (the law arises out of the fact), a defining characteristic of the common law. But the data Warren and Brandeis marshalled were remarkably weak.

The authors referred to the development of photography and other unspecified ‘mechanical devices’ that facilitated the spread of information once discussed only in private, and then launched into a paragraph-long denunciation of the evils of gossip (the latter, however, not a particularly novel phenomenon), especially when given wide dissemination by newspapers.²² But they failed to cite specific intrusive incidents that would have more forcefully established a need for judicial

¹⁸ See Warren & Brandeis, ‘The Right to Privacy’ at 214–16.

¹⁹ See R. Pound, ‘Interests of Personality’ (1915) 28 *Harvard Law Review* 343.

²⁰ See *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), imposing liability for an unpermitted intrusion into the plaintiff’s home while she was giving birth. The interest being protected here was quite different from the interest for which Warren and Brandeis sought judicial protection. Perhaps they did not want to worry the courts about the potential scope of the new tort they were trying to create.

²¹ See Gormley, ‘One Hundred Years of Privacy’ at 1350–52.

²² Warren & Brandeis, ‘The Right to Privacy’ at 195.

recognition of a new tort.²³ The weakness of the factual basis provided by the article might reflect the style of legal scholarship in this era.

There has been speculation about the real reason for the authors' advocacy of a new right of privacy. Although one commentator has claimed that the press had offended Warren with sensationalist coverage of a family wedding,²⁴ it is more likely that Warren's sensibilities took offence not at the way newspapers publicised the wedding, but rather at the fact that they publicised the event in the first place. This would be consistent with the position he took in the article, to the effect that individuals have the right to control the dissemination of information about them, including their names and likenesses, unless the publication at issue served some public interest, which the authors defined narrowly as embracing only what might touch on an individual's fitness for public or quasi-public office.

One interpretation of the Warren-Brandeis article is that it marked an attempt by Warren to convince courts 'to introduce a continental-style right of privacy into American law'.²⁵ Professor James Q. Whitman has argued that the patrician Warren saw the European notion of honour as a value worthy of judicial protection in the United States; being able to control publicity about one's self was an essential component of human dignity, and recognition of the right to privacy at common

²³ Instead, they mentioned a single, arguably inapposite example, drawn from a complaint in a civil suit brought by an actress whose photograph was taken by a spectator without her consent as she appeared in an abbreviated costume on a New York stage. See *ibid.* at 195, n. 7. Since the plaintiff was performing in public, it is difficult to imagine what private information she sought to protect. While the dissemination of her likeness to an audience beyond the limited group before which she was voluntarily appearing might have violated her sensibilities, the likelihood seems greater that she was attempting to assert control over the use of her likeness because of its commercial value to her.

²⁴ William L. Prosser, the pre-eminent torts scholar whose subsequent impact on privacy law nearly matched that of Warren and Brandeis (and whose imagination often got the better of him), ascribed the article's motivation to intrusive newspaper coverage of the wedding of Warren's daughter. Prosser, 'Privacy' at 383. It was not until 1979 that a revisionist article appeared, quoting at length from contemporary press reports to establish that the only Warren family wedding that might have attracted the attention of the media during this period involved his cousin, not his daughter (who was only seven years old when the article appeared in print), and that the coverage of it was quite respectful and tame, at least to the eyes of a modern reader. J. H. Barron, 'Warren and Brandeis, *The Right to Privacy* 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation' (1979) 13 *Suffolk University Law Review* 875.

²⁵ J. Q. Whitman, 'The Two Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151, 1204.

law would vest that power in the individual (although in an apparently even-handed way, since anyone, regardless of social status, could in theory exercise it). The fact that the authors cited French law as ancillary support for their thesis lends some support for this hypothesis. Considering the right of privacy in America as an exogenous cultural implant provides one explanation for the difficulties it has had in taking root. However, as this Chapter will suggest, there are other, more persuasive reasons for the bumps in the road that the privacy tort has taken.

3. The first steps

Scholarship advocating the recognition of a new cause of action in tort is quite different from common-law decision-making, since judges are subject to constraints that do not bind scholars. Judicial opinions, at least ideally, should identify the legal issues that must be resolved in order to decide in favour of one party or the other, apply rules or principles to resolve them, and use reasoned elaboration to explain the results that they have reached. Appellate judges ordinarily do not paint with the broad brushes that scholars and code drafters can wield, but rather confine themselves to the facts of specific cases, and are limited by the procedural posture of the case as it presents itself to them. The binding precedent that they fashion derives from the case holding, which must rest on the narrow rule of law that dictates the final outcome of the dispute.²⁶ Warren and Brandeis could posit whatever facts suited them, and did not have to concern themselves with the resolution of any specific controversy between actual litigants. Courts, however, exercise their law-making function passively, in response to facts and legal issues that opposing parties bring to them.

In the immediate aftermath of the article, one high court and several lower courts handed down decisions supportive of the right to privacy, but involving the unauthorised use of a picture,²⁷ a likeness²⁸ and

²⁶ See Bloustein, 'Privacy as an Aspect of Human Dignity' at 615.

²⁷ *Marks v. Jaffa*, 26 N.Y.S. 908 (Ct. 1893) (unauthorised use of actor's name in newspaper popularity contest; injunction granted; Warren-Brandeis article cited with approval).

²⁸ *Schuyler v. Curtis*, 147 N.Y. 434 (1895) (refusal to grant injunction sought by relatives of deceased woman in whose honour defendants were attempting to erect statue; if right existed, it was personal to victim).

a name,²⁹ and the publication of a biography,³⁰ invasions rather unlike those described by Warren and Brandeis. More than a decade would pass before the issue whether to accept the Warren and Brandeis thesis and recognise a right to privacy came squarely before a court of last resort. But it too fell without the type of fact pattern put forward in the 1890 article to justify the need for the creation of a new tort.

In *Roberson v. Rochester Folding Box Company*,³¹ the defendant obtained a photograph of the plaintiff without her consent and placed it on brochures that advertised its product. Although the depiction was by no means unflattering, the plaintiff claimed that its dissemination bruised her feelings. The Court of Appeals of New York, the state's highest tribunal, rejected her plea in a four-to-three decision and refused to recognise invasion of privacy as a tort.

Because it would have been difficult for the plaintiff to recover for defamation, the one recognised tort she might have invoked,³² she asked the court in effect to fashion a new cause of action, and used the arguments crafted by Warren and Brandeis. The court was unpersuaded, interpreting the cases cited in the 1890 article as not necessarily reflecting a judicial willingness to protect personal feelings *per se* from tortious behaviour.

The court treated *Roberson* as falling within the factual predicate of the Warren and Brandeis article, and the unconsented-to dissemination of the plaintiff's likeness as an unwarranted invasion of the plaintiff's anonymity. Hence, there was no way the plaintiff could prevail unless the court created a new tort. An alternative approach

²⁹ *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (S. Ct. 1891) (defendant enjoined from including plaintiff's name in medicine advertisement; unauthorised use injured his reputation, and also infringed on his right to sole use of his name).

³⁰ *Corliss v. F.W. Walker Co.*, 64 F. 280, 282 (D. Mass. 1894) ('A private individual should be protected against the publication of any portraiture of himself, but when the individual becomes a public character, the case is different'; injunction denied).

³¹ 171 N.Y. 538, 64 N.E. 442 (1902).

³² Plaintiff might have sued for defamation, but she would have had to identify some communication that held her up to hatred, ridicule or contempt in the eyes of right-thinking members of the community; she would then be able to recover money damages based on a presumption that the common law made to the effect that such a damaging statement was false, unless the defendant could prove that the statement was true. See, generally, R.A. Smolla, *The Law of Defamation* (2nd edn., St. Paul: 1999). She might have tried to do this by claiming that the dissemination of her likeness created the impression among those who knew her that she had consented to its commercialisation, but to establish that this knowledge demeaned her reputation might have been problematic.

would have treated what the plaintiff did as a wrongful appropriation of her likeness for a commercial use in a way that unjustly enriched the flour company. This would have meant classifying the plaintiff's interest as proprietary in nature. On the plus side, to do so would have been easier to justify as a logical extension of other types of judicial protection extended to property or quasi-property interests. It would have provided a sensible theory for granting relief in cases such as the only example cited by Warren and Brandeis, involving photographs taken of an actress without her consent as she performed.³³ But this would not have accomplished what the authors set out to achieve with their article. Their goal was not only to establish privacy as an interest meriting legal protection but also to disengage privacy from any link to traditional property interests courts had previously safeguarded. Moreover, a property-based theory could not justify awarding damages for the intrusive publication of sensitive information about plaintiffs, unless courts granted them a proprietary interest in such information, which would in turn enable them to enjoy exclusive rights to transfer or devise it, a step cautious judges would have been unlikely to take. In addition, Mrs Roberson might have had difficulty establishing the economic value of the interest, since she was not a professional model in the business of marketing her likeness.³⁴

Two developments followed immediately in the wake of the *Roberson* decision. Public reaction against it fuelled the quick enactment of a state statute that made it both a crime and a tort to use 'for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without first having obtained the written assent of such person'.³⁵ This clearly overruled the specific holding of *Roberson*.

The second fallout occurred three years after *Roberson*, when the Supreme Court of Georgia reached a different result in a case involving similar facts. In *Pavesich v. New England Life Insurance Company*,³⁶ the defendant published a recognisable photograph of the plaintiff in a newspaper advertisement touting life insurance offered by the defendant. The plaintiff had not consented to this use of his likeness. The

³³ See n. 23 above.

³⁴ She might have had to resort to the argument that the value of the interest to her was freedom from the emotional distress an unauthorised use might cause her. On the other hand, if her interest had been deemed proprietary, a court might not have been hesitant to grant an injunction against its misappropriation.

³⁵ N.Y. Sess. Laws 1903, c. 132, §§ 1-2 (McKinney).

³⁶ 122 Ga. 190, 50 S.E. 68 (1905).

court held that he might recover in tort for an invasion of his privacy. Thus *Pavesich* gained the distinction of being the first American case to admit the existence of the cause of action.

Although the opinion tipped its cap to Warren and Brandeis, the most powerful rationales it presented did not derive from the article. The Georgia court conceded that except for nuisance actions holding defendants liable for infringing on plaintiffs' rights to the quiet enjoyment of their property, the decisions relied on by Warren and Brandeis protected human sensitivities only as an incident to the safeguarding of other interests. However, the court found two other sources from which they derived justification for the new tort. The first was natural law, which gives to the individual not only the right to life but also the right to enjoy life. The court pointed out that this embraced the right to live in seclusion and apart from prying eyes. The second was the United States Constitution, which guarantees against deprivation of liberty without due process of law, and also prohibits unreasonable searches and seizures by government agents.³⁷ The court extracted from these restrictions a policy on the part of the framers in favour of protecting individual privacy against inappropriately intrusive behaviour, and drew from this policy strong indirect support for a state tort-law rule that would permit the plaintiff to recover damages when a defendant violated this interest. Thus, *Pavesich* clearly established that privacy embraced the right of an individual to control the use of his or her likeness, and that this right was personal rather than proprietary.

4. Evolution of a tort

The common law grows gradually and incrementally. It emerges from resolutions of sporadic, unrelated disputes. The process is decentralised and proceeds, often in an unruly way, from the particulars of individual judicial decisions to generalisations drawn from them by courts and commentators. The development of privacy law followed this pattern. Over the next several decades, a few courts followed the holding in *Roberson*,³⁸ while some of the early decisions that imposed liability rested on findings of breach of trust or implied contract.³⁹ However,

³⁷ US Const., Amends. IV, V, XIV.

³⁸ See, e.g., *Henry v. Cherry & Webb*, 30 R.I. 13, 23 Atl. 97 (1909); *Prest v. Stein*, 220 Wis. 354, 265 N.W. 85 (1936).

³⁹ See, e.g., *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) (in breach of express agreement with parents, defendant made private use of negative of photograph of deceased Siamese twins).

there were unmistakable signs of a movement toward recognition of the privacy cause of action in a number of factual contexts.

In the wake of *Pavesich*, several decisions allowed recovery for the unauthorised use of a plaintiff's likeness in advertising,⁴⁰ although there seemed to be some confusion about the exact nature of the interest being protected. Thus, in one of the cases, the court held that a child who was not a professional model had a property interest in his image as part of his natural right to life, liberty and the pursuit of happiness, language suggesting that the interest was intangible and related to a person's individuality; but at the same time the court also indicated that what it was safeguarding was the right to market one's likeness.⁴¹ Several decades later another court recognised the right to privacy in a suit brought by a professional entertainer whose photograph the defendant used in an advertisement.⁴² The opinion noted that a person's name, face and features might have commercial value and hence were entitled to protection.

These decisions seemed to implicate several discrete interests that courts were conflating. Names and likenesses might have commercial value, and privacy claims deriving from their unauthorised use for promotional purposes required judicial determinations as to which party controlled them and could profit from their associative value. An anonymous face (for example, the plaintiff's in *Roberson*) was generic, in the sense that one such likeness might be interchangeable with many others. Of course, the representation might have some economic value (extras receive nominal payment for appearing in motion pictures), but at the same time an individual thusly exploited might feel aggrieved by the appropriation of her persona and by the violation of a wish to remain a private person. The law might wish to recognise and protect her right to choose not to advertise products or services, and not to attract public attention to herself. In addition, such an unauthorised use might also convey both to the public and to the plaintiff's acquaintances the erroneous impression that she had consented to the use. Under some circumstances this might harm her reputation, and she might have a cause of action for defamation.⁴³

⁴⁰ See, e.g., *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918) (plaintiff filmed while in defendant's dry goods store, film used to advertise defendant's business).

⁴¹ *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911).

⁴² *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

⁴³ The classic case is *Peck v. Tribune Co.*, 214 U.S. 185 (1909) (the plaintiff, a total abstainer, recovered for having been depicted without her consent as endorsing the defendant's whiskey product in a newspaper advertisement).

Warren and Brandeis advocated recognition of a tort remedy against the unwarranted publication of private facts – conduct that differed from the activity that produced the decisions in *Roberson* and *Pavesich*. Eventually, the courts began to impose liability for the kind of invasion approximating the concerns expressed in the 1890 article. Thus, the highest court of Kentucky held that a tort suit for invasion of privacy would lie in a case involving a defendant's public posting of a truthful notice identifying the plaintiff as a person who had not paid a debt.⁴⁴ However, the court did not explain why it was adopting the new tort, or what general standard should be used to determine when the dissemination of truthful information is unwarranted. In addition, it did not consider how extensive a publication would have to be in order to justify recovery, that is, whether the divulging of the debtor's identity to one person who had no right to know about it would have been sufficient, and if not, what the scope of a publication would have to be before the plaintiff could recover in tort. Finally, the court overlooked the possible difference between the economic interest of a debtor in keeping knowledge of his indebtedness from others with whom he might want to do business, and the more personal or social interest of an individual wanting to keep the glare of mass-media attention away from certain aspects of his private life.

A California court had the opportunity to confront some of these issues when it ruled in favour of an ex-prostitute who had once been found not guilty of a charge of murder and, having escaped her past, was living an exemplary family life when the defendant made a motion picture depicting the unsavoury incidents of her life and identifying her by name.⁴⁵ Despite the fact that her acquittal was a matter of public record, the court held that 'outing' her was actionable.

Defining privacy in very general terms as the interest in being left alone, the court cited as support for recognising the cause of action a somewhat vague provision in the state constitution guaranteeing citizens a right to happiness. Declaring that individuals should be free of 'unnecessary' attacks on their character, the court stated that the defendant's use of the plaintiff's name 'was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our societal intercourse, and which should keep us from unnecessarily holding others up to the scorn and contempt of upright

⁴⁴ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

⁴⁵ *Melvin v. Reid*, above n. 3.

members of society'.⁴⁶ This, of course, meant that courts would have to determine, on a case-by-case basis, what sorts of publicity are 'unnecessary', and what amount of charity should govern social intercourse. This would make it very difficult for potential tortfeasors to predict whether or not a particular exposure might lead to tort liability, which in turn would undercut the deterrent effects of the tort. Moreover, the court did not specify whether these kinds of difficult determinations should be made by judges or juries.

Another stated ground for the court's decision was policy-oriented, and implicated society's interest in rehabilitation. The benefit of letting the plaintiff hide her past, apparently, would outweigh the benefit her friends and neighbours would gain from knowing about it, although the opinion did not explicitly weigh the societal advantages and disadvantages that would flow from permitting these kinds of suits generally, or from permitting this plaintiff to recover in the case before it.

Melvin involved the disclosure of factual information that the plaintiff wished to keep secret and that might affect her relationships with others, to whom knowledge of her past might be important. One early case arose as a result of a disclosure that was highly personal and sensitive in nature, allegedly violated social norms, and would not be relevant to relationships between plaintiffs and others. In *Bazemore v. Savannah Hospital*,⁴⁷ the Supreme Court of Georgia upheld a complaint by the parents of a deceased child against defendants responsible for the publication of a photograph of the child, who had been born with an external heart. The interest being protected here seemed quite distinct from that protected in *Melvin*.

In the 1930s, as part of its ambitious project to bring clarity and coherence to the common law, the American Law Institute published its four-volume *Restatement of Torts*.⁴⁸ The last of these volumes contained a section recognising the existence of a new tort. But it seemed to conflate the protection against unwanted publicity sought by Warren and Brandeis with that afforded by the holdings in *Pavesich* and *Bazemore* by assuming that the dissemination of sensitive factual information, embarrassing disclosures and the appropriation of likenesses all violated

⁴⁶ 297 Pac. at 291.

⁴⁷ 171 Ga. 257, 155 S.E. 194 (1930).

⁴⁸ The American Law Institute is a private entity, whose members – judges, law professors and attorneys – tend to be pillars of their respective establishments. The volumes that it publishes carry no authority other than persuasive weight, although over the years they have attained a substantial influence over the development

identical interests. The black-letter provision stated succinctly that: 'A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.'⁴⁹ Comments to the section recognised that the interest to be protected here was similar to an individual's interest in avoiding intentional physical contacts to which she did not consent, and in having a reputation unsullied by false statements of fact; that the purpose of the tort was to compensate plaintiffs when their feelings were seriously hurt; and that the new tort was still in a formative state, lacking clear guidelines that would define its scope.

Although the *Restatement's* treatment of privacy was somewhat superficial, it situated itself on the cutting edge of the law's development, since at the time the courts seemed to be divided and somewhat uncertain about the privacy tort. The fact that the American Law Institute granted its stamp of approval to the new tort gave it a strong aura of legitimacy.

In the two decades that followed, the decisional law suggested a broad trend in favour of recognising the privacy tort in principle,⁵⁰ but there were also signs that it might not always provide the type of protection Warren and Brandeis had advocated. Thus, in *Sidis v. F.R. Publishing Corp.*,⁵¹ the most factually dramatic of the cases, a plaintiff who had once been a child prodigy found himself the subject of a mercilessly revealing magazine article (entitled 'April Fool') that exposed his idiosyncrasies and self-propelled slide into obscurity. A federal court applying New York law⁵² denied him recovery against the publisher on the ground that the public had a legitimate interest in the fate of a person who at the age of 11 had lectured to mathematicians, five years later graduated from Harvard College, soon afterward taught at a university in Texas and then became a reclusive eccentric. This interest, the court

of state common law. They 'restate' widely and generally accepted principles and doctrines, and have occasionally shaped the direction of the common law by adopting positions held by only a minority of jurisdictions but deemed by the Institute to be the better view, or the view toward which courts were tending.

⁴⁹ 4 American Law Institute, *Restatement of Torts* § 867 (1930).

⁵⁰ See generally Prosser, 'Privacy'.

⁵¹ 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940). The life of the plaintiff has been the subject of a moving biography. See A. Wallace, *The Prodigy* (New York: 1986); see also E. Karafiel, 'The Right of Privacy and the *Sidis* Case' (1978) 12 *Georgia Law Review* 513.

⁵² The court did not consider whether the New York privacy statute occupied the field and hence impliedly pre-empted the common-law privacy tort.

felt, trumped the plaintiff's interest in retreating into anonymity and remaining there. The mores of the community, according to the court, included indulging in a curiosity about the misfortunes and frailties of its members. The opinion did note that: 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's sense of decency.'⁵³ Yet as a practical matter this reservation seemed to be too vague for courts to apply with confidence, and to permit little breathing space for the privacy tort.

Sidis was not the only decision to flash cautionary signals about the future of the right to privacy in tort. With the burgeoning growth of both mass marketing and the entertainment industry in the United States, the demand for protection of intangible interests associated with the names, likenesses and other attributes of public figures began to go beyond the kinds of interests asserted by private citizens in *Roberson* and *Pavesich*. Plaintiffs sought relief, with some success, not only for the unauthorised commercial use of their names and likenesses, but also for related wrongs such as the misappropriation of their performances,⁵⁴ a development that broadened the scope of judicial protection afforded to privacy. This inevitably raised the question whether privacy was really the interest at stake, and whether the privacy tort as it had evolved could provide an adequate remedy for these kinds of wrongs. A notable decision applying New York law⁵⁵ posited that the relief plaintiffs were seeking in these cases was for a misappropriation of a right of publicity, rather than a violation of a right to privacy.⁵⁶ This seemed to be an intangible property interest that its owner could transfer or devise, quite distinct from every individual's right to the reasonable enjoyment of anonymity and seclusion, which courts had consistently held to be personal and thus maintainable only by the victim.⁵⁷

⁵³ 113 F.2d at 809.

⁵⁴ See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956) (heavyweight boxer allowed to recover for telecast of boxing match staged before advent of television; televised excerpt showed only rounds in which plaintiff suffered a bad beating); cf. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (suggestion by court that plaintiff had property right in performance of animal act televised without his permission).

⁵⁵ Again, as in *Sidis*, above n. 51, the court assumed that the New York privacy statute did not pre-empt the common-law privacy tort.

⁵⁶ *Haelan Labs. Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (packs of chewing gum sold with photographs of baseball players).

⁵⁷ For an encapsulation of this rule, see 3 American Law Institute, *Restatement of Torts* 2d § 652I (1977).

Remarkably, as these problems were surfacing, the privacy tort received a major boost, once again as a result of a law review article. In 1960 William L. Prosser, the Dean of the University of California School of Law at Berkeley, the author of the most authoritative treatise on the law of torts and the Reporter for the Second Edition of the *Restatement of Torts* (a work in progress at the time), hailed the judicial trend toward recognition of a common-law right to privacy, and went on to argue that in fact the courts had created not a single tort but rather a four-some.⁵⁸ Surveying the case law, he classified the reported decisions as falling under four separate headings: the unreasonable publication of particularly sensitive information; the misappropriation of names, likenesses or other aspects of personality without the consent of the person adversely affected; unreasonable physical intrusions; and the publication of facts that held a person up to false light.

The third of the categories had not made its way into the first edition of the *Restatement of Torts*, even though it related to one of the concerns mentioned by Warren and Brandeis and had some support in the case law. Invasions of privacy, as their article had noted, might come about from the use of improperly intrusive conduct.⁵⁹ Some such conduct might be actionable under existing tort principles, inasmuch as the defendant might, for example, commit a trespass on the plaintiff's land to acquire personal information. If so, the plaintiff might be able to recover for emotional upset as part of her damages. However, modern devices facilitated intrusions for which there would be no liability under existing causes of action such as trespass, but which might still trample on the individual's right to be let alone.

*Rhodes v. Graham*⁶⁰ illustrated this phenomenon. The defendants tapped the telephone wire leading into the plaintiff's home and had a stenographer take notes on conversations being intercepted. In upholding the plaintiff's right to recover for invasion of privacy, the court saw no difference in the interests invaded by telephone tapping and unwarranted newspaper publicity as decried by Warren and Brandeis. Yet the

⁵⁸ Prosser, 'Privacy'.

⁵⁹ The example given by Warren and Brandeis was the bribing of servants to obtain confidential information. See Warren & Brandeis, 'The Right to Privacy' at 209, n. 1. The early case not cited by them involved an intrusion while the plaintiff was giving birth. See *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), discussed above n. 20.

⁶⁰ 238 Ky. 225, 37 S.W.2d 46 (1931).

gist of the violation in the latter context was the dissemination of information, whether by the written media or by pictorial reproduction, which the plaintiff wished to keep out of public circulation; in the intrusion cases, the *per se* penetration of the plaintiff's private space was the wrongful act, whether or not it resulted in any further publication. The victim's realisation that an intrusion had occurred under circumstances that violated community standards of anonymity sufficed to justify recovery in tort.

The false-light category of privacy cases was of relatively recent origin and did not have strong support in the case law. Here, the essence of the wrong was a diminution of a person's control over his individuality. The communication of misinformation violated not an individual's right to prevent the publication of factual information about herself, but rather the right to make sure that such publications were not inaccurate. The so-called false-light privacy tort substantially overlapped the traditional tort of defamation, which also imposed liability for false statements, but only when they harmed the plaintiff's reputation. Neither Prosser nor the *Restatement* explained why a plaintiff whose reputation had been damaged by false statements should be allowed to assert multiple causes of action in tort for the same wrong. A major difference between them, as incorporated in the *Restatement*, was that a defendant might be liable in defamation for communicating derogatory matter to one other person, while false-light privacy required communication to a large audience.⁶¹

Courts cited Prosser's article and his treatise, which incorporated its substance, and the resulting decisions became judicial authority for the proposition that privacy amounted to four torts (and only those four). Not surprisingly, the section on privacy in the Second Edition of the *Restatement of Torts* then adopted the classification scheme devised by its Reporter.⁶² As the eminent legal historian G. Edward White later observed, 'Prosser's capacity for synthesis had become a capacity to create doctrine'.⁶³ What this meant was that claims falling outside Prosser's categories would be deemed non-actionable, without consideration whether they involved privacy interests worth protecting.⁶⁴

⁶¹ See 3 American Law Institute, *Restatement of Torts* 2d § 652E, comment a, § 653D, comment a (1977).

⁶² 3 *ibid.* § 652A.

⁶³ G. E. White, *Tort Law in America: An Intellectual History* (New York: 1980), p. 176.

⁶⁴ For an example, see *French v. Safeway Stores, Inc.*, 430 P.2d 1021 (re. 1967).

5. Additional protection for peace of mind

The common law does not grow in a vacuum. Evolving causes of action must fit into a grander scheme, and hence any account of the history of the privacy tort must take into account related parallel developments. As the courts were creating and refining a new tort remedy for invasion of privacy, they were also recognising a related tort that seemed to protect at least in part the same interest that the privacy tort safeguarded.

Mental distress had always been a parasitic element of damages for which plaintiffs could recover when they made out valid claims for intentionally or negligently inflicted personal injury. But when defendants intended only to bring about distress, the courts were at first hesitant to impose liability, a reluctance reflected in the *Restatement of Torts*, which originally took the position that peace of mind in and of itself was not an interest worth protecting.⁶⁵ However, a few cases did find in favour of mentally anguished plaintiffs.⁶⁶ This gave Prosser an opportunity to exercise his creative talents once again, and argue that the case law was moving in favour of protecting peace of mind, a trend to which he gave his stamp of approval.⁶⁷ Despite the paucity of decisional support for the proposition that plaintiffs could recover if they suffered only emotional harm, without physical trauma,⁶⁸ a 1948 supplement to the *Restatement* executed a *volte face* and provided that the intentional infliction of emotional distress should result in liability for such distress and any physical injury resulting from it.⁶⁹ Some years later the Second Edition of the *Restatement of Torts* adopted a new section that recognised the new tort, with the limitations (the need for the plaintiff to prove that the defendant's conduct had been outrageous, and that the mental distress incurred was extreme) suggested by Reporter Prosser in his prior article.

⁶⁵ 1 American Law Institute, *Restatement of Torts* § 46 (1934).

⁶⁶ See, e.g., *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1930) (defendant's employee wrapped dead rat instead of loaf of bread in package given to plaintiff); *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920) (defendants tricked decedent into thinking she had discovered pot of gold, humiliated her by staging opening of the stone-filled pot in front of witnesses).

⁶⁷ See W.L. Prosser, 'Intentional Infliction of Mental Suffering: A New Tort' (1939) 37 *Michigan Law Review* 874; for a follow-up article, see W.L. Prosser, 'Insult and Outrage' (1956) 44 *California Law Review* 40.

⁶⁸ See C. O. Gregory and H. Kalven, Jr, *Cases and Materials on Torts* (2nd edn., Boston/Toronto: 1969), p. 974.

⁶⁹ See *Restatements of the Law*, 1948 Supp. 612.

Since the need to safeguard people's feelings was one of the arguments made by Warren and Brandeis, the recognition of this new cause of action created an obvious potential for overlap between invasions of privacy and the infliction of emotional distress. This opened the way for the argument that the threat of liability for the latter, which subsequently came to be known as the tort of outrage, might so effectively deter egregious and purposeful invasions of privacy as to eliminate the need for a separate privacy tort. Moreover, a plausible argument could be made that lesser invasions do not merit judicial protection.

6. The academic backlash

Although Prosser's synthesis cast an influence on the courts, within the academy dissent soon surfaced, as some of the heavyweights in the torts professoriate took issue both with the *Restatement's* Reporter and one another. They not only debated the particulars that gave substance to the common-law action for invasion of privacy, but also began to reconsider its intrinsic worth.

On one side, Professor Edward J. Bloustein argued vigorously that the right to privacy, as it had judicially evolved, was indeed a unitary tort that sought in different ways to safeguard a single interest, the right to human dignity as embodied in the individuality of the person.⁷⁰ This clearly distinguished the right to privacy from the right to emotional tranquility, or from the right to profit from the economic value of one's name or likeness, or from the right to an unsullied reputation. Bloustein's thesis amounted to an effort to return privacy to its roots in the 1890 article, as well as in some of the earlier decisions, like *Pavesich*, that invoked natural law as a source of the new tort. In that respect, Bloustein became a keeper of the flame first lit by Warren and Brandeis.

Professor Harry Kalven, Jr, on the other hand, took aim at the heart of the privacy tort and suggested that 'fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored'.⁷¹ He

⁷⁰ Bloustein, 'Privacy as an Aspect of Human Dignity'.

⁷¹ Kalven, 'Privacy in Tort Law' at 328. He cited cases such as *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (1949) (ex-boxer unsuccessfully sued comedian Groucho Marx for quipping on his radio programme: 'I once managed a fighter named

surmised that those who suffered genuine invasions of their privacy would seldom sue, since litigation would serve only to increase unwanted publicity, while many of those who did sue would do so for exploitative reasons. He also bemoaned the indefinite parameters of the tort, the difficulty of measuring damages and the uncertainties about whether liability should be strict, or based on negligence, or based on intentional invasions. Kalven's criticisms had some bite, but they seemed more persuasive in making a practical, process-related case for reform rather than convincingly establishing the need for completely doing away with the tort.

Eventually, the privacy tort came under the unsparing lens of economic analysis, as applied by the master of the genre, Professor (now Judge) Richard Posner.⁷² His point of departure was the proposition that privacy had to be viewed as not an end in itself, with an ascertainable market value, but rather an instrument for the enhancement (or reduction) of net societal worth, a fundamental point with which those whose views rested on the acceptance of privacy as a cherished, fundamental value could never agree.⁷³ He confined himself to the unwarranted-disclosure and the unreasonable-intrusion aspects of the tort and found them in large part not worth recognising. In his judgment, allowing plaintiffs to recover damages for truthful disclosures amounted to a suppression of information valuable to other members of society, since if it had no worth, there would be no demand for it; hence, unless the information in question came into being as a result of significant investment by the holder (so that publication would create disincentives for its production), or unless the disclosure conveys no information that would correct misconceptions about the plaintiff among those who have dealings with him (the example given is the publication of a photograph of the plaintiff's deformed nose in an article about human ugliness), its dissemination should not be actionable. By the same token, imposing liability for intrusions would be justified only if permitting them would create incentives for wasteful expenditures by those determined to frustrate intruders.

Canvasback Cohen. I brought him out here [Los Angeles], he got knocked out, and I made him walk back to Cleveland'), to illustrate his triviality point.

⁷² See Posner, 'The Right of Privacy'; for the author's further views on the subject, see R. A. Posner, 'Privacy, Secrecy, and Reputation' (1979) 28 *Buffalo Law Review* 1.

⁷³ See E. J. Bloustein, 'Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory' (1978) 12 *Georgia Law Review* 429.

7. The United States Supreme Court intervenes

The academic debate would continue,⁷⁴ fuelled even further when media defendants in privacy tort cases began to assert the constitutional guarantee of freedom of expression as a defence, and the United States Supreme Court responded favourably to their arguments by imposing substantial, if not crippling restraints on plaintiffs seeking to recover damages for allegedly unwarranted publicity.

The right to privacy, insofar as it impedes the mass media's ability to gather and publish truthful information, has always carried with it the risk of collision with the rights of a free press, as recognised in the First and Fourteenth Amendments to the Constitution.⁷⁵ Indeed, some scholars had already called explicit attention to this potential conflict.⁷⁶ But it was not until the Supreme Court began to place limits on the liability of the media for publishing untruthful and reputation-damaging information about public figures, that constitutional restrictions also began to make themselves felt in privacy tort cases involving the publication of truthful information. This provided yet another illustration of a cross-over effect between adjacent tort categories.

The constitutionalisation of the tort of defamation began in 1964, when the Supreme Court reversed a substantial verdict against the *New York Times* for printing an advertisement that made inaccurate accusations against an Alabama state official who had participated in the repression of civil-rights demonstrations in his state. The Court interpreted the First Amendment as requiring that a public official, in order to recover for defamation against a mass-media outlet, prove that a mass-media defendant published defamatory statements either with knowledge of their falsity or with reckless disregard of whether they were true or false.⁷⁷ In the years that followed, the Court applied

⁷⁴ See, e.g., Halpern, 'Rethinking the Right of Privacy'; R. C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957.

⁷⁵ The First Amendment forbids Congress from enacting any law abridging freedom of speech or of the press. The Fourteenth Amendment, forbidding the states from making or enforcing any law abridging the privileges or immunities of citizens, has been interpreted as applying to the states the prohibitions of the first ten amendments (commonly known as the Bill of Rights).

⁷⁶ See, e.g., M. A. Franklin, 'A Constitutional Problem in Privacy Protection' (1963) 12 *Stanford Law Review* 107.

⁷⁷ *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964). For a detailed description and analysis of *Sullivan*, see A. Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: 1992).

constitutional restrictions to public figures and private individuals seeking to recover money damages for defamation.⁷⁸

It was a natural next step for the Court to apply the Constitution in a similar way to the aspect of the privacy tort that most resembled defamation. In *Time, Inc. v. Hill*,⁷⁹ a national magazine published a photo story about a Broadway play that dramatised an actual incident in which escaped convicts held a family hostage in their home. Although the play did not use the names of the actual victims, the magazine did. The photo story placed the stage actors in the house where the real-life events occurred, and followed the text of the play, which fictionalised certain parts of the story and exaggerated the indignities suffered by the family. The falsifications were not such as might cause reputational damage, so the best hope for members of the family was the false-light privacy tort. The case ultimately went before the Supreme Court, which held that plaintiffs could recover for false-light invasion of privacy only if they proved that a defendant knowingly published the false statements or exhibited a conscious disregard of whether they were true or false.⁸⁰ In the Court's view, to allow plaintiffs to recover under invasion of privacy for harm for which they could not recover under defamation would make little sense, since such a recovery would infringe equally on the right of freedom of the press.

The rationale for limiting recovery in these kinds of cases was that the threat of liability might have a chilling effect on freedom of expression, not merely as it might promote the robust exchange of ideas and opinions essential to self-governance in a functioning democracy, but also as it might communicate to the citizenry information and ideas relating to culture, the social and natural sciences, religion and, indeed, any other matter of public interest. Hence, it was only a matter of time before the sensitivity the Supreme Court was exhibiting in defamation and false-light privacy cases would surface in a privacy case involving the publication of truthful information.

⁷⁸ For a discussion of the cases, see Dobbs, *The Law of Torts*, at 1169–72. The restriction on private persons applies only when the subject of the publication was of public concern.

⁷⁹ 385 U.S. 374 (1967).

⁸⁰ Richard M. Nixon argued the *Hill* case for plaintiffs before the Supreme Court, while he was working for a New York law firm and before his successful campaign for the presidency in 1968. For an account of Nixon's performance as an advocate, see Lewis, *The Sullivan Case*, at 187–89.

The inevitable occurred in *Cox Broadcasting Corp. v. Cohn*,⁸¹ where a father whose 17-year-old daughter died as a result of a rape incident sued a television station for mentioning the girl's name in a news report on the trial of the perpetrators. Citing a state statute that made it a misdemeanour to publish or broadcast the name or identity of a rape victim, he argued that this law was an expression of public policy that supported his claim for money damages for the invasion of his common-law right to privacy. The defendant's reporter had taken notes during the proceedings, and in open court, while the trial was in recess, he had obtained from the clerk of the court a copy of the indictments, which named the plaintiff's daughter. The United States Supreme Court reversed a judgment for the father and held that a state may not constitutionally impose sanctions on a defendant for accurately publishing a rape victim's name when it was obtained from the judicial records of a proceeding open to the public. The majority opinion pointed out that: 'By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.'⁸² Therefore, state courts could not hold media defendants liable for giving wider dissemination to this information.

The Court specifically limited its holding to the actual press-privacy conflict present in this case, and left open whether a state might ever impose liability on the media for unwanted publicity. In a subsequent decision holding that a state may not hold a newspaper liable for publishing the name of a rape victim recorded in a police report,⁸³ the Court once again left expressly unresolved the general question whether the First Amendment should be construed as creating a blanket defence against any imposition of liability for the publication of truthful information.

8. The present status of the unwarranted-disclosure privacy tort

The debates about the right of privacy in the legal literature and the limitations the United States Supreme Court had placed on it convinced some state tribunals to take a harder look at the privacy tort in cases where they were asked to adopt or apply it, especially in cases

⁸¹ 420 U.S. 469, 95 S. Ct. 1029 (1975).

⁸² 420 U.S. at 495.

⁸³ *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989).

involving unwarranted disclosures. A pair of decisions by the Supreme Courts of North Carolina and Minnesota nicely illustrate contrasting judicial approaches to the issue, and in the bargain demonstrate vividly how the *ad hoc*, fact-driven approach of the common law can influence outcomes.

*Hall v. Post*⁸⁴ involved a suit against a newspaper that had published articles about a birth mother's search for a child she had abandoned at the age of four months; as a consequence of the first of the defendant's articles, the birth mother discovered her natural daughter, then seventeen years of age and happily living with her new mother; a second article described the emotional encounter between them. The stories referred by name to all the parties to the incident. The mother sued the newspaper for the invasion of their privacy.

The North Carolina court had previously recognised the right to privacy in a case where the plaintiff sought to recover damages for the unauthorised use of a photograph for commercial purposes,⁸⁵ but more recently had refused to recognise the false-light branch of the tort, on the grounds that it often overlapped with defamation and unreasonably heightened the tension between the First Amendment and tort law.⁸⁶ *Hall* brought the unwarranted-disclosure tort before the North Carolina Supreme Court for the first time. The court viewed the cause of action as constitutionally suspect, in light of past United States Supreme Court decisions. In addition, the court claimed that as a practical matter the privacy tort overlapped with the cause of action for outrage, a tort previously recognised in the state. Therefore, the latter tort in most instances would protect the same interest safeguarded by the privacy cause of action. Hence, the court found for the defendant and used broad language to declare that the unwarranted-publicity tort would not be incorporated into the jurisprudence of North Carolina.

What the court failed to take into account, however, was that the United States Supreme Court decisions dealing with the privacy tort all involved media defendants and relied heavily on the constitutional guarantee of freedom of the press. But not all disclosure privacy cases have involved media defendants. The majority opinion in *Hall* did not explain why the First Amendment should protect them. Therefore, the only justification the North Carolina court might have applied for

⁸⁴ 323 N.C. 259, 372 S.E.2d 711 (1988).

⁸⁵ *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

⁸⁶ *Renwick v. News and Observer*, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 49 U.S. 858 (1984).

immunising them from liability would be the argument that the privacy tort overlaps with the tort of outrage to such an extent that it adds nothing of practical value to it, and hence does not merit an independent existence.

The cause of action for outrage, however, does not exactly duplicate the privacy tort. The interest in the former safeguards – freedom from serious and purposely provoked mental disturbance – is not quite the same as the rights to solitude and anonymity, essential attributes of individuality and at the essence of privacy protection. The pivotal elements of the tort of outrage are the defendant's conduct, which will trigger liability only if it constitutes a substantial deviation from community standards of decency, and what that conduct inflicted – emotional harm that must exceed some unspecified threshold level before the defendant will be held responsible. The critical element of the privacy tort is the uniquely precious interest that it seeks to shield.

The issue whether or not to adopt the unwarranted-publicity cause of action in North Carolina as a matter of first impression arose in the context of a suit against a member of the mass media, and this clearly was a key factor in the North Carolina court's decision not to recognise the tort. On the other hand, as a vivid demonstration of how facts affect the development of the common law, in Minnesota the issue presented itself for the first time in a claim against a department store whose employees had disseminated photographs that the store's photo lab had developed for the plaintiffs and that depicted them showering together in the nude.

In *Lake v. Wal-Mart Stores, Inc.*,⁸⁷ the supreme court of the state reversed a dismissal of the plaintiffs' claims alleging unwarranted publicity, and in so doing pronounced that: 'The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.'⁸⁸ The facts of the case did not require consideration of the constitutional implications of granting recovery against a media defendant, since none was implicated. One is left to wonder how the North Carolina court would have decided a claim based on the facts of *Lake*, and how the Minnesota court would have decided *Hall*.

⁸⁷ 582 N.W.2d 231 (Minn. 1998). ⁸⁸ *Ibid.* at 235.

The cases also demonstrate the importance of a more careful delineation of protected interests. Photographs depicting individuals in humiliating ways, by revealing parts of the body, social interactions, emotional displays or bodily functions not normally placed on public display, are quite different from information that might affect other peoples' estimations of individuals' character.⁸⁹ By rejecting the unwarranted-publicity tort *in toto*, the North Carolina Supreme Court cast the former category of exposures outside the scope of tort law, a most unfortunate result.⁹⁰

Moreover, it is not at all self-evident why media publication of these kinds of depictions should merit constitutional protection. Consider the extreme hypothetical of individuals taken hostage during a bank robbery, forced to strip totally naked and then released by their captors. What would explicit photographs and videotape footage of the release add to verbal or written factual descriptions of the incident? Community norms establishing that people have a right to keep the intimate parts of their bodies from public view seems clear enough to serve as a workable standard to which the media might fairly be held.⁹¹

The North Carolina court might have issued a narrower holding by refusing to countenance disclosure privacy claims against media defendants. This was the approach taken by the highest tribunal of a jurisdiction that had played an important role in developing the cause of action for unwarranted publicity. In *Gates v. Discovery Communications, Inc.*,⁹² the California Supreme Court took a dramatic step backward and overruled a prior holding that had stood as perhaps the leading case permitting recovery in tort against a media defendant for unreasonable disclosures.

The facts in *Gates* brought before the court a recurring issue, the conflict between the citizenry's right to know and interests of persons with shady or criminal pasts, but currently leading exemplary lives, to

⁸⁹ The point is well made by Posner, 'The Right of Privacy' at 413-14; see also D.J. Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1147-51.

⁹⁰ For a case extending privacy protection in these kinds of cases, see *Daily Times Democrat v. Graham*, 162 So. 474 (Ala. 1964) (publication of photo of amusement-park patron shown with dress blown above her waist by jet of air in 'fun house').

⁹¹ For an unconvincing effort to justify giving constitutional protection to the media publication of a photograph of a student soccer player with his genitalia inadvertently exposed, see *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. App. 1991), criticised in Solove, 'Conceptualizing Privacy' at 1147-49.

⁹² 21 P.2d 552 (2004).

keep their prior misdeeds from contemporary public exposure. A lower court in California had previously upheld an invasion-of-privacy claim by an ex-prostitute mentioned by her real name in a motion picture made long after she had rehabilitated herself.⁹³ The Supreme Court of the state had its opportunity to consider the question some 40 years later in *Briscoe v. Readers Digest Ass'n, Inc.*,⁹⁴ a case presenting similar facts. There a magazine article 'outed' a reformed hijacker more than a decade after he gave up criminal pursuits, paid his debt to society and began to live a respectable life. The court held that the plaintiff's complaint stated a good cause of action against the magazine for invasion of privacy. The rationale of the decision was that although public interest in the subject of the article was no doubt legitimate, naming the plaintiff served no purpose and undercut the social goal of rehabilitating law-breakers.⁹⁵

In *Gates* the Supreme Court of California overruled *Briscoe*, at least in cases where a media defendant lawfully obtains the name of the plaintiff from public and official records of judicial proceedings. It adopted the reasoning of the United States Supreme Court in *Cox Broadcasting Corp.* to the effect that by allowing the plaintiff's identity as a convicted hijacker to appear on a record to which the public had access, the state had already balanced the interest of the people in knowing about the plaintiff's past against society's interest in rehabilitating offenders, in favour of the former. Characterising the state's action as the result of a deliberative balancing process, however, seems like wishful thinking. Moreover, if the media was subject to liability for public disclosures under the prevailing standard in unwarranted-disclosure cases – that is, when publication would offend the sensibilities of a reasonable person – the press and broadcasters might err on the side of caution in making decisions about what information to disseminate, and this could have a negative effect on the people's right to know. The involvement of an individual as a defendant in a criminal proceeding thereby becomes like a scarlet letter, forever branded on his or her public persona.

⁹³ *Melvin v. Reid*, above n. 45–46.

⁹⁴ 4 Cal.3d 529, 483 P. 2d 34 (1971).

⁹⁵ For a criticism of the proposition that imposing tort liability in these kinds of cases will promote rehabilitation, see Epstein, 'Privacy, Property Rights' at 472 (refusing to impose liability will encourage ex-offenders to make their conduct as exemplary as possible to counter disclosures that his past life makes him untrustworthy and to disclose his past early in any relationship where it might be relevant).

The current status of the unwarranted-disclosure branch of the tort of invasion of privacy appears somewhat blurry. In suits brought by public figures against media defendants, no tribunal has up to now had to decide whether a revelation was so extremely indelicate, wilfully outrageous, contrary to community mores and irrelevant to any legitimate public interest as to forfeit constitutional protection, nor has the United States Supreme Court had the occasion to review such a decision. Conceivably the cause of action might survive as a remedy private individuals might invoke against media defendants in the event the latter published intimate facts solely for the purpose of causing distress or other harm to that individual (although this might also amount to an actionable intentional infliction of emotional distress), or against a non-media defendant who discloses private facts in a way that violates a right to anonymity. This, however, would be a far cry from what Warren and Brandeis had in mind when they wrote their famous article.

9. The present status of the intrusion privacy tort

Of Prosser's four privacy categories, the physical-intrusion branch has fared most successfully over the years. The value of the interest protected has remained beyond serious dispute, and the possibility that it might overlap with other torts, such as trespass to land, has not triggered arguments that courts should not recognise it.

The Second Edition of the *Restatement of Torts* encapsulated the tort in a black-letter rule that requires plaintiffs to prove that the intrusion was intentional and would have been deemed highly offensive to a reasonable person.⁹⁶ This provision both reflected existing case law⁹⁷ and influenced courts considering whether or not to recognise the intrusion tort.⁹⁸

Some opinions have elaborated on what kinds of invasions might be considered highly offensive. In a leading decision by the United States Court of Appeals for the District of Columbia, the court stated

⁹⁶ 3 American Law Institute, *Restatement of Torts* 2d § 652B (1977).

⁹⁷ See, e.g., *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964) (defendant-landlord installed listening device adjacent to plaintiff-tenant's bedroom).

⁹⁸ See, e.g., *Froelich v. Adair*, 516 P.2d 993 (Kan. 1973) (defendant suspected her ex-husband and plaintiff were lovers; she convinced a friend to obtain samples of plaintiff's hair from hairbrush and piece of adhesive tape during plaintiff's stay in hospital, so that specimens might be compared with hair found in ex-husband's bed; cause of action for invasion of privacy upheld; *Restatement* cited).

in dictum that plaintiffs may recover damages for intrusions ‘into spheres from which an ordinary man in plaintiff’s position could reasonably expect that the defendant should be excluded’.⁹⁹ Thus, reasonable expectations, derived from community standards establishing the limits of an individual’s right to be left alone, become a critical element of the tort.

The intrusions might take the form of patterns of conduct, such as constant, unwanted public surveillance.¹⁰⁰ In some such situations, a strong possibility of overlap with the tort of outrage looms, since the plaintiff might easily be able to establish the defendant’s intent to inflict severe emotional distress. However, this might be difficult to prove in celebrity-harassment cases, where the privacy tort might be the only remedy against overzealous pursuers.

Indeed, while courts have been reluctant to let public figures recover damages for unwarranted-disclosure invasions of privacy, especially against media defendants, they have not hesitated to impose liability for outrageous intrusions into the private spaces of celebrities.¹⁰¹ In these cases, the public’s right to know yields to the right of well-known individuals to maintain intact some sphere of personal privacy (although in the current culture, where some celebrities market even the most intimate aspects of their lives, there is a risk that even this value may one day be deemed just another commodity).

Where media defendants or their employees invaded the private spaces of plaintiffs in search of newsworthy information, they have occasionally asserted their right to freedom of the press as a defence to a claim of invasion of privacy. However, when the intrusion would

⁹⁹ *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) (applying District of Columbia law; investigative reporters held not liable for publishing information obtained from documents taken from US Senator’s files, although persons who took the documents might be liable); see also *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (‘Plaintiff’s den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen’). For a recent California Supreme Court decision elaborating upon what makes an intrusion on reasonable privacy expectations ‘highly offensive’, see *Hernandez v. Hillsides, Inc.*, 211 P. 3d 1063, 1078–82 (Cal. 2009).

¹⁰⁰ See, e.g., *Kramer v. Downey*, 680 S.W.2d 524 (Tex. App. 1984) (harassment by plaintiff’s former lover, who followed him about on bicycle or motorbike, sent him cards and gifts and made vulgar remarks to him in public).

¹⁰¹ For the most noteworthy instance, see *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (applying New York law; widow of President John F. Kennedy granted remedy against extraordinarily intrusive conduct of *paparazzo*); see also *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765 (1970) (applying District of Columbia law; consumer advocate allowed to recover damages against corporation for intrusive efforts to discredit him).

amount to a tortious trespass or a crime, the courts have rejected the argument and imposed liability.¹⁰²

A difficult question arises when the intruder or a third party subsequently publishes to a mass audience information in the public interest and obtained as a result of a tortious intrusion, and the victim seeks to recover compensation for harm attributable to the publication. What complicates matters are the possibilities that the original intruder might not have links to the mass media and the victim might sue him for consequential harm caused by the publicity; or that the original intruder might have no link to the mass media, and the victim sues the media outlet that published the information; or that the intruder might be an employee of the media publisher.

The case law on these issues is sparse. One decision has denied liability against a media defendant with no ties to the intruder,¹⁰³ while another has imposed liability on a media defendant that published information tortiously obtained by its employees.¹⁰⁴

Professor Richard Epstein has aptly posed the question as ‘whether the ends justify the means: does the public release of true information justify the [intrusion]?’¹⁰⁵ If media defendants are not held liable for harm caused when they publish the fruits of their invasions of privacy, this would in effect exonerate tortious conduct. Indeed, it would call into serious question why they should be liable for the original intrusion. If the Constitution protects them when they disseminate the information, why should it not protect them from liability for invading privacy in the course of obtaining it?

10. The present status of the false-light privacy tort

While the intrusion privacy tort remains alive and well, the survival of the false-light invasion of privacy tort may be in doubt. As has been

¹⁰² See, e.g., *Dietemann v. Time, Inc.*, above n. 99 (applying California law; First Amendment does not immunise newsmen from torts or crimes committed while newsgathering); *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (1986) (television network held liable when its TV camera crew entered, without any consent, the bedroom of a person who suffered a heart attack, and filmed efforts of paramedics to save him).

¹⁰³ See *Pearson v. Dodd*, above n. 99.

¹⁰⁴ See *Dietemann v. Time, Inc.*, above n. 99.

¹⁰⁵ R.A. Epstein, ‘Deconstructing Privacy: And Putting It Back Together Again’, in E. Paul, F. Miller and J. Paul (eds.), *The Right to Privacy* (Cambridge: 2000), p. 14 (helpful analysis of the conundrum).

pointed out, the United States Supreme Court's decision in *Time, Inc.* has made it difficult for plaintiffs to recover, by incorporating constitutional defences and limitations applied to the tort of defamation because of constitutional considerations,¹⁰⁶ and some courts have refused even to recognise the cause of action because of a concern that the pressure it places on the First Amendment outweighs the benefits to be gained by permitting plaintiffs to use it.¹⁰⁷ This latter position assumes that the value of protecting against statements that put people in a false light exceeds the value of reputation, since defamed plaintiffs can still recover damages if they meet the requirements that the Supreme Court has imposed, but plaintiffs placed in a false light would never be allowed to recover damages, even if they could meet those requirements.¹⁰⁸

11. The present status of the misappropriation privacy tort

The last of the quartet of privacy torts dates back to *Roberson* and *Pavesich*, where the courts considered the right of the individual to control the use of her name or likeness, not as a commodity to be marketed or withheld from the market, but as an element of individuality forming an essential aspect of one's persona. As considered in these cases, the right to be left alone embodied not only control over dissemination of private facts that an individual wished to keep secret, which was the interest Warren and Brandeis wanted to protect, but also identifying features such as names and photographs.

With the spread of mass marketing and the somewhat related development of a culture of celebrity, what has come to be commonly known as the right of publicity has now broken away from its privacy roots and become a part of the growing field of intellectual property law. The legal issues it has generated, such as descendibility,¹⁰⁹ scope of protection¹¹⁰ and whether or to what extent it can coexist with the

¹⁰⁶ See above nn. 79–80 and accompanying text.

¹⁰⁷ See *Hall*, discussed above nn. 84–86 and accompanying text.

¹⁰⁸ For a spirited debate on the issue, compare D.L. Zimmerman, 'False Light Invasion of Privacy: The Light That Failed' (1989) 64 *New York University Law Review* 364 and J. Clark Kelso, 'False Light Privacy: A Requiem' (1992) 32 *Santa Clara Law Review* 783 (arguing for the abolition of the tort), with G.T. Schwartz, 'Explaining and Limiting a Limited Tort of False Light Invasion of Privacy' (1991) 41 *Case Western Reserve Law Review* 885.

¹⁰⁹ See, e.g., A.B. Sims, 'Right of Publicity: Survivability Reconsidered' (1981) 49 *Fordham Law Review* 453.

¹¹⁰ See, e.g., A.W. Langvardt, 'The Troublising Implications of a Right of Publicity "Wheel" Spun Out of Control' (1997) 46 *University of Kansas Law Review* 329.

statutorily created law of copyright,¹¹¹ more accurately fall within the concept of property or quasi-property rights.

This does not mean that there is no role left for the misappropriation privacy tort. It is conceivable that the name or likeness of a non-celebrity such as Mrs Roberson or Mr Pavesich might find its way into a marketing campaign or might even be used for a non-commercial purpose, without the consent of the individual referenced or portrayed.¹¹² The interest violated in such a case would seem to be personal and dignitary, which would justify the use of the privacy tort to safeguard it.

12. Conclusion

In response to a *New York Times* editorial criticising the result in *Roberson*, a member of the majority voting not to recognise the new cause of action took the unusual step of writing a lawreview article that sought to justify the court's holding. Judge Denis O'Brien insisted that: 'It is quite impossible to define with anything like precision what the right of privacy is or what its limitations are, or how or when the right is invaded or infringed, or what remedy can be applied if any.'¹¹³ The subsequent history of the tort has demonstrated that courts and commentators should have paid more heed to these concerns.

The value of privacy in fact embraces a range of interests, and it may well be that not every one of them merits the kind of protection that tort law can effectively provide. In addition, the failure of the courts to develop the kinds of rules that can signal to potential defendants what sorts of behaviour might be tortious and standards that juries can sensibly apply has been a major cause of the disarray in which the privacy tort now finds itself. The difficulty in using the common-law litigation process to delineate private and public spheres in a principled way has proved to be a far greater challenge than Warren and Brandeis ever imagined.

¹¹¹ See, e.g., D.E. Shipley, 'Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976' (1988) 20 *Arizona State Law Journal* 369.

¹¹² One of the earliest privacy decisions raised but did not resolve this issue. In *Schuyler v. Curtis*, 147 N.Y. 434, 43 N.E. 22 (1896), the relatives of a woman sued to prevent the defendant from erecting a bust in honour of her. The court held that even if a right to privacy existed, it was personal and hence could not furnish a basis for legal relief after her death.

¹¹³ D. O'Brien, 'The Right of Privacy' (1902) 2 *Columbia Law Review* 437.

This Chapter has pointed out how claims alleging privacy invasions that occurred because of the unwarranted disclosure of private facts have collided with and been repulsed by the constitutional provision against governmental infringement of freedom of the press. The failure of the courts to go beyond Prosser's classifications and identify the various discrete privacy interests that disclosures might invade has undercut the continued viability of this aspect of the tort. A reconsideration, informed by an analysis of current social norms and the policies embodied in the vast body of legislation enacted to protect against various kinds of releases of private information and other disclosures, would seem in order.

The unreasonable-intrusion privacy tort has become firmly rooted in the common law, in part because of a more precise appreciation of the interest being safeguarded, and in part because of a consensus about the need for protection against modern technology, with its expanding capability to violate an individual's private space without implicating any other recognised tort. However, if the courts opt to protect the mass media from liability for harm resulting from the subsequent publication of information obtained from unreasonable intrusions, they risk undercutting the incentives to refrain from the sort of intrusive conduct that the tort was meant to prevent.

The false-light category has always been problematic. Where the dissemination of inaccurate information damages a person's reputation, the traditional cause of action for defamation would seem to provide an adequate remedy. When the errant publication does not harm reputation, courts must grapple with the compelling (but not totally overwhelming) argument that the interest violated may be too trivial to merit judicial protection, especially since victims may have other means to reach the public and rectify misimpressions that have been created.

Finally, the misappropriation privacy tort has been almost completely subsumed by the right to publicity, which gives individuals a quasi-property interest in their names, likenesses and other attributes of identity. There is still a role to be played by the right to privacy, where the defendant's conduct violates the plaintiff's right to prevent the appropriation of aspects of his individuality that may have no commercial value, but remain precious as a fundamental component of personhood and hence worthy of legal protection.

The American Law Institute is currently preparing a *Restatement (Third) of Torts* that will address invasions of privacy. This will present

an opportunity to re-examine what Warren and Brandeis created and Prosser refined. Since the current confused state of the tort reflects at least in part the failures of past *Restatements*, the Institute can play an important role in bringing order and rationality to a field of tort law sorely in need of a fresh look.

PART II CASE STUDIES

4 Case 1: The corrupt politician

Case

A newspaper published an article accusing a well-known politician (called by name) of being corrupt. Does the politician have any claim against the journalist, the publisher or the editor-in-chief of the newspaper? If the politician was informed beforehand about the forthcoming article, is he entitled by law to stop the publication? Distinguish the following situations:

- (a) The journalist's statement is not supported by any facts.
- (b) The journalist alleged some facts related by a third person, which then turned out to be false.

Discussions

Austria

I. Operative rules

The politician may apply for a preliminary injunction to stop the publication. In situation (a), the politician has a claim *against the journalist* for the forbearance of defamatory statements, the revocation of the false statement and its publication, and for compensation of pecuniary loss. The politician may sue *the publisher* for compensation of non-pecuniary loss. In addition, the politician can claim for a right of reply. In contrast, the politician probably has no claim under situation (b), but this depends on several conditions.

II. Descriptive formants

If the politician was informed beforehand about the forthcoming article, he may apply for a preliminary injunction pursuant to § 381

EO¹ if ‘such an injunction seems to be necessary for the avoidance of ... an unrestitutable damage’. Under this provision, only objective endangerment (*objektive Gefährdung*) is required. After an ordinary hearing the injunction may be removed.

With regard to the claimant’s action, the defendant parties are the journalist and, under § 6 *MedienG*, a special provision to protect someone’s honour, the owner (publisher) of the newspaper, irrespective of his/her fault.²

In situation (b), the journalist and the owner/publisher of the newspaper are not liable in respect of the claims described above if the credibility of the third person alleging the facts was appropriate³ enough so that the journalist could not be accused of having breached his/her particular duty of care (*journalistische Sorgfaltspflicht*), and if there was a prevailing public interest in publishing the statement of corruption which – in the case of a famous politician – can be taken for granted.

In the particular instance where the journalist quoted the third person in a correct and complete manner and without personal identification of the cited facts he/she is not liable under § 6, subs. 2(4) *MedienG*, given that the public interest in publishing the statement prevails over the politician’s private interest in concealing these facts.⁴

In situation (a), any claim against the *journalist*, even one for the forbearance of defamatory statements in the future,⁵ depends on wrongfulness. The journalist acted wrongfully if an overall balancing reaches the conclusion that the politician’s right not to be defamed prevails over the constitutional right of the press to inform the public.⁶

Although politicians and other ‘public figures’ (*Personen der Zeitgeschichte*) are expected to have a higher level of tolerance and therefore

¹ Cf. OGH MR 1992, 250; MR 2002, 295; MR 2003, 90; R. Reischauer in P. Rummel, *Kommentar zum ABGB II/2b* (3rd edn., Vienna: 2004) § 1330 no. 55.

² Liability according to § 6 *et seq. MedienG* is not based on fault. Cf. E. Karner and H. Koziol, ‘Non-Pecuniary Loss under Austrian Law’, in W. V. Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Vienna: 2001) at 16; G. Korn, ‘Das Entschädigungssystem’, in A. Mayer (ed.), *Persönlichkeitsschutz und Medienrecht* (Vienna: 1999), p. 101.

³ The journalist was likely to believe him with good reason – see OGH MR 1997, 299, where the third person was not credible.

⁴ OGH MR 1998, 138; E. Swoboda, *Das Recht der Presse* (2nd edn., Vienna: 1999) at 50 *et seq.*

⁵ Cf. OGH EvBl 1983/91; MR 2001, 373; R. Reischauer in P. Rummel, *Kommentar*, § 1330 no. 23. This claim does not depend on fault.

⁶ OGH MR 1989, 15; G. Korn and H. Neumayer, *Persönlichkeitsschutz im Zivil- und Wettbewerbsrecht* (Vienna: 1991) at 59 *et seq.*

must endure more public criticism,⁷ they have a right to honour. Therefore, for example, the OGH does not allow journalists to call politicians ‘liars’ without enough facts to support this statement.⁸

Defamatory statements may violate both one’s right to honour (protected by § 1330, subs. 1 ABGB) and one’s right to ‘economic reputation’ (*wirtschaftlicher Ruf*, protected under § 1330, subs. 2 ABGB) which is reflected in one’s creditworthiness (*Kredit*), earnings (*Erwerb*) and professional advancement (*Fortkommen*). Although the latter provision denotes ‘factual statements’ (*Tatsachenbehauptungen*), whereas the former also deals with value judgments (*Wertungen*), in this case the accusation of corruption infringes both provisions. Therefore, the plaintiff may choose between § 1330, subs. 1 or 2 ABGB, both of which grant compensation for pecuniary loss⁹ only; non-pecuniary loss, however, remains without indemnification under this provision. Beyond the law of damages, the latter provision offers more – namely the right to revoke the statement and to publish this revocation.

Not only the claim for one’s right to the forbearance of defamatory statements may be pursued against the *owner/publisher* of the newspaper in the future, but also the claim for compensation of non-pecuniary loss pursuant to § 6 *MedienG*, without proof of fault. The same is true in respect of the claim for publication of a counter statement under § 9, subs. 1 *MedienG*.

III. Metalegal formants

Some Austrian scholars criticise the levels of awards for non-pecuniary loss provided by the Media Act, as well as the *de facto* levels awarded by the courts. The maximum amount provided by § 6(1) *MedienG* is €50,000 in exceptional circumstances where defamatory statements are involved and €20,000 in all other cases. In contrast, the real amounts of compensation awarded by the Higher Regional Court of Vienna level out at €1,454 to €7,270. The three other Higher Regional Courts (of Graz, Linz and Innsbruck) award sums noticeably

⁷ ECtHR EuGRZ 1986, 428; MR 2002, 84 (commentary by E. Swoboda); ÖJZ 2002, 464 (‘Dichand’). This is primarily based on Art. 10 ECHR (Freedom of Speech and Press); OGH MR 2001, 89.

⁸ OGH MR 1997, 299.

⁹ Loss of earnings or, e.g., costs of the employment of a PR expert for the restoration of the politician’s reputation: OGH 26.5.1997, 6 Ob 135/97 i.

lower than these amounts. Graz, for example, only awards a quarter of the Viennese amounts.¹⁰

Belgium

I. Operative rules

In both hypotheses (a) and (b), the politician can claim damages from the journalist. He can also exercise a right of reply. However, he will not get an injunction before the article is published.

II. Descriptive formants

Besides the traditional *trias politica*, the Belgian press is considered and considers itself the 'Fourth Branch'. Its power is protected under the Constitution, which guarantees freedom of expression (Art. 19). Notwithstanding this fact, criminal law and tort law remain applicable.

Some general provisions of the Criminal Code can be applied to this case. The most important are defamation (Art. 443 Criminal Code) and insult (Art. 448 Criminal Code). The following conditions apply:

- (1) a certain opinion has to have been made;
- (2) the Criminal Code is not applicable in cases concerning a mere descriptive article;
- (3) this opinion must also be punishable and the offence must be committed by the printing-press;
- (4) finally, it is necessary that the article has become public, for example, by publishing the article in a newspaper.

In applying Art. 1382 of the Civil Code, the journalist's behaviour will be tested against the conduct of a reasonable journalist of ordinary prudence in similar circumstances. The judiciary demands great prudence, moderation, caution and circumspection from journalists. Their liability is judged in respect of the importance of the accusations, the harm that can be caused, the means of inquiry at their disposal and that used, and, finally, the public interest.¹¹

The applicant of an action based on Art. 1382, has to prove three elements. Firstly, he/she has to prove that the journalist did not behave like a reasonable journalist. Furthermore, he/she has to show that

¹⁰ Cf. E. Karner & H. Koziol, 'Non-Pecuniary Loss under Austrian Law' at 24.

¹¹ Civil court Charleroi, 9 Dec. 1998, AM 2000, 145; Civil court Brussels, 26 Oct. 2001, AM 2002, 88. See, in general, P. Robert, 'La responsabilité civile du journaliste' (2000) AM 18.

harm was caused to him/her by this behaviour. Finally, the judge will grant damages where the applicant also proves a causal connection between the journalist's fault and the harm suffered.¹²

In respect of situation (a), where the journalist's opinion is not supported by any facts, his/her behaviour is imprudent. The journalist commits a fault if he/she makes serious accusations without first verifying the facts or simply bases his/her opinion on groundless rumours.¹³

Regarding situation (b) where the journalist alleged some facts which had been reported by a third person and which then turned out to be false, the journalist has a reasonable duty to verify his/her sources; the stronger the accusations, the stricter the duty to verify.¹⁴

In relation to who the politician can claim from, Art. 25(2) of the Constitution states: 'When the author is known and resides in Belgium, neither the publisher, nor the printer, nor the distributor can be prosecuted.' This provision stipulates a multi-staged civil and criminal liability: no claim based on personal liability can be lodged against the printer or distributor if the writer is known, and no claim can be brought against the distributor if the publisher is known.

Some judgments uphold the vicarious liability of the journalist's editor-in-chief if the latter is known and resides in Belgium,¹⁵ others consider the editor-in-chief as the 'publisher' whose liability cannot be sought if the journalist is known.¹⁶

If the journalist is an employee, the law protects him/her from claims based on slight negligence. Third parties can only claim damages based on the grounds of serious or deliberate offences or recurrent negligence, e.g. serious accusations without verification of the source. It is disputed whether or not the vicarious liability of the employer can be sought in such cases.

Journalists have set up a self-regulating Press Council (*Raad van de Journalistiek*) with deontological competence for the written press. This Council tries to settle conflicts amicably.

¹² See H. Vandenberghe, 'Over civielrechtelijke pers aansprakelijkheid. Een stand van zaken', in M. Debaene and P. Soens (eds.), *Aansprakelijkheidsrecht. Actuele tendenzen* (Brussels: 2005) at 109 *et seq.*

¹³ Civil court Brussels 14 Dec. 1993, *AJT* 1994-95, 70.

¹⁴ CA Brussels 16 Feb. 2001, *AM* 2002, 282; CA Brussels, 20 Sept. 2001, *AM* 2002, 254; CA Brussels 9 Nov. 2001, *AM* 2002, 257.

¹⁵ Civil court Brussels 5 Dec. 2001, *AM* 2002, 282.

¹⁶ Civil court Brussels 9 Nov. 2001, *AM* 2002, 288.

When the defamatory article is published, not only monetary remedies can be granted but also non-monetary remedies. Through Art. 1 of the Right of Reply Act,¹⁷ the injured person can exercise his/her right of reply in order to rectify a factual element or to defend him- or herself against defamation.

Judges will usually grant damages to remedy the non-pecuniary harm. Opinions differ with regard to the amount of compensation that should be awarded. Some judges are convinced that the nominal amount of €1 in damages is sufficient, while other judges are more generous. While some judges, for example, allow compensation of €125 to €1,250, others opt for compensation of €2,500 to €12,500.¹⁸

Whether or not one can obtain an injunction to prevent the publication of an article is highly uncertain in Belgian law. Most authors consider it a form of censorship prohibited by Art. 25 of the Constitution.¹⁹ Most courts are also unwilling to grant an injunction.²⁰ An injunction is only accepted by some courts in exceptional circumstances. The Belgian *Cour de cassation* has decided that an injunction is constitutional when the article has already been published and is known by the public.²¹ An injunction before publication is in principle unavailable, but in summary proceedings there is at least the possibility to attain one. Some judges accept the possibility of an injunction to prevent imminent damage to a highly threatened interest, on condition that the injunction prevents irreparable loss or further damage.²²

The president of the Civil Court of Namur decided that an issue of the magazine *L'Investigateur* could not be distributed because it contained a list of alleged paedophiles. The distribution of this list on the internet was also forbidden. The Court referred to the human rights and the presumption of innocence of the alleged paedophiles, as well as the fact that publication of the list could endanger them.²³

¹⁷ Right of Reply Act, 8 Jul. 1961. For a general overview, see E. Brewaeyts, *Recht van antwoord in APR* (Ghent: 2005).

¹⁸ D. Voorhoof, *Handboek mediarecht* (Brussels: 2003) at 161 *et seq.*

¹⁹ *Ibid.* at 60–75. See also D. Voorhoof, 'Vrijheid van meningsuiting', in J. Vanden Lanotte and Y. Haeck (eds.), *Handboek EVRM* (Antwerp: 2004) at 845 *et seq.*

²⁰ See the examples given by D. Voorhoof, *Handboek mediarecht* at 60 *et seq.*

²¹ Cass. 29 Jun. 2000, *AM* 2000, 4443, note A. Brewaeyts, *Rec. Cass.* 2001, 35, note D. Voorhoof.

²² E.g., Antwerp (President) 4 Nov. 1999, *AM* 2000, 87 and 89; Brussels (President) 22 Mar. 2002, *AM* 2002, 443; Civil court Brussels (President) 24 Apr. 1996, *TBBR* 1997, 135.

²³ Civil court Namur (President), 9 Aug. 2000, *JLMB* 2000, 1182, note F. Jongen. See D. Voorhoof, 'Publicatie pedofielenlijst in België stuit op rechterlijk verbod' (2000) *Mediaforum* 271.

England

I. Operative rules

In both situations, the politician can sue the journalist, publisher and editor-in-chief for defamation. He is entitled to compensation in the form of damages. He is also entitled to apply for an injunction. However, whether or not he will be successful in obtaining an injunction depends on a number of factors outlined below. The politician is not entitled to a right of reply.

II. Descriptive formants

(a) *The journalist's statement is not supported by any facts.*

This type of case could come under the tort of defamation or malicious falsehood. The preconditions for the tort of malicious falsehood are that one party has published false words about the other party, that these words were published maliciously, and that special damage has followed as the direct and natural result of their publication. Under s. 3(1) of the Defamation Act 1952, it is sufficient that the words published in writing are calculated to cause pecuniary damage to the claimant. Malice will be inferred if it is proven that the words were calculated to create damage and that the party publishing the words knew that they were false or was reckless as to whether they were false or not.²⁴ In this particular case, we cannot tell if malice was present or not. Therefore, we will concentrate on the tort of defamation.

The tort of defamation protects a person from untrue imputations, which reflect on a person's reputation so as to lower him/her in the estimation of right-thinking members of society generally.²⁵ Libel is defamatory material in permanent form, for example in print, whereas slander takes a transient form. The tort has a number of aspects. Firstly, the test is objective so that it does not matter whether or not the defendant intended to defame the claimant. Accusing a politician of being corrupt is clearly defamatory. Secondly, the defamation must refer to the claimant, i.e. make him/her identifiable. This is clearly the case in this situation since the politician has been named. Thirdly, the defamation must have been communicated to some person other than the claimant, which is obvious in the case of a newspaper article.²⁶ It

²⁴ *Kaye v. Robertson* [1991] FSR 62, per Glidewell LJ; *DSG Retail Ltd v. Comet Group plc* [2002] FSR 58 at para. 13.

²⁵ *Sim v. Stretch* (1936) 52 TLR 669.

²⁶ *Powell v. Gelston* [1916] 2 KB 615.

is also important to note that libel does not require any damage to be shown by the claimant, but is actionable *per se*.²⁷

Where defamatory matter is contained in a newspaper, there will be a series of publications, each of which is actionable in principle. The author, editor and publisher are liable.²⁸ Furthermore, distributors could also be liable. However, some of these persons have defences available.

The defence of 'justification' applies where the defendant can prove the truth of the defamatory statements even if he/she acted with malice.²⁹ In the case at hand, this defence is not available since the statement was not based on any facts. Partial justification, in cases where there is some evidence that the statements were true but where the claimant cannot prove sufficient facts to establish the defence of justification, is not a defence but will be taken into consideration when calculating damages.³⁰

The defence of 'comment on a matter of public interest' (known as the fair comment defence) is available to everyone but it is of particular importance to the media. Everyone has a right to make comments on matters of public interest. However, this defence is merely concerned with the protection of comment, not imputations of fact.³¹ It allows for vigorous comment as long as the facts on which the comment is based are true. Thus, in the present case, this defence is not available.

The defence of 'absolute privilege' protects the defendant no matter how dishonest or malicious his/her motives.³² Occasions of absolute privilege fall into the categories of parliamentary proceedings, judicial proceedings and official communications. In this particular case, the defence is not available as it does not appear that the defamatory material has arisen from an occasion of absolute privilege. The defence of 'qualified privilege' exists in common law and in statutory law.³³

²⁷ This is different in slander, with four exceptions. One of these is an allegation in relation to the claimant's competence or fitness in any office, profession, calling, trade or business. In the case at stake, corruption would clearly disqualify the politician from his office so that even slander would be actionable *per se*. For details, see M. Jones, *Textbook on Tort* (7th edn., London: 2000) at 511.

²⁸ For a summary of early case law, see *Godfrey v. Demon Internet Ltd* [2001] QB 201, at 207 *et seq.*

²⁹ *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, at 192, per Lord Nicholls of Birkenhead.

³⁰ *Pamplin v. Express Newspapers Ltd* [1988] 1 WLR 166; *Campbell v. News Group Newspapers Ltd* [2002] EMLR 43, 966, at 977; *Burstein v. Times Newspapers Ltd* [2001] EMLR 14, 364.

³¹ *Reynolds v. Times Newspapers Ltd* at 193, per Lord Nicholls of Birkenhead.

³² See Defamation Act 1996, Ch. 31

³³ For more details, see ss. 14 and 15 Defamation Act 1996; *Reynolds v. Times Newspapers Ltd* at 167, per Lord Bingham of Cornhill; *McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd* [2001] 2 AC 277, at 290 *et seq.*, per Lord Bingham of Cornhill.

It applies to the dissemination of information to the general public that the public should know.³⁴ In both common and statutory law the defence merely applies to fair and accurate reports, which implies an absence of malice.³⁵ It arises 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 made has a corresponding interest or duty to receive it’.³⁶ Furthermore, common law has always distinguished between those who produced the libel and those who merely disseminate it, such as the booksellers, librarians or newsagents, the latter having a defence available if they were innocent.³⁷ This defence of innocent dissemination was made available through s. 1 of the Defamation Act 1996 to printers, distributors, sellers, broadcasters of live programmes and also the operators of a communication system by means of which a defamatory statement is communicated.³⁸ The burden of proof lies with the distributor.³⁹

The author can make an ‘offer of amends’.⁴⁰ Such an offer of amends bars defamation proceedings if it is accepted by the person defamed. It can also be relied upon as a defence unless the person who made the defamatory statement:

- (a) referred to the aggrieved party or was likely to be understood as referring to him/her; and
- (b) was both false and defamatory of that party.⁴¹

The other problem is that by relying on the defence of ‘offer of amends’ the defendant loses the right to rely on any other defence.⁴²

³⁴ *Reynolds v. Times Newspapers Ltd* at 195, per Lord Nicholls of Birkenhead.

³⁵ *McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd* at 301, per Lord Cooke of Thorndon.

³⁶ *Adam v. Ward* [1917] AC 309, at 334.

³⁷ *Vizetelly v. Mudies’s Select Library Ltd* [1900] 2 QB 170, at 180; *Bottomley v. F.W. Woolworth & Co. Ltd* (1932) 48 TLR 521.

³⁸ For details, see M. Jones, *Textbook on Tort*, at 508–9; L.J. Smith, ‘Neuere Entwicklungen in der Haftung für Persönlichkeitsverletzungen nach deutschem und englischem Recht – Publish and be damned’ (1999) *Zeitschrift für Europäisches Privatrecht* 303, at 312. See also *Godfrey v. Demon Internet Ltd* [1999] 4 All ER 342, concerning an internet service provider.

³⁹ See *Godfrey v. Demon Internet Ltd* [2001] QB 201, at 204.

⁴⁰ See ss. 2, 3 and 4 Defamation Act 1996. See also *Veliu v. Mazrekaj & Anor* [2006] EWHC 1710 and *Campbell-James v. Guardian Media Group* [2005] EWHC 893 (QB).

⁴¹ S. 4 (2) and (3) Defamation Act. A similar defence under the preceding Defamation Act 1952 had turned out not to be very helpful in practice since it required the publisher to prove that he/she had exercised all reasonable care in relation to the publication. See M. Jones, *Textbook on Tort*, at 505–6.

⁴² S. 4(4) Defamation Act 1996.

Thus, the defendant may choose not to rely on it but rely on mitigating damages instead.⁴³ The newspaper also has the possibility of utilising the defence of apology and payment into court although this is rarely used in practice.⁴⁴

The possible remedies available to the politician in the case of defamation will now be considered. Generally speaking, the remedy of injunction is available in defamation cases. The question is, however, to what extent this applies to interlocutory relief. Two major barriers have to be overcome. The first is a problem of jurisdiction. Defamation cases are among the rare cases still heard before a jury.⁴⁵ Thus, the court, in ordering an interim injunction, would replace the jury's decision with its own decision. Therefore, an interim injunction ought only to be granted in the clearest cases, where any jury would say that the matter complained of was libellous and where the court would set aside the verdict as unreasonable if the jury did make such a finding.⁴⁶ The second problem is the conflict between interlocutory injunctions and freedom of the press. In practice, courts have always been very reluctant to order an injunction in libel cases, at least in interlocutory proceedings, and they have never done so if the defendant said that he/she intended to plead justification.⁴⁷ Now, s. 12(3) of the Human Rights Act 1998 states that no relief that might affect the Convention right to freedom of expression is to be granted in order to prevent publication

⁴³ S. 4(5) Defamation Act 1996.

⁴⁴ Under s. 2 of the Libel Act 1843, the defence of apology and payment in court is available to newspapers and periodicals that have published a libel without malice or gross negligence. The newspaper may publish a full apology and pay money in court as amends. This defence is, however, seldom used in practice. See M. Jones, *Textbook on Tort*, at 511–12; V. Harpwood, *Principles of Tort Law* (4th edn., London: 2000) at 378.

⁴⁵ The jury's jurisdiction was introduced with Fox's Libel Act 1792. For the historical background, see the speech by Nourse LJ in *Sutcliffe v. Pressdram Ltd* [1991] QB 153, at 181. See also L.J. Smith, 'Neuere Entwicklungen', at 311–2. An exception can be made under s. 69 of the Supreme Court Act 1981 if the court is of opinion that the trial requires any prolonged examination of documents which cannot be conveniently made with a jury. See, for example, *Aitken v. Preston and Others* [1997] EMLR 415.

⁴⁶ *William Coulson & Sons v. James Coulson & Co.* (1887) 3 TLR 46; *Kaye v. Robertson & Anor* at 67. Vice versa, under Part 24 of the Civil Procedure Rules 1999, the court may only strike out a claim by summary judgment if there is no evidence fit to be left to a jury on the essential issue; see *Alexander v. Arts Council of Wales* [2001] 1 WLR 1840; *Wallis v. Valentine* [2003] EMLR 8, 175.

⁴⁷ See *Schering Chemicals Ltd v. Falkman Ltd and Others* [1982] QB 1, at 17–18, per Lord Denning MR; *Kaye v. Robertson & Anor* at 67.

before trial, unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.⁴⁸

If the defendant is liable for libel, the claimant is entitled to damages. At first instance, these are determined by a jury.⁴⁹ Only in cases of overly excessive awards, could an order for a new trial be made on appeal.⁵⁰ However, after some spectacularly excessive jury decisions in defamation cases, s. 8 of the Courts and Legal Services Act 1990⁵¹ was adopted in order to entitle the Court of Appeal to deal with excessive awards by the jury. The Court does so by ordering a new trial or by substituting the sum awarded by the jury with such a sum as appears proper to the Court. The Court of Appeal has exercised this right repeatedly,⁵² arguing that the notion of ‘excessive’ under s. 8 of the Courts and Legal Services Act 1990 expresses a smaller difference between the sum awarded and the proper sum than what was necessary prior to the adoption of the Courts and Legal Services Act 1990.⁵³

In defamation actions, the principle of *restitutio in integrum* has a highly subjective element. In fact, the sum awarded should be such that the claimant can, in the future, point at it and convince a bystander of the baselessness of the charge. Compensation thus serves two goals: vindication of the claimant, and consolation to him/her for a wrong.⁵⁴

The factors that are to be considered in determining libel damages are as follows:⁵⁵

⁴⁸ ‘Likelihood’ has been understood by English courts to be a standard that is slightly but insignificantly higher than the previously applied standard of ‘real prospect of success’. See *Imutran Ltd v. Uncaged Campaigns Ltd* [2001] 2 All ER 385, at 391, per Morritt V-C; *A v. B plc and Anor* [2003] QB 195, at 205. This interpretation was reinforced by the House of Lords in *Cream Holdings Limited v. Banerjee* [2005] 1 AC 253.

⁴⁹ See s. 69(1) Supreme Court Act 1981, Ch. 54.

⁵⁰ See, for example, *McCarey v. Associated Newspapers Ltd (No. 2)* [1965] 2 QB 86, at 111, per Wilmer LJ: ‘divorced from reality’; *Sutcliffe v. Pressdram Ltd* at 176: ‘so excessive that no twelve men could reasonably have given them’.

⁵¹ Ch. 41.

⁵² For an excessive award, see, for example, *John v. MGN Ltd* [1996] 2 All ER 35 (£350,000). The jury award of £1.5 million in a libel case was held to be a violation of Art. 10 ECHR, see ECHR, judgment of 13 Jul. 1995, *Tolstoy Miloslavsky v. United Kingdom*, (1995) 1 *Yearbook of the European Convention on Human Rights*, 283, at 285–6. For an overview, see *Campbell v. News Group Newspapers Ltd* at 996 *et seq.*

⁵³ See *Rantzen v. Mirror Group Newspapers (1986) Ltd and Ors* [1994] QB 670, at 685.

⁵⁴ *Broome v. Cassell & Co.* [1972] AC 1027, at 1071, per Lord Hailsham.

⁵⁵ See *Kiam v. MGN Ltd* [2002] EMLR 25; *Campbell v. News Group Newspapers Ltd* at 975.

- (1) the objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it was published, and any repetition;
- (2) the subjective effect on the claimant's emotions;
- (3) matters tending to mitigate damages, such as the publication of an apology;
- (4) matters tending to reduce damages, for example, evidence of the claimant's bad reputation;
- (5) special damages; and
- (6) vindication of the claimant's reputation past and present.

In cases of gross negligence, and, in particular, in cases of malice, so-called 'aggravated damages' can be awarded.⁵⁶ Aggravated damages may also be awarded with the aim of compensating for the subsequent conduct of the defendant. Any refusal to apologise may be considered here.

Furthermore, the jury can award 'exemplary or punitive damages'. This applies, in particular, to cases where the defendant knew that he/she was committing a tort when he/she published the statement, or was reckless over whether his/her action was tortious or not, and decided to publish in the end because the prospect of material advantage outweighed the prospects of material loss. Exemplary damages should teach the defendant, and the world, that tort does not pay.⁵⁷ Notably, the mere fact that the libel was committed by a newspaper in the course of its business does not mean that it is a libel for which exemplary damages should be awarded.⁵⁸

English law does not give the claimant a right of reply. This would be regarded as an undue restriction of the freedom of the press.⁵⁹ Some elements of the English law of defamation, however, encourage the press to consult the person who is to be reported on in advance. For

⁵⁶ *Broome v. Cassell & Co.* at 1072, per Lord Hailsham.

⁵⁷ For the general principles, see the landmark case of *Rookes v. Barnard* [1964] AC 1129, at 1227, per Lord Devlin. For their application in defamation cases, see *Broome v. Cassell & Co.*; *Riches v. News Group Newspapers* [1986] QB 256, with critical remarks on the jury's competence to award exemplary damages by Stephenson LJ, at 269. See also G. Wagner, 'Geldersatz für Persönlichkeitsverletzungen' (2000) *Zeitschrift für Europäisches Privatrecht*, 200 at 216–7.

⁵⁸ *Manson v. Associated Newspapers Ltd* [1965] 1 WLR 1038, at 1043.

⁵⁹ See the Calcutt Report, at para. 11.4. See also P. Schmitz, *Persönlichkeitsrecht als Bürgerliche Freiheit im englischen Recht unter besonderer Berücksichtigung der Kollision mit der Pressefreiheit* (Frankfurt: 1996), at 232 *et seq.*; B. Brömmekamp, *Die Pressefreiheit und ihre Grenzen in England und der Bundesrepublik Deutschland* (Frankfurt: 1997), at 81; G. Gounalakis and R. Glowalla, 'Reformbestrebungen zum Persönlichkeitsschutz in England (Teil 2)' (1997) *Archiv für Presserecht* 775.

example, the defence of fair comment usually requires consultation in advance. Furthermore, offers of amends have a similar function, with the important distinction that the press is the author of the rectification, while the claimant still does not have a right of reply.⁶⁰ Finally, the refusal to apologise may infer aggravated damages.

In addition, the Code of Conduct of the Press Complaints Commission provides for a 'fair opportunity for reply to inaccuracies ... to individuals or organisations when reasonably called for'. This clause cannot, of course, be enforced by individuals. It has even been misused by the media sometimes to surface the defamatory story once again.⁶¹

(b) The journalist alleged some facts related by a third person, which then turned out to be false.

Under the law of defamation, this would not change anything, in principle, since the journalist would have to prove that the alleged facts were true. Mere unfounded reliance on a third person is not, as such, a defence in defamation cases.

In *Reynolds v. Times Newspapers*, the House of Lords set out a number of criteria for assessing whether or not the press acted in a manner that can broadly be described as 'responsible journalism',⁶² including the seriousness of the allegation, the nature of the information and the extent to which it is of public concern, the source of the information, the steps taken to verify the information, the status of the information, the urgency of the matter, whether comment was sought from the person defamed, the tone of the article and the circumstances of the publication, including the timing.⁶³

A lesser form of defence is available in cases where the claimants cannot establish the truth of the suspicion raised but can justify that the claimant him- or herself triggered reasonable grounds for suspicion. In such cases, the defendant must usually focus upon some conduct by the claimant that in itself gives rise to suspicion. In exceptional situations strong circumstantial evidence may be sufficient, whereby hearsay evidence is no longer excluded. Matters post-dating publication are irrelevant.⁶⁴

⁶⁰ See B. Brömmekamp, *Die Pressefreiheit*, at 81.

⁶¹ See G. Gounalakis & R. Glowalla, 'Reformbestrebungen zum Persönlichkeitsschutz' at 773.

⁶² *Reynolds v. Times Newspapers Ltd* at 202, per Lord Nicholls of Birkenhead.

⁶³ *Ibid.* at 205.

⁶⁴ For details, and for the development of this defence, see *Dr Grigori Loutchansky v. Times Newspapers Ltd and Ors* [2002] EWHC 2726, at para. 48 *et seq.*

III. Metalegal formants

While not having formed part of formal constitutional law, the importance of a free press has always been emphasised by the English courts,⁶⁵ and English courts have always considered this element of common law as being reflected by the ECHR.⁶⁶ This opinion has been reinforced by the introduction of the Human Rights Act 1998 explicitly incorporating Art. 10 ECHR on freedom of expression.⁶⁷ Certainly, freedom of the press is restricted if the press must always be able to prove all defamatory statements, i.e. all statements that do harm to a person's reputation in the eyes of right-thinking members of society. This effect has been called the 'chilling effect' of the law of defamation on freedom of expression.⁶⁸

Finland

I. Operative rules

There seems to be no possibility of an injunction in order to hinder the publishing of false information about the politician. The politician is entitled to damages based on the fault of the journalist, the publisher or the editor-in-chief.

II. Descriptive formants

According to Ch. 24, s. 9 of the Finnish Penal Code, the crime of defamation is committed if a false statement or innuendo is made which is likely to cause damage or suffering to the offended person. The person making the statement can only avoid penal consequences if he/she has well-grounded reasons to believe that the statement is true. The Government Bill provides that the mass media in particular have to carefully scrutinise whether an alleged fact is true or not. One source may not be enough.⁶⁹ As was established in the Supreme Court case

⁶⁵ See, for example, *Schering Chemicals Ltd v. Falkman Ltd and Others* [1982] QB 1, per Lord Denning MR; *R v. Central Independent Television plc* [1994] Fam 192, at 202–3, per Hoffmann LJ; *R v. Secretary of State for the Home Department, ex parte Simms and Anor* [2000] 2 AC 115, at 125 *et seq.*, per Lord Steyn; *Mills v. News Group Newspapers Ltd* [2001] EMLR 41, 957, at 965.

⁶⁶ See *R v. Secretary of State for the Home Department, ex parte Simms and Anor* at 131, per Hoffmann LJ.

⁶⁷ See *Mills v. News Group Newspapers Ltd* at 965; *Reynolds v. Times Newspapers Ltd* at 206, 208, per Lord Steyn.

⁶⁸ See, for example, *Reynolds v. Times Newspapers Ltd* at 170. See also E.M. Barendt, *Libel and the Media: The Chilling Effect* (Oxford: 1997).

⁶⁹ Government Bill 184/1999, 36.

1997:185, there is a duty on the journalist and the editor-in-chief to verify that the statement is true.⁷⁰ If the false statement or innuendo is made through the mass media, for example, and the defamation as a whole is considered aggravated, then the crime is characterised as aggravated defamation according to Ch. 24, s. 10 of the Penal Code.

Since the reform of the Finnish Constitution in 2000 and the previous reform of fundamental rights in 1995, freedom of speech (Ch. 2, s. 12 of the Finnish Constitution) is considered to be so fundamental that the possibility of injunction is practically non-existent.⁷¹ There is no legislation which, in general, makes an injunction possible in respect of defamatory acts. The use of injunctions has not been based on an unwritten principle of law either.⁷² However, according to s. 10 of the Act on Freedom of Speech in Mass Communication (460/2003), the politician has a right to have the false statement corrected in the newspaper. According to s. 25, the victim of the defamation can demand at trial that the defamation judgment be published.

In addition to criminal remedies, which are not discussed here, the remedies available to the victim also include a claim for damages. As defamation is a punishable act in both its normal and aggravated form, compensation for pure economic loss is possible according to Ch. 5, s. 1 of the Tort Liability Act. If the politician has suffered pure economic loss, i.e. loss that has no connection with physical damage to property, and can prove this – which can be a difficult task – he is entitled to damages. In addition, the politician has a compensatory claim for anguish according to Ch. 5, s. 6 (in its amended form 509/2004, which came into force on 1 January 2006), as a person is entitled to compensation for any anguish suffered if his/her liberty, peace, honour or private life has been offended through a punishable offence. According to the provision, the likely anguish suffered should be taken into account by considering the form of the offence, the position of the offended, the relationship between the offender and the offended and the publicity of the offence.⁷³ The action of the newspaper in this case is clearly

⁷⁰ According to P. Tiilikka, *Sananvapaus ja yksilön suoja – Lehtiartikkelin aiheuttaman kärsimyksen korvaaminen* (Vantaa: 2007), at 534, there are no definite rules on when the defendant has presented enough evidence to prove that he/she had well-grounded reasons for the statement.

⁷¹ S. Manninen, 'Hallitusmuodon uusi sananvapaussäännös', in Nordenstreng (ed.), *Sananvapaus* (Juva: 1996) at 25.

⁷² See T. Vuortama, *Journalisti 15/1999*, www.journalistiliitto.fi/journalisti/arkisto/1599/ala/alakerta.htm (9 June 2003).

⁷³ According to the Government Bill 167/2003, 59–60, the situation has to be judged objectively and the compensation must not cover any economic loss.

one of the punishable acts which give the right to compensation for anguish.⁷⁴

As Finland is deemed to be one of the least corrupted countries in the world,⁷⁵ an allegation that a politician is corrupt is a highly offensive and humiliating statement. Although the position of a politician can legitimate even strong criticism against him/her (see Ch. 24, s. 9(2) of the Penal Code), in the case at hand the honour of the politician is clearly affronted by the statement and he would be entitled to damages for anguish. Although some recent court cases show a tendency to award higher amounts of damages, it is difficult to estimate the adequate amount of damages in this case. In light of some court cases debated in the press, €10,000–€20,000 would be a very rough estimate. If the defamation is aggravated according to Ch. 24, s. 10 of the Penal Code, the amount of damages will normally be higher than that awarded for a ‘normal’ form of defamation.⁷⁶

⁷⁴ In the Supreme Court case 1980 II 86, two civil servants were indirectly accused in a newspaper article of violating their official duty. The editor-in-chief, who did not reveal the author of the article, was found guilty of defamation and was obliged to pay damages to the civil servants in the sum of 10,000 FIM (€1,682) each. For a thorough analysis of the new provision, see P. Tiilikka, ‘Lehtiartikkelin aiheuttaman henkisen kärsimyksen korvaamisesta: vastuun perusteen arviointia’, in *Kuka valvoo vapautta? Viestintäoikeuden vuosikirja 2005* (Helsinki: 2006) at 172–87.

⁷⁵ See www.verkkouutiset.fi/arkisto/Arkisto_2000/15.syyskuu/korr3700.htm (28 February 2003).

⁷⁶ In the Supreme Court case 2002:55, the name of the girlfriend of a former Finnish civil servant was mentioned in a television programme where the crimes of the former civil servant were reported. According to the Supreme Court, the girlfriend was entitled to damages of €8,000 for the anguish. In a Finnish doping case on 11 Nov. 2000, the Helsinki Appellate Court entitled a sportsman, who had been accused of using banned hormones, to damages for the anguish to an amount of over €21,000. In the Supreme Court case 1997:185, the amount of the compensation for the anguish was 75,000 FIM (€12,614), see L. Sisula-Tulokas, *Contract and Tort Law: Twenty Cases from the Finnish Supreme Court* (Jyväskylä: 2001), at 124–6. Recently the Helsinki district court granted €20,000 to a woman who had been found defamed in an aggravated way by a gossip magazine in two different articles. She was alleged to have been an alcoholic and to have had her children only for money. See Helsingin Sanomat 31.12.2005. For an analysis of the amounts granted during the period 1980–1990, see Sisula-Tulokas, *Sveda, värk och annat lidande* (Saarijärvi: 1995), at 141–4. The author addresses criticism regarding the low amounts of damages in the Supreme Court cases, but she sees some tendencies for higher amounts in some lower court cases. In the recent Supreme Court case 2006:62, a civil servant had been alleged of having committed a crime when he had given information in a report. However, the number of persons who had the possibility to identify the civil servant was low. Therefore, the civil servant was only entitled damages of €3,500.

The division of the liability for damages between the journalist, the publisher and the editor-in-chief⁷⁷ of the newspaper is based on the rules in Chs. 3 and 4 of the Tort Liability Act. The liability of the employee is regulated in Ch. 4. If an employee is found slightly negligent, he/she is not liable for damages.⁷⁸ If he/she is found guilty of an intentional act, he/she is normally liable to the full extent. In other situations, for example when the negligence is 'normal' or aggravated, he/she is liable for the damage to a reasonable extent. According to Ch. 3 of the Tort Liability Act, an employer is liable to the full extent for damage caused by his/her employees. As the journalist and the editor-in-chief are employed by the publisher,⁷⁹ their liability is secondary to that of the publisher according to the following rules: under Ch. 6, s. 2 of the Tort Liability Act, the employer is primarily liable whenever the act causing damage is unintentional; the employee is only liable if the compensation is not recoverable from the employer.⁸⁰

The liability of two employees is divided between them depending on their fault. The individual liability of the journalist depends on whether he/she has been the only person negligent and to what extent. If the defamation has been intentional, he/she has full liability. The liability of the editor-in-chief is also based on the degree of negligence. If the politician is granted compensation, the publisher will be liable for it to the full extent.

In principle, the amount of damages is not affected by the greater fault in case (a) compared to case (b), because the damage suffered is not dependent on the offender's fault.⁸¹

According to Ch. 10 of the Penal Code, as a further sanction, the profit of the crime can be declared forfeited to the state to the extent that it exceeds the damages.

⁷⁷ If the chief editor is not directly liable for the actual crime, he can still be punished for editorial misconduct according to s. 13 of the Act on Freedom of Speech in Mass Communication. Then, the chief editor is not liable for the compensation of anguish, see P. Tiilikka, *Sananvapaus ja yksilön suoja* at 364–5.

⁷⁸ This was the situation in the Supreme Court case 1982 II 42. The chief editor of a paper was found only slightly negligent.

⁷⁹ According to s. 14 of the Act on Freedom of Speech in Mass Communication, the publisher is liable although the author is not an employee of the publisher.

⁸⁰ See Supreme Court case 1982 II 42, where the journalist was found only secondarily liable compared to the publisher.

⁸¹ L. Sisula-Tulokas, *Contract and Tort Law* at 136.

III. Metalegal formants

The impossibility of awarding an interim injunction against a newspaper has been disputed. In some cases, the fundamental right to privacy (Ch. 2, s. 10 of the Constitution) and the fundamental right to freedom of speech could create a ground for an interim injunction against a newspaper in order to avoid a clear case of defamation, for example.⁸²

France

I. Operative rules

The politician can bring an action against the journalist, the editor-in-chief, and the publisher of the newspaper based on the 1881 Act on Freedom of the Press (*Loi sur la liberté de la presse*). The politician can thus obtain damages (non-economic loss) in criminal proceedings. However, this is subject to the very strict procedural requirements set out in the 1881 Act. He cannot sue in general private law (*Code Civil*). It is quite improbable that the politician will obtain an injunction to prevent the publication. He can, on the other hand, exercise his right of reply.

II. Descriptive formants

The Freedom of the Press Act (1881)⁸³ punishes the crimes (*délits*) of defamation (Art. 29(1): *diffamation*) and of insult (Art. 29(2): *injure*). The first encompasses 'any allegation or imputation of a fact which causes injury to the honour or reputation of the person or body to which the fact is imputed'. The second deals with 'any offensive expression, term of contempt, or invective not involving the imputation of any fact'. An Act of Parliament passed on the 15 June 2000 has levelled the penalty incurred for these two offences at a fine of €12,000. In addition, the prior sanction of imprisonment was removed.

According to the 1881 Press Act, defamation has the following five preconditions: that there is an allegation or imputation of a particular fact; that the fact is likely to injure honour or reputation; that a specific person is targeted; that the allegation is made in bad faith (the existence of which is, in reality, presumed); and that the allegation is made publicly.

⁸² J. Niemi-Kiesiläinen, *Sananvapaus ja silikonirinnat* (Oikeus: 2002) at 432, with reference to E. Havansi, *Uusi turvaamistoimilainsäädäntö selityksineen* (Jyväskylä: 1994) at 63. J. Niemi-Kiesiläinen has, however, been heavily criticised by Vuortama, *Journalisti* 18/2002, www.journalistiliitto.fi/journalisti/arkisto/182002/ala/18aluske.htm (9 June 2003).

⁸³ *Loi sur la liberté de la presse du 29 juillet 1881*.

As to the first precondition, it concerns the criteria which distinguish between defamation and insult. To constitute defamation, the imputations should not be vague or general. Furthermore, they have to be in the form of an articulation of facts which could, without difficulty, be the object of evidence in the course of criminal proceedings.⁸⁴ This is the case in situation (b). However, on the contrary, the imputations concerning a vice or habit, which do not target a precise fact delimited in time, constitute insult and not defamation.⁸⁵ This is the case in situation (a).

The intention to harm does not need to be proven because the voluntary nature of the defamatory statements essentially implies bad faith. The author of the statements can rebut the presumption of bad faith by proving four elements:

- (1) the legitimacy of the objective pursued;
- (2) the absence of personal animosity;
- (3) prudence and moderation in the expression;
- (4) the existence of a serious enquiry.

The belief that the statements are true is irrelevant. He/she who imputes facts to another has the duty to verify whether those facts are true. If he/she does not, then he/she is, at the very least, a defamer because of his/her imprudence. In the instant case, in hypothesis (b) it is insignificant whether the facts stated by the journalist have been reported by a third person. Unless he/she can prove that he/she has made very serious efforts to verify the facts, the journalist is guilty of *difamation*.

Art. 29 of the 1881 Act punishes defamation without distinguishing whether the defamatory allegation is true or not. However, according to Art. 35(3) of the same Act ‘the truth of the defamatory facts can be proven at all times, except where the allegation concerns the private life of the person, refers to facts which occurred over ten years ago, or to facts constituting an offence which has been subject to either amnesty or prescription’. In cases where the exception of truthfulness is admitted, this exception is a ground for justification which rebuts the presumption of bad faith.⁸⁶ If the defamatory imputation turns out

⁸⁴ Cass. crim. 2 Dec 1980, Gaz. Pal. 1981, 2, 483.

⁸⁵ In practice the distinction is sometimes quite subtle. Thus to say ‘he is a liar, he is a thief’ is an insult (injury). In contrast, defamation is the accusation that another has committed a certain theft.

⁸⁶ Cass. crim. 14 June 2000, Bull. no. 225: ‘to have an absolving effect, the evidence of the defamatory facts must be perfect, complete and related to the whole scope of the defamatory imputation.’

to be true, the publication does not amount to a criminal offence or a tort. However, in this particular case, in hypothesis (b) the journalist cannot prove the corruption because his/her article rests on the allegations of a third person which have been shown to be false.

If the politician in question is a person exercising public authority (a minister, representative, senator, etc.), Art. 31 of the Press Act provides for more severe penalties in cases where the defamation or insult concerns his public function. The allegations must then have a direct and close association with the functions and qualities of the victim. On the other hand, if the politician is targeted in his private capacity, then the special protection of Art. 31 does not apply.⁸⁷

With regard to the defendants, the 1881 Press Act establishes a special regime to determine the persons responsible. Thus, Art. 42 of the Press Act contains an exhaustive list of persons considered as the principal authors of press infractions; this list includes the directors of the publication, its editors, writers, printers, vendors and distributors. It is a matter of a system of responsibility '*en cascade*', which means that the designated persons are called one after the other, in function of their rank, in the absence of a person of higher rank.

Once insult or defamation has been determined, the criminal court can grant the claimant damages to remedy the non-economic loss (*préjudice moral*) which he/she has suffered because of that insult or defamation. In practice, however, the politician's action against the newspaper on the basis of the 1881 Act runs the risk of not being very effective, given that there are numerous procedural obstacles. Firstly, the action is subject to the extremely brief prescription period of three months. The action must also respect a very strict prerequisite: to stop the running of the period of prescription, the first procedural action must qualify the incriminated facts and indicate the applicable laws in a very clear manner. The complaint definitively frames the debate; the judges do not dispose of any power to requalify the facts under a different criminal offence and thus condemn the defendant on the basis of a cause of action different from the one which had been invoked. Finally, the penalties are quite weak in practice.⁸⁸

Accordingly, one can ask whether the politician might bring an action before the civil courts on the basis of the general rules of tort

⁸⁷ TGI Paris 13 Oct. 1998, *Légipresse* 1999, No. 160, I, 42.

⁸⁸ B. Beignier, *L'honneur et le droit* (Paris: 1995) at 183.

law (Art. 1382, 1383 CC), the fault being an abuse of the freedom of opinion. The judiciary, however, is extremely reluctant to admit such an action. Up until 2000, such an action was subject to very strict conditions, either under malicious intent (*intention malveillante*) or recklessness (*négligence grave*). Nevertheless, in principle, the possibility of such an action was admitted.⁸⁹ In two decisions of 12 July 2000, the Plenary Assembly (*Assemblée Plénière*) of the Supreme Court (*Cour de cassation*) established that ‘the abuse of the freedom of expression provided for and punished by the Act of 29 July 1881 cannot be remedied on the basis of Art. 1382 *Code Civil*’.⁹⁰ This exclusion of the application of the general regime of tort liability in cases of defamation is criticised by some legal scholars.⁹¹ In any event, it is a solution which is extremely favourable to the press.

It is quite improbable that the politician will obtain an injunction to prevent publication. French law certainly recognises the possibility to bring a claim before the ‘*juge des référés*’ (summary proceedings in cases of urgency), ‘either to prevent imminent harm or loss; or to end a manifestly unlawful disturbance’ – see Art. 809 of the Code of Civil Procedure (*Code de procédure civile*). Despite this legal consecration of an intervention by the summary judge *a priori*, legal scholars remain as hesitant as the judiciary to grant measures intended to

⁸⁹ CA Versailles 20 May 1999, D. 1999, IR, 172: ‘While it is admitted that an action based on civil liability under Art. 1382 C.civ. can be allowed if the publication of expressions of thoughts appeared as a fault which causes damage to another – an action which is separate from the one regulated by the 1881 Act – the person who invokes such a principle must provide evidence of both the fault and the damage caused thereby’; CA Paris 28 May 1999, *Légipresse* 1999, No. 167, III, 170: no statutory provision bars the concomitant pursuit of an infraction against press laws and an injury sanctioned by the Civil Code. However, the plaintiff cannot bring an action under general civil liability law to escape the brief prescription period which applies to defamation.

⁹⁰ Cass. Ass. plén. 12 Jul. 2000, D. 2000, somm., 463; JCP 2000, I, 280, no. 2. Thereafter we can find consolidated case law: Cass. civ. 2nd ch. 8 Mar. 2001, *Légipresse* 2001, No. 181, III, 72; Cass. civ. 29 Mar. 2001, *Légipresse* 2001, No. 182, I, 77; JCP 2002, I, 122; Cass. civ. 9 Oct. 2003, D. 2004, jur., 590; Cass. civ. 29 Nov. 2005, JCP 2005, IV, 3785; Cass. civ. 7 Feb. 2006, D. 2006, IR, 532; Cass. civ. 21 Feb. 2006, D. 2006, IR, 674; Cass. civ. 30 May 2006, D. 2006, IR, 1636; Cass. civ. 12 Dec. 2006, *Légipresse* 2007, No. 240, III, 65; D. 2007, 541; Cass. civ. 31 May 2007, RDLI 2007/28, No. 923, p. 53.

⁹¹ G. Viney, ‘Chronique de responsabilité civile’ (2002) JCP, I, 122, No. 2; E. Derieux, ‘L’actualité du droit des médias en France’ (July 2000 – June 2002), *Auteurs & Media* 2002/6, at 508; S. Martin-Valente, ‘La place de l’Article 1382 du Code civil en matière de presse depuis les arrêts de l’Assemblée Plénière du 12 juillet 2000. Approche critique’ (2003) *Légipresse* No. 202, II, 71; E. Dreyer, ‘Disparition de la responsabilité civile en matière de presse’ (2006) D. chr., 1337.

prevent an injury to personal honour when freedom of expression is at stake.⁹²

Although the politician probably cannot prevent the publication of the article, he could use his right of reply to re-establish the truth. The right of reply, enshrined in Art. 13 of the Press Act, is in fact often granted and plays an important role. It commands the press to publish the reply of any person who considers him- or herself to be implicated in the matter. The right of reply thus has the re-establishment of a certain balance between individuals and the press as its objective. The right of reply does not depend on any fault committed by the journalist; the most legitimate and most objective information can give rise to a right of reply because it is not a sanction.⁹³

Germany

I. Operative rules

In situation (a), the politician cannot bring any claim. In situation (b), there is a basis for a preliminary injunction against the journalist, the publisher and the editor-in-chief to stop the publication. The politician also has a right of reply regarding factual statements.

Given the negligence of the journalist in situation (b), the politician can claim general damages after the publication of the article.

II. Descriptive formants

The right to honour and reputation is codified in the German Penal Code (§§ 185–187 *StGB*), but also protected as part of the uncodified ‘general personality right’⁹⁴ which allows damages under the general tort action in § 823(1) *BGB*.

In defamation cases, the acts of infringement are the allegation (by the journalist) and the dissemination (by the editor-in-chief and the publisher) of *facts* or *opinions* detrimental to a person’s reputation.

In cases where the claimant is informed beforehand about a forthcoming defamatory article, an injunction preventing publication is

⁹² TGI Paris 18 Nov. 1998, D. 1999, IR, 36: ‘the constitutional principle of freedom of expression bars a court, which is not empowered to control publications ex ante, from prohibiting the selling of a work which has not yet been written and whose actual content is still uncertain.’

⁹³ A. Chavanne, ‘Droit de rectification et de réponse’, in *Droit de la presse* (Paris: 2000) at 186, No. 60.

⁹⁴ BGHZ 13, 334 – Schacht-Leserbrief; BGHZ 26, 349 – Herrenreiter; BVerfGE 30, 173, 194.

granted against any person who is responsible for making a necessary contribution to the offensive act. The allegation and the circulation thereof constitute defamatory actions.⁹⁵ An injunction may even be granted against the distributor of a newspaper with regard to a defamatory article in one of the newspapers which he/she distributes, whether the distributor knew of the existence of the article or not.⁹⁶ A preliminary injunction may also be granted.

The principal question therefore is whether the defamatory act – fact or opinion – falls under press privilege.⁹⁷ In press cases, courts have developed a special press privilege regarding matters of public concern, relying on a partial codification under § 193 *StGB*.⁹⁸ This privilege is not restricted to media defendants.⁹⁹ Courts have developed guidelines for reasonable efforts to be made by journalists¹⁰⁰ in order to protect personality interests in media cases. An important factor is whether the publication contains a *mere opinion* or if *facts* have been stated.

In situation (a), the allegation is not based on any fact. Nevertheless, calling a person ‘corrupt’ may indicate that this person is willing to accept private benefits in exchange for his or her public service. Therefore, the allegation may signify a hidden fact. However, German courts tend to require a minimum amount of substance for an allegation to be seen as a ‘factual statement’.¹⁰¹ Merely calling a person corrupt will therefore be qualified as a subjective opinion. Those opinions fall under the privilege of freedom of expression/freedom of the press according to Art. 5(1) GG, as long as they are not being expressed with the mere intention of humiliating the person (so-called ‘*Schmähkritik*’).¹⁰² With respect to comments on the behaviour of public figures, there is a presumption that press articles do not intend to humiliate but simply wish to comment on a topic of public concern.¹⁰³ That is why an infringement of

⁹⁵ BGH GRUR 1969, 147, 150; BGHZ 66, 182, 189.

⁹⁶ BGH NJW 1976, 799, 800.

⁹⁷ BVerfG AfP 2006, 354, 355 f.; BGH NJW 1994, 124, 126; OLG Hamburg AfP 2006, 257, 258.

⁹⁸ *Wahrnehmung berechtigter Interessen*, BGHZ 3, 270, 280; with distinction BGHZ 13, 334, 338.

⁹⁹ BGHSt 18, 182 = NJW 1963, 665, 667.

¹⁰⁰ *Pressemäßige Sorgfaltsanforderungen* – standard of due care to be complied with by the press and other media; see BGHZ 31, 308, 313; BGHZ 143, 199.

¹⁰¹ BVerfGE 61, 1 = NJW 1983, 1415, 1416: comparison between the Bavarian party Christian Social Union (CSU) and an extreme right wing party (NPD); BGH NJW 2002, 1192, 1193.

¹⁰² BGHZ 45, 296, 310; BVerfGE 66, 116, 151; BVerfGE 82, 43, 51.

¹⁰³ BVerfGE 7, 198, 212.

the politician's honour will probably be denied. There will be neither a ground for an injunction nor for general damages in situation (a).

In situation (b), the defamatory allegation is based on facts which are reported in the article. The courts will not regard this as mere opinion. There is no general privilege for allegations of false facts under the German Constitution.¹⁰⁴ Factual statements are only privileged if they are true. However, the press does have a privilege to report on facts which cannot be proven, provided that the facts involve a matter of public concern¹⁰⁵ and provided that the press has made an effort to research the basis of the allegation.¹⁰⁶ The duty of journalists to take reasonable care varies according to the personality interest at issue.¹⁰⁷ An allegation of corruption is a serious reproach. Merely consulting one person as a source will not be considered sufficient.¹⁰⁸ Therefore, the press privilege in situation (b) does not apply. The politician has grounds for an injunction even if the publication has taken place before the facts were found to be false.

The easiest and fastest way for a claimant to correct a false statement is the so-called right of reply (*Gegendarstellungsrecht*) codified in the press Acts of the German *Länder*. The right of reply does not require a court judgment regarding the facts of the case. If certain (strict) formal requirements are followed, the press has to publish the statement. In urgent cases, the claimant can ask for a preliminary injunction.

A claim for damages for violations of personality rights requires the claimant to prove that the defendant – journalist, editor-in-chief, publisher – has acted negligently by not complying with standards of professional care. Usually, like the politician in this case, claimants will not be able to prove economic loss. Non-economic loss can, in principle, be compensated under German law if there is an injury to the body, health, freedom or sexual autonomy of a person (§ 253(2) *BGB*). With regard to personality rights, non-economic (general) damages can be claimed if

- (1) no other remedy is effective; and
- (2) a serious and grave violation of personality interests has taken place.¹⁰⁹

¹⁰⁴ BVerfG NJW-RR 2006, 1130, 1131; BVerfGE 99, 185, 197.

¹⁰⁵ BGHSt 18, 182 = NJW 1963, 665, 667.

¹⁰⁶ BGHZ 132, 13, 23 ff. = NJW 1996, 1131, 1134; BGH NJW 1997, 1148, 1149.

¹⁰⁷ BGHZ 31, 308, 313; BGHZ 68, 331 = NJW 1977, 1288, 1289.

¹⁰⁸ BGHZ 68, 331 = NJW 1977, 1288, 1289.

¹⁰⁹ BGHZ 26, 349, 356; BGHZ 35, 363, 369; BGHZ 39, 129, 133; BVerfGE 34, 269 = NJW 1973, 1221; BGHZ 128, 1, 15; BGHZ 132, 13, 27.

In cases where the suspicion of criminal behaviour is imputed, a serious and grave violation will be assumed.¹¹⁰

The amounts awarded by the courts have been modest in the past. In cases such as this one, politicians have been awarded sums between €5,000 and €25,000.¹¹¹ In recent years, courts have tended to grant even higher amounts of money in cases where the press has acted knowingly, wilfully and recklessly.¹¹² In these cases, the BGH has argued that monetary compensation has to prevent the press from committing violations. Some scholars in Germany have considered that this opens the door to punitive damages, which are, in principle, unavailable in German law.¹¹³

III. Metalegal formants

The dichotomy between the two notions of honour and reputation marks a clear difference between the German law and the common law concept of defamation. While the common law tort of defamation tends to protect only the public reputation of a person,¹¹⁴ the more idealistic concept of personality interests in German law has a clear focus on the question of honour.¹¹⁵ It must be said, however, that the importance of protecting the right to the inner feeling of dignity has lost its prominence and nowadays the right to reputation is more and more central to the interests of the courts. Where public figures are concerned, the courts tend to discuss the right to reputation only. This is due to the fact that public figures gain their 'social capital' from their reputation. Politicians are especially eager to protect their public image.¹¹⁶ More recent cases show that public employees in particular

¹¹⁰ OLG Karlsruhe NJW-RR 1995, 477.

¹¹¹ Among the highest amounts awarded are BGH GRUR 1969, 147 (accusation of being corrupt and various false allegations concerning the former minister of defence Franz-Josef Strauss: 25,000 DM); BGHZ 68, 331 = NJW 1977, 1288: 50,000 DM (accusation of corruptness concerning a member of the Federal Parliament).

¹¹² BGHZ 128, 1, 15: 180,000 DM for a series of paparazzi shots and a false interview concerning Princess Caroline of Monaco; OLG Hamburg, - 7 U 138/99 - 10.10.2000 (unpublished): 200,000 DM for about 40 paparazzi shots of Princess Caroline of Monaco.

¹¹³ Cf., *inter alia*, J. Rosengarten, 'Der Präventionsgedanke im deutschen Zivilrecht' (1996) NJW, 1935-1938; W. Seitz, 'Prinz und die Prinzessin - Wandlungen des Deliktrechts durch Zwangskommerzialisierung der Persönlichkeit' (1996) NJW 2848 (2848).

¹¹⁴ A. Caldecott and P. Moloney, 'Libel and Slander', in *Halsbury's Laws of England*, Vol. 28 (4th edn., London: 1997) para. 46, No. 42.

¹¹⁵ BGHSt 29, 67, 70; H. Ehmann, 'Zur Struktur des Allgemeinen Persönlichkeitsrechts' (1997) *Juristische Schulung* 195, 198.

¹¹⁶ BGH GRUR 1969, 147.

have a strong interest in protecting their professional and personal integrity against the allegation of corruption.¹¹⁷ This is due to the sociological observation that the reputation of a public figure has assumed a strong importance as a 'social currency'.¹¹⁸

Greece

I. Operative rules

In both situations (a) and (b), the politician can claim damages for economic and non-economic loss from the owner of the newspaper, the journalist, the publisher or the editor-in-chief. Additionally, the politician can claim an injunction for cessation and non-recurrence in the future and also has a right of reply.

It is unlikely that the politician would have any success in applying for interim measures against the newspaper to prevent imminent publication. Rather, it is probable that the court shall order the deletion of defamatory phrases or sections of the publication as an interim measure. This is a solution which arguably does not lead to a restriction of the freedom of the press.

II. Descriptive formants

According to a recent decision of the Supreme Court of Greece (*Areopag*), the notion of 'personality' is to be understood as 'a net of values, protected by the Constitution (Art. 2(1)), which consist of the moral substance of the human'.¹¹⁹ Elements of this 'net of values' are the honour and reputation of the person, mainly related to his/her private and family life, as these are recognised and protected by the Greek Constitution (Art. 5(2) and Art. 9(1)), the ECHR (Art. 8), and the ICCPR (Arts. 17 and 22). Each person's honour and respect is reflected in the appreciation and value given to this person by others.¹²⁰

According to Art. 57 CC, if a person suffers an injury to his or her personality, he or she can claim an injunction for cessation and the non-recurrence thereof in the future. The action is even possible against a defendant who is not responsible in the particular case, or incapable of being responsible at all.

¹¹⁷ BGH NJW 2000, 656 (press article accusing a public broadcaster of corrupt practices); BGHZ 143, 199 = NJW 2000, 1036 (satirical article accusing public servants of corruption).

¹¹⁸ Cf. L. Vogt, *Zur Logik der Ehre in der Gegenwartsgesellschaft* (Frankfurt: 1997).

¹¹⁹ Supreme Court Decision 854/2002. Court of Thessaloniki Decision 16923/2003. Decisions cited are available in Greek via the legal database 'NOMOS'.

¹²⁰ Supreme Court Decision 788/2000.

Furthermore, according to s. 2 of Art. 57 CC, a claim for damages in accordance with the provisions governing unlawful acts shall not be excluded (see Art. 914 CC).

According to Art. 914 CC, a person who has unlawfully and deliberately caused damage to another person shall be liable for compensation. An act or omission is unlawful in the sense of Art. 914 when it conflicts with principles of law. Since personality rights are absolute rights, any injury to personality is *prima facie* unlawful¹²¹ unless reasons exist that justify the otherwise unlawful character or nature of the act in question (e.g. defence, acts serving the public order, consent of the person whose rights are being infringed).

In relation to injuries to one's honour, the Greek Penal Code makes the following distinctions:

- (a) when a person's honour is offended by words, or by acts, or by any other means (Art. 361 PC);
- (b) when a person's honour or reputation is offended through the claiming or communication of facts to a third person by any means (Art. 362 PC);
- (c) when the facts communicated under (b) are false and the offender is aware that they are false (Art. 363 PC).

In the case of (b) above, if the facts communicated are true, the offensive act is not punishable according to the Penal Code (Art. 366(1)). However, this does not exclude claims for remedies in tort law. If the facts communicated concern the unlawful acts of a person and are brought before a court, Art. 366(2) PC states that the facts are considered to be true if the court makes a determination of guilt, and are considered to be false if the court makes a determination of innocence.

The following acts are not *prima facie* considered to be unlawful: negative judgments on scientific, artistic or professional activities; negative expressions contained in the documents of a public authority

¹²¹ Georgiadis, *General Principles of Civil Law* (in Greek) (2nd edn., Athens/Komotini: 1997) at 129; Papantoniou, *General Principles of Civil Law* (in Greek) (3rd edn., Athens: 1983) at 134. Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) at 66. See also, Supreme Court Decision 6/2004. In this case, a newspaper devoted some articles to the politicians (candidates for the Greek Parliament) of an electoral region, by mentioning their names and publishing their photos. These publications systematically and intentionally left out the name and photo of one of the candidates. The Supreme Court accepted that this behaviour (not mentioning the name, not publishing the photo) caused an injury to the honour and reputation of the person, because it was indirectly implied that this person was not worthy to become a member of the Greek Parliament.

and connected or related to its area of activity; acts pursuant to the execution of legal duties, the exercise of legal authority, the protection of a legal interest or any other justified interest (Art. 367(1) PC).

However, the acts remain unlawful when they are undertaken by the offender in spite of the fact that he/she is aware that they are false, or when the circumstances under which the offence is committed still prove that the defamation was intentional (Art. 367(2) PC).

In the present case, the violation of the politician's right to honour is committed through the press. According to Art. 14(1) Greek Constitution, every person may express and propagate his or her thoughts orally, in writing and through the press in compliance with the laws of the State. Furthermore, Art. 14(2) of the Constitution explicitly states that the press is free and preventive measures against the press are prohibited. However, freedom of information and freedom of the press may be restricted by law, but the restrictions should be of a general nature and should only have an *ex post* (after publication) character.

Scholars and courts have affirmed that the freedom of the press is not absolute. It should not lead to the sacrifice of any other lawful interest and is therefore subject to a general provision to respect the laws of the State. Regulations providing for a restriction of the freedom of the press may refer to national security, public order, the protection of honour and other rights of third persons, the protection of confidential information or the validity, objectiveness and impartiality of the courts. These restrictions are provided by Art. 10 of the International Convention of Rome (para. 2), which has been implemented into Greek national law by Law 2329/1953 and Decree 53/1974, and therefore has direct effect.

Freedom of the press and the social role of the press constitute legitimate rights and interests which could outweigh the unlawful character of the defamatory act in question. Persons directly connected to the function of the media, in particular journalists, are committed to reporting facts relevant to the behaviour of persons that attract public interest. Therefore, in order to facilitate and promote public information, the publication of articles containing harsh criticism and even negative comments regarding such persons is allowed.¹²²

However, if the statement is not supported by any facts or if the journalist alleged some facts which turned out to be false, the unlawful

¹²² See Supreme Court Decision 1177/2002, Supreme Court Decision 825/2002.

character of the act still remains. The unlawful behaviour lies in the journalist not having made a sufficient effort to verify the accuracy of the facts published and proceeding to publish the statement without a previous examination of the facts or after an insufficient examination of them.¹²³

Therefore, in both situations (a) and (b), accusing the politician of being corrupt amounts to defamation under the Penal Code, as well as an unlawful violation of his personality under Art. 57 CC. Moreover, the politician is entitled to damages under Art. 914 CC.

An additional legal basis for the liability of the journalist and the editor-in-chief could be Art. 920 CC, which regulates the specific instance of injury to personality rights. According to this provision, a person who either knowingly or through non-exculpable ignorance supports or spreads untrue information which endangers the credibility, profession or future activity of another person, shall be liable to compensate the latter.

As far as liability is concerned, Art. 1 of Law 1178/1981 provides that in the case of injury caused deliberately through a publication which damages the honour and reputation of a person, the owner of the printed medium is fully liable for reparation in respect of both compensation for pure economic loss and compensation for non-economic loss. The liability of the owner of the printed medium persists even if the intention to offend (Art. 919 CC) or the actual or constructive knowledge (Art. 920 CC) only concerns the author of the article (journalist), or in case the latter is unknown, the publisher or the editor-in-chief of the printed media¹²⁴ (strict liability).

In addition, the author (journalist), publisher and editor-in-chief of the printed medium are also liable according to the general rules of tort liability (Arts. 57, 59, 914, 919, 920, 932 CC, in combination with Arts. 361–363 PC).¹²⁵

With regard to the amount of damages to be awarded, Art. 2 of Law 1178/1981 provides for a minimum amount of €30,000 as compensation

¹²³ See Supreme Court Decision 1177/2002. See also Supreme Court Decision 780/2005: 'The unlawful character of the insulting or defamatory behaviour remains when under the given circumstances the act takes place with the intention to defame, in other words, the intention is oriented to dishonour another person through the rejection of the moral or social value of the person or by despising him.'

¹²⁴ See Supreme Court Decision 6/2004. See also Karakostas, *Personality and Press* at 244–5.

¹²⁵ See Supreme Court Decision 1462/2005.

for non-economic harm, particularly for violations made by a printed medium which has a large circulation and a minimum amount of €6,000 for violations made by a smaller medium.

Although the general rule of Art. 932 CC leaves the determination of 'a reasonable amount of money' to the court,¹²⁶ the specific rule of Law 1178/1981 sets a minimum amount. This intervention by the legislator in defining the minimum amount of compensation for injuries to personality which occur through the press was necessary because Greek courts have traditionally been very reserved in determining the amount of compensation. Therefore, academics have spoken of a practical impoverishment of the right to compensation.¹²⁷

Regardless of compensation for economic loss, when an unlawful act is committed the court may allot a reasonable amount of money as reparation for moral prejudice, according to Art. 932 CC. This provision especially applies in cases of injury to a person's health, honour, or dignity or when a person was deprived of his or her liberty.

Specific reparation for non-economic harm in the case of an infringement of personality rights is also provided for by Art. 59 CC. Such reparation consists of: (a) the payment of a sum of money; (b) a publication or public retraction; or (c) any other measure appropriate under the circumstances. In this instance, as well as in a situation where Art. 932 CC applies, reparation through the payment of a sum of money requires the offensive act to be the result of intentional, fraudulent behaviour.

The amount of the award for non-economic harm is left to be determined by the court. Courts take many factors into account, including the type and the gravity of the injury, the circumstances in which the injury was committed (place, time and medium), the liable person's degree of fault, the amount of publicity the injury has gained, combined with a variety of elements such as the social, professional and economic condition of all of the parties involved, the effect on the victim's social and professional life, etc.¹²⁸

¹²⁶ See Supreme Court Decision 1143/2003.

¹²⁷ Stathopoulos, in Georgiadis and Stathopoulos, *Civil Code – Interpretation by Article* (Athens: 1996) at 299, No 3. Karakostas, *Personality and Press* at 260. See also Supreme Court Decision 1462/2005: 'the regulation of Art. 1 para. 2 Law 1178/1981 ... has as its scope to ensure a minimum protection of citizens from particularly strong injuries to their honour and reputation due to publicity, therefore it conforms to Art. 2 para. 1 of the Constitution according to which, the respect and protection of human values is the main obligation of the State'.

¹²⁸ See, for instance, Supreme Court Decision 1177/2002.

Ireland

I. Operative rules

The politician has a cause of action in defamation against all parties concerned. If the politician was informed beforehand, it is likely that he would succeed in obtaining an injunction preventing the publication, particularly where the claimant could not prove that the statement was supported by any facts.

II. Descriptive formants

(a) *The journalist's statement is not supported by any facts.*

The publication is clearly defamatory of the politician (if untrue) and has identified the politician by name. The publishers of the article will not be able to plead truth as a defence as the statement is unsupported by any facts. It is also unlikely that a defence of qualified privilege could succeed as in order to establish such a defence, it is necessary for the defendant to prove that he/she did not act maliciously in publishing the material. As the statement is not supported by any facts, it could be difficult for the defendant to prove that his/her actions were not malicious or that the public had any interest in receiving information of this kind.

The politician's case would alter only slightly if the facts upon which the journalist relied were supplied by a third party and later turned out to be false. The article would still be considered defamatory and the journalist could not rely on the defence of truth. However, depending on the source of the information, the journalist could possibly plead qualified privilege, arguing that he/she had acted reasonably in light of the information that had been made available to him/her.

The law on defamation in Ireland is very similar to that of England and Wales. To succeed in an action for defamation it must be established that the defamatory statement had been published, i.e. communicated to a third party.¹²⁹ Publication can take two forms: namely, libel and slander. Libel is the publication of defamatory material in some permanent form, whereas slander assumes a more transient form. Thus, the publication of a statement in a newspaper article is libellous. Any person who makes a defamatory statement or who distributes a defamatory statement will be liable in defamation.¹³⁰ Therefore, not only will the journalist be liable but so too will his/her editor-in-chief for authorising the publication and the newspaper for disseminating the libel.

¹²⁹ *Berry v. Irish Times Ltd* [1973] IR 368 ¹³⁰ *Ibid.*

The politician in this case must objectively establish that the material was capable of lowering him in the eyes of right-thinking members of society.¹³¹ Falsely accusing the politician of being corrupt is capable of damaging his reputation. Furthermore, the politician must establish that he had been identified as the subject of the defamatory article.¹³² In this case, as the politician is well known to the public and has been named; he has been clearly identified for the purposes of the tort.¹³³ It is unlikely that the publishers have any defence. While truth is a complete defence to an action in defamation, it is clear that the statement in this case is not supported by any facts. In England, it is possible that the publishers could plead a modified form of qualified privilege in their defence.¹³⁴ While the status of the 'Reynolds privilege' under Irish law remains unclear, there is some evidence that such a defence could be pleaded in this jurisdiction.¹³⁵ Regardless, this defence is unlikely to succeed in the above scenario as such communications would only be privileged if the publisher took care in publishing the story and, in doing so, did not act maliciously. As the story is unsupported by any facts it does not appear that care has been taken in the publication of the article.

As in England, the politician would be entitled to obtain an interlocutory injunction preventing the publication of the article should he learn about it beforehand. The politician would also be entitled to damages should the article be published.

(b) The journalist alleged some facts related by a third person, which then turned out to be false.

Defamation is a strict liability tort. Essentially, whether the journalist was mistaken as to his/her facts is irrelevant. The journalist would not be able to plead the defence of truth. The journalist could plead the defence of qualified privilege as outlined in *Reynolds v. Times Newspapers Ltd*¹³⁶ and argue that, while ultimately mistaken, he/she had acted reasonably in the circumstances. The status of 'the source' could be significant in this regard as it would be evidence of whether the journalist's actions were appropriate. Such an argument is unlikely to succeed however, as the source of the information is only one of ten factors which the journalist should have regarded in deciding whether or not to publish the information.¹³⁷

¹³¹ *Quigley v. Creation Ltd* [1971] IR 269 ¹³² *Berry v. Irish Times Ltd.*

¹³³ *Ibid.* ¹³⁴ *Reynolds v. Times Newspapers Ltd* [1999] 4 All ER 609.

¹³⁵ *Hunter v. Gerald Duckworth and Co. Ltd & Anor.* [2003] IEHC 81.

¹³⁶ [1999] 4 All ER 609. ¹³⁷ *Ibid.* at 626.

III. Metalegal formants

Irish defamation law has not been subjected to legislative reform since the enactment of the Defamation Act 1961. In 2006, the Irish government published the Defamation Bill. The Bill is being debated by the *Oireachtas* (Parliament) and has not yet been enacted into Irish law. The legislation is intended to reform much of current Irish law in this area. One of the main proposals of the Bill is the creation of a defence of ‘fair and reasonable publication on a matter of public importance’ (s. 24). This defence is intended to alleviate the current harshness of Irish defamation law which is strict liability based. It proposes to do so by giving greater scope to the media, in particular, to publish information regarding matters of public interest. Under this new defence, a defendant will not be liable in defamation where it can be proven that he or she has acted reasonably and fairly in the publication of material which is deemed to be in the public interest. The fact that the material may be untrue does not necessarily affect this defence. Whether the publisher has acted reasonably in the publication of the material would appear to be measured in accordance with the principles of ‘best practice’ listed under s. 24(2) of the Bill. This list includes issues such as whether the defendant adhered to the Press Council code of standards, the extent to which the statement drew a distinction between suspicions, allegations and facts, etc.

The Bill also proposes to redefine the current definition of a defamatory statement. S. 2 provides that it is no longer necessary to establish whether the statement was capable of damaging the plaintiff’s reputation in the eyes of right-thinking members of society. Under the Bill, it will be acceptable if it can be established that the statement damaged the claimant’s reputation in the eyes of reasonable members of society, i.e. a class of people amongst whom the plaintiff’s reputation mattered. S. 37 of the Bill proposes to reduce the limitation period on defamation claims from six years to one year (two years in exceptional cases).

Italy

I. Operative rules

In both situations, the politician has a claim for an injunction against the editor-in-chief and the publisher of the newspaper in order to stop the forthcoming publication. If the article has already been published, the politician can claim for damages (both for economic and non-economic loss) against the journalist, the editor-in-chief and the

publisher. Furthermore, the politician can recover an additional sum of money ('reparation') from the journalist. Finally, the politician has a claim against the editor-in-chief and the publisher for the rectification of the defamatory material.

II. Descriptive formants

Defamation in the press is a criminal offence according to Art. 595 Penal Code (*CP*) and Art. 13 Press Act.¹³⁸ The requirements of this offence are indubitably met if the author of a press article accuses an identified person of corruption without any legal justification.

From a private law point of view, the offender's conduct violates the injured party's right to honour and personal reputation. This is the oldest Italian personality right. The former positivist conception of personality rights ('pluralistic' doctrine) did not acknowledge a comprehensive right to personality, but only individual rights specifically protected by Italian legislation. The existence of a right to honour and reputation was not questioned because of the explicit protection of honour and reputation in Art. 594 *et seq.* *CP*.

However, the old pluralistic doctrine is no longer valid. Now both the majority of scholars and the Italian Supreme Court (*Corte di cassazione*) follow the 'monistic' doctrine, according to which Art. 2 Italian Constitution (*Cost.*) is a direct source of personal rights, enforceable regardless of whether or not they are expressly acknowledged in specific Acts of Parliament.¹³⁹ The various personality rights are no longer considered as different rights, but as different aspects of the same right. Consequently, the right to honour and personal reputation is now seen as just one of the numerous manifestations of the constitutional protection of personality.¹⁴⁰

According to Art. 700 Code of Civil Procedure, the person whose honour and reputation are endangered by a forthcoming publication may seek an injunction.

If the damaging material has already been published, pecuniary and non-pecuniary remedies can be granted. In relation to non-pecuniary remedies, under Art. 8 Press Act the injured person has a claim for the rectification of untruthful and/or defamatory material. The rectification is a written declaration denying the truthfulness of the defamatory

¹³⁸ Legge 8 Feb. 1948 n. 47.

¹³⁹ Cf. Cass. 10 May 2001 no. 6507, *Giust. civ.* 2001, I, 2644; Cass. 7 Feb. 1996 no. 978, *Foro it.* 1996, I, 1253.

¹⁴⁰ See, e.g., Cass. 9 Jun. 1998 no. 5658, *Foro it.* 1998, I, 2387.

material or clarifying the facts in question by including further information. The rectification has to be published in its entirety¹⁴¹ in the same newspaper which had published the defamatory material, at the very latest in the second issue after the date of the court judgment.

The claim for rectification is not subject to the same strict requirements as the claim for damages. Rectification is granted to all persons who subjectively consider their personality rights infringed by a publication, regardless of the requirements of unjust harm and fault under Art. 2043 Civil Code (CC). One important function of rectification is to enable information pluralism. Thus, persons who are directly or indirectly involved in items reported by the press have the right to express their opinion about both the facts in question and their description or interpretation in the press statements.

An additional remedy for non-economic loss caused by criminal offences in general is the publication of the court's sentence in one or more newspapers (Art. 186 CP). This general remedy only applies if it is claimed for by the plaintiff. On the contrary, if the criminal offence is committed by a periodical, under Art. 9 Press Act the court has to order the publication of the sentence in the same periodical.

In relation to monetary remedies, the offended person can recover damages from the journalist, the editor-in-chief, the owner of the newspaper and the publisher, who are made jointly and severally liable according to Art. 11 Press Act. Art. 185 CP provides that damages for economic and non-economic loss are recoverable.

Under Art. 12 Press Act, the victim of defamation in the press is entitled to 'reparation' in addition to damages, which is a sort of private penalty.¹⁴² Reparation can only be recovered from the persons who committed the crime of defamation in the press, i.e. in principle only the journalist.¹⁴³ The amount of reparation depends on the gravity of the offence and the circulation of the publication.

All remedies, except rectification, are only granted if the harm is unlawful. In the present case, it is questionable whether or not this requirement is met. The protection of honour and reputation – and the constitutional protection of personality rights in general – is not

¹⁴¹ However, the newspaper is allowed to omit statements which constitute criminal offences and to shorten rectifications which exceed 30 lines (cf. Art. 8 Press Act).

¹⁴² Cf. Cass. 7 Nov. 2000 no. 14485, *Giur. it.* 2001, 1360.

¹⁴³ A complicity of the editor-in-chief and/or the publisher in the criminal defamation requires their positive knowledge of the journalist's defamatory

unlimited, because personality rights may conflict with other constitutionally protected rights. In particular, defamatory material may be legally justified by freedom of speech, freedom of the press and freedom of information (Art. 21 *Cost.*). Therefore, the right to honour and reputation must be balanced against the freedom of the press, the journalist's freedom of expression and the public interest in information.¹⁴⁴

If this balancing depended entirely on a free weighing-up of all of the circumstances of the case, legal certainty and equality could be threatened. Thus, Italian case law has regulated this balancing *in abstracto*, by developing requirements for the lawfulness of press statements which apply to all press cases. In this regard, the Supreme Court makes a distinction between the right to report news (*diritto di cronaca*) and the right to express criticism (*diritto di critica*).¹⁴⁵

In respect of the right to report news, according to a well-established Supreme Court opinion, press statements which are detrimental to one's honour and reputation can only be regarded as a lawful exercise of the right to report news if three requirements are met: (a) truthfulness (*verità*); (b) sufficient public interest (*pertinenza*); and (c) politeness, i.e. inoffensive formulation (*continenza*).¹⁴⁶

- (a) News can be 'true' not only in the sense of absolute, objective truth, but also in the sense of putative truth (*verità putativa*). News is putatively true if it is a result of 'serious and careful research',¹⁴⁷ i.e. if the journalist has fulfilled his or her duty of professional care by assessing the truthfulness of the news.
- (b) True news which is detrimental to a person's honour and reputation can only be lawfully published to the extent that it is pertinent, i.e. insofar as there is sufficient public interest in it. Journalists have a

statements: negligent ignorance is not sufficient. Cf. e.g. Cass. 3 Oct. 1997 no. 9672 *Giur. it.* 1998, 2276.

¹⁴⁴ See e.g. Cass. 6 Aug. 2007 no. 17172, www.eius.it/giurisprudenza/2007/104.asp.

¹⁴⁵ See, also for further references, A. Pace and F. Petrangeli, 'Diritto di cronaca e di critica', in *Enciclopedia del diritto* (Milan: 2002) at 338; M. Chiarolla, *La diffamazione a mezzo stampa - analisi critica della normativa tra diritto di cronaca, diffamazione, privacy* (Forlì: 2004); D. Chindemi, *Diffamazione a mezzo stampa (Radio-Televisione-Internet)* (Milan: 2006).

¹⁴⁶ Cass. 24 Jan. 2000 no. 747, *Resp. civ.* 2001, 156. This is a firmly established principle: for a recent confirmation see Cass. 19 Jan. 2007 no. 1205, *Guida al diritto* 2007, 1269.

¹⁴⁷ See, e.g., Cass. 13 Feb. 2002 no. 2066, *Foro it.* I, 2322; Cass. 19 Jul. 2004 no. 13346, *Giust. civ.* 2005, I, 3074; Cass. 16 May 2007 no. 11259, *Giust. civ.* 2007, I, 1851.

duty to limit their reports to information which is strictly necessary for satisfying the public interest. Unnecessary defamatory details should be omitted.

- (c) True and pertinent news should be reported in a civilised manner, by avoiding any offensive formulation.

With regard to the right to express criticism – other than the right to report news – the expression of one’s own opinion about facts or judgments of other persons is allowed. The Supreme Court has recognised that the requirement of objective truthfulness cannot apply to expressions of criticism, as every interpretation of facts and human behaviour is a subjective one.¹⁴⁸ However, like the reporting of news, the expression of criticism must concern matters of public interest and must be politely formulated. If these requirements are met, even harsh criticism is covered by freedom of speech.¹⁴⁹

Following the approach of the Supreme Court, if a publication reports news and expresses criticism at the same time, the assessment of the defamatory nature of the statement cannot be a formal one. It must give room to the subjective interpretation of the facts and to the criticism the author wishes to express.¹⁵⁰

If a press statement (reporting of news and/or expression of criticism) does not comply with one or more of the abovementioned requirements, it is to be regarded as an unlawful infringement of the right to honour and reputation. However, the question of whether or not those requirements are met is not just a matter of fact. For each requirement, a higher or lower threshold can be established according to the views of the person interpreting them.

III. Metalegal formants

As to situation (a), one may question whether or not a journalist, who states that a certain politician is corrupt, without alleging any facts, makes a lawful use of his or her right to express criticism. On this point, the Supreme Court seems to waver between two opposite positions. On the one hand, in 2000, the Court held that an article in a magazine (famous for its left-wing political criticism), which

¹⁴⁸ See, e.g., Cass. 24 Jan. 2000 no. 747, *Resp. civ.* 2001, 156.

¹⁴⁹ *Cf. ibid.*

¹⁵⁰ Cass. 24 May 2000 no. 7628, *Giust. civ.* 2002, I, 2444; Cass. 6 Aug. 2007 no. 17172, www.eius.it/giurisprudenza/2007/104.asp.

accused a well-known public person of having pursued ‘dishonest and sometimes criminal undertakings’, without alleging any particular fact, was covered by the right to express criticism.¹⁵¹ On the other hand, in 2002, the Supreme Court held that an expression of criticism should not be axiomatic, but supported by suitable reasoning. According to the latter judgment, if an allegation is either unmotivated or is motivated by non-existent facts, it cannot be seen as a lawful exercise of the right to express criticism.¹⁵² Both judgments seem to be supported by good reasoning. The solution to the dilemma could be the following: the journalist is still allowed to express criticism by accusing someone of criminal offences without mentioning any particular fact, but only in cases where the accusation is objectively supported by well-known facts. For instance, the facts which support the allegation that the former politician Bettino Craxi or the former judge Renato Squillante are corrupt are well-known; the authors of critical pamphlets are not obliged to mention those facts when they write about ‘the corrupt politician Craxi’ or ‘the corrupt judge Squillante’.

However, in situation (a), the journalist’s defamatory statement is neither accompanied by the mention of particular facts, nor supported by any well-known facts. Therefore, even if the requirements of sufficient public interest and polite formulation are met, the legal justification of freedom of speech does not apply.

Regarding situation (b), accusing someone of corruption on the basis of particular facts constitutes both reporting of news and expression of criticism at the same time. For facts which support the allegation that a well-known politician is corrupt there is always a sufficient public interest. Supposing the defamatory statement is politely formulated, the question is whether or not the journalist has fulfilled his or her

¹⁵¹ Cass. 24 Jan 2000 no. 747, *Resp. civ.* 2001, 156. The statement in question was the following: ‘And here they are (... names of several Italian politicians), who are going again, with their clean faces, along routes which Gelli and Ortolani had paved and soiled, in order to adapt them to their dishonest and sometimes criminal undertakings (see the intimate relationships between Gelli and the state executioner in Argentina and Uruguay.)’ Ortolani sued the journalist, the chief editor and the publisher for damages, but was unsuccessful.

¹⁵² Cass. 15 Jan. 2002 no. 370, *Dir. aut.* 2004, 362. In this particular case, the mayor of a small town had said, during a town council meeting, that a certain businessman had been entrusted with public works because he was the secretary of the local Socialist Party and that then the work relationship ended because of the

duty of professional care in assessing the truthfulness of the alleged facts.

According to well-established case law, no privileged sources of information exist. Journalists are not justified merely because they report another person's true declarations. Journalists must not only verify the reliability of the sources of information, they must also assess the truthfulness of the facts themselves.¹⁵³ The same principle is laid down in the self-regulatory Charter of Duties of Journalists: 'The journalist must always verify the information obtained by their sources, assess their reliability and check the origin of the news to be disseminated. In doing so, they always have to guarantee the substantive truth of the facts.'¹⁵⁴

The question is how far this duty extends. Sometimes the Supreme Court has been very strict. For instance, it held the accurate reporting of an actual complaint made by a nurse before a lower court to be unlawful where the facts complained of were false. However, this was only found out after publication. The Supreme Court held that the journalist's duty was to assess the truthfulness of the facts alleged in the nurse's complaint.¹⁵⁵

Nevertheless, in some recent judgments, the Supreme Court follows a more reasonable position. Accordingly, if the facts mentioned in the news are alleged in official documents such as judicial acts or parliamentary proceedings, the requirement of putative truth is met, provided that the source of the information is quoted in the journalist's report.¹⁵⁶

However, in situation (b), the facts are not mentioned in any official document. The journalist did not undertake any serious and careful research. He/she just reported facts which had been related by a third person. Therefore, the news is neither objectively nor putatively true and no legal justification applies.

businessman's lack of professional capacity. The businessman successfully sued the mayor for damages.

¹⁵³ See, e.g., Cass. 5 May 1995 no. 4871, *Foro it.* 1996, I, 657; Cass. 4 Jul. 1997 no. 6041; Cass. 2 Jul. 1997 no. 5947; Cass. 9 Apr. 1998 no. 3679, *Foro it.* 1998, I, 1834.

¹⁵⁴ Consiglio nazionale dell'ordine dei giornalisti, 'Carta dei doveri del giornalista' (1993), www.edizionets.com/etichecomunicazione/etica_com_publicitaria/carra_doveri_giomalista.pdf.

¹⁵⁵ Cass. 3 Mar. 2000 no. 2367, *Danno e responsabilità*, 2000, 490.

¹⁵⁶ Cass. 2 Nov. 2000 no. 14334; Cass. 24 May 2002 no. 7628, *Foro it.* 2002, I, 2322.

The Netherlands

I. Operative rules

In situation (a), the politician has a claim against the journalist, the publisher and the editor-in-chief for economic and non-economic damages. He can also claim for an injunction and for rectification. Whether or not the journalist has a claim in situation (b) depends on whether the newspaper relied upon the third party for good reasons.

II. Descriptive formants

(a) *The journalist's statement is not supported by any facts.*

Freedom of the press is of central importance in this case (Art. 7 Constitution; Art. 10 ECHR; Art. 19 ICCPR). However, Art. 6:162 of the Dutch Civil Code (*BW*) implies that every exercise of a right has its limits.¹⁵⁷ For example, in respect of the right to privacy, these limits include the right to one's honour and/or reputation. The circumstances that can be taken into account in this case include:¹⁵⁸

- (a) the nature of the suspicion and the seriousness of the foreseeable consequences of publication;
- (b) the seriousness of the imputation for the interest of society;
- (c) whether the publication was based on facts;
- (d) the way in which the imputation has been published;
- (e) whether there was a less harmful way to reach the objective;
- (f) the capacity/authority of the person who provided the information;¹⁵⁹
- (g) whether the person who invokes his/her right to privacy is a public figure and/or participates in the broader public discussion in society; and
- (h) the nature of the publisher and its method of gathering the information.

If defamatory or accusing facts are to be published or have been published, two interests have to be balanced. The first is the interest

¹⁵⁷ HR 5 Jun. 1987, NJ 1988, 702 (Goeree-case); HR 2 Feb. 1990, NJ 1991, 289 (Goeree-case). It is likely that the provision of Art. 6:162 meets the requirements of ECtHR 25 Mar. 1985, NJ 1987, 900 (Barthold) and ECtHR 20 Nov. 1989, NJ 1991, 738 (Markt Intern). With respect to the standard of Art. 21 Auteurswet which most likely meets the requirements of ECtHR 11 Jan. 2000, see NJ 2001, 74 (News Verlag). See G.A.I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 10.

¹⁵⁸ HR 24 Jun. 1983, NJ 1984, 801 (Gemeenteraadslid). These circumstances do not bind the judge in other cases and the list is not limited: HR 8 Mar. 1985, NJ 1986, 437 (Herrenberg); HR 6 Jan. 1995, NJ 1995, 422 (Parool-Van Gasteren).

¹⁵⁹ HR 27 Jan. 1984, NJ 1984, 803 (Ombudsman).

of a democratic society in being properly informed about facts which might detrimentally affect that society. The second is the interest of an individual not to be too imprudently accused openly by the press.

In respect of an individual's personal life, it is regarded as contrary to proper social conduct to publish defamatory facts about persons without having an objective basis for the statements that have been (or are going to be) published (circumstance (c) above).¹⁶⁰

In 1995, the Press Council in the Netherlands (*Raad voor Journalistiek*) published several rules of thumb in its annual report. However, these rules do not add substantially to the standards described above. In answering the question of whether information may be used, the Press Council suggests an accurate and conscientious balancing of the interest in publication (with regard to the actuality and interest of the subject matter) and the confidentiality interests of the particular individual implicated. Special weight is given to the protection of privacy.¹⁶¹ If the publication may be incriminating for an individual, the Press Council adopts a strict standard of the right to hear and be heard.¹⁶² This balancing of interests is in line with the decisions of the ECtHR.¹⁶³

Due to the fact that the ECtHR has repeatedly referred to the professional rules of the press in assessing conduct, it has been argued that it is appropriate to make these rules more substantial from a legal perspective. The procedure before the Press Council and the application of the code of conduct is presently too noncommittal. The arguments of journalists tend to be torn between two opinions. The first, in line with the freedom to express one's opinion, is that everyone has the freedom to be a journalist and therefore professional rules of conduct should not exist. The second is that journalists can claim a special position, for example, the right of nondisclosure. Therefore, it has been argued that Dutch judges should focus in more detail on standards for professional conduct. That would provide the journalists with a possibility to check whether they comply with these standards or not.¹⁶⁴

¹⁶⁰ HR 24 Jun. 1983, NJ 1984, 801; Schuijt, *Losbladige Onrechtmatige Daad*, nos. 26, 27, 36, 37.

¹⁶¹ Raad voor Journalistiek, Annual Report 1995, vuistregel 7.3, 7.4 (especially 7.4.19–7.4.11).

¹⁶² Raad voor Journalistiek, Annual Report 1995, vuistregel 7.4.6.

¹⁶³ E.J. Dommering, case note on ECHR, 18 May 2004, NJ 2005, 401 (*Le Grand Secret*).

¹⁶⁴ E.J. Dommering, case note on ECHR, 17 Dec. 2004, NJ 2005, 369 (*Pedersen & Baadsgaard v. Denmark*).

The publication of defamatory statements about a public person without any reference to supporting facts¹⁶⁵ is unlawful. If the statement has already been published, the person is entitled to claim for damages. According to Art. 6:95 *BW*, economic and non-economic damages have to be distinguished. Damages for economic loss can be recovered. Damages for non-economic loss can only be recovered if the requirements of Art. 6:106 *BW* have been met.¹⁶⁶ Since it is clear that the politician's honour or reputation has been impugned, he has a claim for non-economic damages. According to Art. 6:106 *BW*, the judge assesses non-economic damages fairly. Besides circumstances concerning the publication itself, the judge can take the profits that are derived from publication by the newspaper into account (Art. 6:104 *BW*).

Art. 6:104 *BW* only applies if the injured party actually suffered loss.¹⁶⁷ If he/she is infringed in his/her person, non-economic loss has occurred and so there is the possibility of applying Art. 6:104 *BW*. If, however, the patrimonial interest was the reason for the unlawfulness of the publication, it has to be proved that this interest was indeed harmed.

Art. 6:104 *BW* does not provide the injured party with a right to have the wrongdoer turn over the entire profits. It maintains that the judge can assess the damages on the basis of the net profits. The judge is not entitled to assess the damages in this (abstract) way, unless he/she has been asked to do so by the injured party and the injured party based this request on facts. The injured party does not have to establish the amount of profits. This implies that the judge needs to obtain information from the wrongdoer about the net profits. Although the wrongdoer does not have a clear duty to unveil information about profits, without this information the judge will assess the profits according to his/her insights based on the information which is available.

The injured party may choose to base his/her claim for compensation either on Art. 6:96 *BW* or on Art. 6:104 *BW*. He/she cannot obtain both compensation for any missed profits and the profits obtained by

¹⁶⁵ HR 27 Jan. 1984, NJ 1984, 802.

¹⁶⁶ Van Harinxma thoe Slooten, *Toegang tot het recht in perszaken* (Den Haag: 2006) explains that due to procedural difficulties (like uncertainties relating to the outcome of a legal procedure and the costs of a procedure) it can be hard in practice to get compensation when the press infringes someone's right to personality.

¹⁶⁷ *Parlementaire Geschiedenis, Invoering, Boek 6*, at 1266-70; HR 24 Dec. 1993, NJ 1995, 421.

the wrongdoer. He/she can, however, base his/her claim for damages both on Arts. 6:96 and 6:106 *BW* (in which case he/she has to introduce facts that support the claim).

If the claim is based on Art. 6:96 *BW* and Art. 6:104 *BW*, it is the judge who ultimately decides which provision the compensation is to be based on. If he/she considers Art. 6:104 *BW* to be applicable, he/she has to assess the damages according to Arts. 6:96 and 6:104 *BW* and has to choose the provision which is most favourable to the politician.

According to Art. 6:95 *BW*, the injured party can request compensation for loss and/or for deprived profits. He/she has to prove that the unlawful act of the author is the cause of the harm suffered by him/her. It is important to be aware of the two-step method that follows from Art. 6:98 *BW*, in combination with Art. 6:162 *BW*, and that method has to be used to establish causation.¹⁶⁸ According to this method, the requirement of *condicio sine qua non* (Step 1) is to be distinguished from the so-called ‘reasonable imputation’, which is based on all of the circumstances of the case (Step 2).¹⁶⁹ The rule of ‘reasonable imputation’ is normative and as such is based on the different values that form the very foundations of civil law as a whole.

The second step is part of the requirement of a causal relationship. The *condicio sine qua non* requirement is also known as the ‘but for’ test. According to this requirement, an act or omission is the cause of particular damage if, *ex post*, it is established that the damage would not have occurred ‘but for’ the act or omission, judged on the basis of the best knowledge and experience at the time. In other words, in order to determine whether an act or omission was the cause of the loss, one should hypothetically eliminate the act or omission and consider whether or not the loss would still have occurred without it. If the loss does not occur when the act or omission is eliminated, the act or omission is a *condicio sine qua non* for the loss.

One of the important goals of this knowledge-based approach of the *condicio sine qua non* test is to protect the defendant from compensating damage that has not been caused by his/her unlawful act or breach of

¹⁶⁸ C. Asser and A. S. Hartkamp, *Verbintenissenrecht, De verbintenissen in het algemeen* 4-I (Deventer: 2004), nos. 426, 429; A. S. Hartkamp and M. M. Tillema, *Contract Law in the Netherlands* (The Hague: 1995) at 144 and 145; J. H. Nieuwenhuis, ‘Eurocausaliteit’ (2002) *Tijdschrift voor Privaatrecht* at 4–11. This two-step method is applied in almost all important jurisdictions. See J. Spier, *Unification of Tort Law: Causation* (The Hague: 2000) at 127 *et seq.*

¹⁶⁹ Asser-Hartkamp, 4-I (2004), nos. 424–41b.

contract.¹⁷⁰ The defendant is not obliged to repair damage that would have been suffered anyway without regarding his/her unlawful act or breach of contract.¹⁷¹ If an act or omission is a factual cause of the damage, the next step is to assess whether the act or omission is a legal cause.

To decide whether an act or omission that is a *condicio sine qua non* is also a relevant legal cause, Art. 6:98 BW requires a second, normative assessment. This requirement expresses the idea that in the law, the test of *condicio sine qua non* is not sufficient in order to establish the reasonableness of the defendant's liability for the damages claimed. This rule employs a multi-factor approach and is also known as the rule of 'reasonable imputation'. As stated above, the rule of 'reasonable imputation' is normative and as such is based on the different values that form the very foundations of civil law as a whole. This is the reason why several of the arguments used in relation to the other requirements (foreseeability, nature of the damage, nature of the liability, nature of the breach of duty) for liability, for instance breach of duty and contributory negligence, are also used in relation to the attributability ('reasonable imputation') of damages based on Art. 6:98 BW.

With regard to the nature of the damages, damages are more readily regarded as attributable in respect of physical damage as opposed to economic loss. In relation to economic loss or deprived profits, the foreseeability has to be fairly considerable. If that is the case, for instance because the victim is dependent on his/her reputation for getting job or project offers, the pecuniary damage can be attributed to the liable person.¹⁷²

Injunction If the statement has not yet been published, the politician is entitled to ask for an injunction (Art. 3:293 BW) to prevent the newspaper from publishing the article, since publication of the information is unlawful (see above).

If the statement has been published, the politician can ask for rectification. If the politician's interests still continue to be an issue, he can also ask the publisher of the newspaper to recall the issues of the newspaper.

¹⁷⁰ J.H. Nieuwenhuis, 'Eurocausaliteit', at 11-12.

¹⁷¹ Asser-Hartkamp, 4-I (2004), no. 425.

¹⁷² *Ibid.* no. 433.

(b) *The journalist alleged some facts related by a third person, which then turned out to be false.*

If negative statements about a public person have been published with reference to facts alleged by a third party, whether the publication of these facts is unlawful or not depends on several conditions. An important condition is whether the information provided by the third party can be taken seriously (circumstances (c) and (f) above). This depends on the substance of the information that has been provided and on the capacity of the third party who gave the information.¹⁷³ Merely referring to the fact that the information has been provided by a third party is not enough to prevent the publication from being unlawful. The journalist has to check whether the information concerned can be taken seriously, for example because it is based on facts. He/she can do so by trying to source out other third parties who can confirm the information, or he/she can check the facts with the politician him- or herself.

Another condition is whether publication of the information is in the public interest (circumstance (b) above). If there is considerable public interest then being less scrupulous with the information is more justified than when there is no public interest concerned but only a need for sensation.¹⁷⁴

Assuming that the newspaper was not allowed to rely upon the information given by the third party, the answer is the same as under situation (a).

If the newspaper relied upon the third party for good reasons and the facts have already been published, the politician can ask for rectification afterwards.¹⁷⁵ If the facts have not yet been published and the politician informs the newspaper about the inaccuracy of the facts, it is then unlawful to publish the facts afterwards. In that case, the politician has a claim if the facts are published regardless and he can ask for an injunction to prevent the newspaper publishing these false facts in the future.

Portugal

I. Operative rules

In both hypotheses (a) and (b), the politician can claim damages against the journalist and the publisher. If the politician was informed before-

¹⁷³ Schuijt, *Losbladige Onrechtmatige Daad*, nos. 38, 70.

¹⁷⁴ *Ibid.* no. 32.

¹⁷⁵ HR 24 Jun. 1983, NJ 1984, 801 (Gemeenteraadslid).

hand about the forthcoming article, he is entitled to an injunction to stop the publication.

II. Descriptive formants

Cases of this kind are very common in Portugal, both in civil law and criminal law. The Portuguese Constitution (*Constituição da República Portuguesa, CRP*) guarantees the right to inform and be informed and freedom of the press as fundamental rights (Arts. 37 and 38); it also guarantees the right to personal honour and reputation (Art. 26). These rights, like all fundamental constitutional rights, are directly enforceable. Thus, there is often a conflict between these fundamental rights: on the one hand, the right to honour and (good) reputation and, on the other hand, the freedom of the press and the right to inform and to be informed.

There is a doctrinal division between two basic assumptions – one assuming that there is, in this kind of case, a conflict of rights which have the same level of dignity; another assuming that the right to honour and reputation is superior to the freedom of the press and the right to inform and to be informed. This second position finds support in the fact that the right to honour and reputation is a personality right and, therefore, an ‘ontological fundament of law’. The doctrine concerning a conflict of rights which are on the same level is more frequently followed, but the doctrine of the superiority of personality rights has been gaining ground in more recent decisions. The superiority of the rights to honour and reputation over the rights to inform and be informed is also based on Art. 37(3) *CRP*, which states that offences committed through the misuse (abuse) of the rights to inform and be informed are subject to the general principles of criminal law and shall be judged by the criminal courts.

In addition to the Constitution, the right to honour is also protected by the Criminal Code (*Código Penal, CP*), which punishes defamation and insult.¹⁷⁶

Also relevant in this regard is the Press Act (Act no. 2/99 of 13 January, *Lei de Imprensa, LI*), Art. 3 of which stipulates that the right to one’s good name, the confidentiality of the intimacy of private life, the right to one’s image and the right to one’s own words are the limits to the freedom of the press. Furthermore, journalists shall strictly respect

¹⁷⁶ The Portuguese is ‘difamação’ and ‘injúria’: the former is indirect defamation (i.e. it is not directly addressed to the victim but to others), while the latter is direct defamation (i.e. directly addressed to the victim).

the accuracy and objectivity of information. Therefore, the issue is not actually one of reporting and publicising the information, but the way in which this is done. This was confirmed by the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça, STJ*), in a decision dated 9 October 2003.¹⁷⁷ With regards to journalism, there is a profound difference between fact and opinion. What remains factual and truthful is, in principle, lawful; when it comes to the personal and subjective opinion of the journalist, it all depends upon the necessity and the proportionality of the comments vis-à-vis the lawful aim of informing. Arts. 24 to 27 of the Press Act grant the right of reply to those who are referred to in a text or image that could affect their reputation and good name, even if it is indirect.

In relation to civil liability, Art. 29 of the Press Act refers back to the general rules. However, in particular, it determines the joint liability of newspaper companies when an article or image is inserted in a periodic publication with the consent of the editor or his/her legal representative. Civil liability is governed by the general rules (Art. 483 *et seq.* of the Civil Code): there must be unlawfulness, fault, damage and causation. The burden of proof of both the knowledge and the non-opposition of the editor-in-chief falls on the claimant.

In addition, in connection with the exercise of journalism, Art. 14(a), (c) and (f) of the Journalists Statute (Act no. 1/99 of 13 January, *Estatuto do Jornalista, EJ*) determines that journalists should be rigorous and impartial, refrain from formulating accusations without evidence, respect the presumption of innocence, and not gather images or declarations which may harm someone's dignity. Furthermore, the Journalists' Union Code of Practice¹⁷⁸ contains principles that also contribute to determining the lawfulness of their conduct.

¹⁷⁷ All decisions of the STJ quoted can be found at www.dgsi.pt/.

¹⁷⁸ Portuguese journalists are governed by a Code of Practice that contains the following principles:

1. Journalists shall report the facts accurately and exactly and shall interpret them honestly. The facts must be proved, with a hearing of the parties having a reasonable interest in the case. Distinction between news and opinion must be made clear in the eyes of the public.
2. Journalists must combat censure and sensationalism, and shall consider accusation without proof and plagiarism to be serious professional faults.
3. Journalists must fight against restrictions to access to sources of information and attempts to limit freedom of expression and the right to inform. The journalists' obligation is to divulge offences against these rights.

Finally, Art. 70 of the Civil Code determines that:

1. the law protects individuals against any unlawful offence or threat of offence against their physical or moral persona;
2. regardless of any civil liability, the person threatened or offended may apply for measures adequate to the circumstances of the case to prevent the threat from being realised or to attenuate the effects of an offence already committed.

This regime does not require the existence of fault on the part of the agent; objective unlawfulness is sufficient. In addition, in general, it only applies to individuals, not to corporate persons. The measures to defend personality may be preventive, decreed in light of the danger of the injury, or may be attenuating when the injury has already been committed.¹⁷⁹ The right to honour has long been perceived as one of

4. Journalists must employ loyal means to obtain information, pictures or documents and must abstain from abusing the good faith of others. Their identification as journalists is the rule and other procedures are warranted only for reasons of unquestionable public interest.
5. Journalists must assume responsibility for all their work and professional activity and they shall also promptly rectify any information seen to be inexact or false. Journalists shall also refuse those acts contrary to their conscience.
6. Journalists shall identify their sources as the fundamental criterion. Journalists must not reveal their confidential sources of information in court, nor disregard commitments entered into, unless an endeavour has been made to try to use them to channel false information. Opinions must be attributed at all times.
7. Journalists must safeguard the presumption of innocence of the accused until the sentence is declared *res judicata*. Journalists must not directly or indirectly identify the victims of sexual crimes and delinquents who are minors, and they must forbid the humiliation of people and exacerbation of their pain.
8. Journalists must reject the discriminatory treatment of people on the basis of colour, race, creed, nationality or gender.
9. Journalists must have regard for the privacy of citizens except when the public interest is at stake or the person's conduct is manifestly in contradiction with the values and principles that he publicly defends. Journalists undertake, before gathering statements and pictures, to take into account the serenity, freedom and responsibility of the people involved.
10. Journalists must refuse duties, tasks and benefits that could compromise their status of independence and their professional integrity. Journalists must not take advantage of their professional position to broadcast news on matters in which they have an interest.

¹⁷⁹ A remarkable feature of the Portuguese personality rights legal framework is that, in contrast to most of the other European legal systems, it relies a lot more on injunctions than on compensation. Although Art. 70(2) CC outlines both legal instruments for the protection of a person's personality rights, it puts a

the specific personality rights which can be deduced from the general clause of Art. 70 CC.¹⁸⁰

Art. 70(2) CC entitles the person whose personality is threatened to be offended to ask for measures adequate to the circumstances of the case to prevent this threat from materialising. These measures to defend personality are applied by quite an expedited, simplified procedure, governed by Arts. 1474 and 1475 of the Civil Procedure Code (*Código de Processo Civil, CPC*). This procedure only applies to matters of urgency, and grants the judge very wide discretionary powers. The judge is free to examine the facts, collect evidence, order enquiries and collect such information as may be deemed appropriate. He/she may also refuse evidence which is considered unnecessary. A lawyer does not have to be appointed, save in the appeal stage, and sentence is passed within 15 days. In the decision, the court is not subject to strict legality criteria. The decision may be altered in the event of later circumstances. Appeal is only allowed in relation to what is decided on the basis of criteria of convenience. The court is not limited by what the claimant pleads and may decide in a different manner. The special characteristics of the personality procedure do not allow the inclusion of a request for damages, which must be subject to a separate action in keeping with the common rules. In any case, the effectiveness of this injunctive relief is very high and, therefore, Portuguese courts make a very extensive use thereof.

Moreover, a specific cause of action for injuries to reputation and honour is provided by Art. 484 CC: ‘Whoever affirms or spreads a fact which is able to harm the good name or reputation of a natural person or legal entity, is liable for the damage caused.’ According to consolidated Portuguese case law, this provision grants the victim a right to damages.¹⁸¹ Furthermore, Art. 496 CC expressly states that ‘when determining the amount of the damages, non-pecuniary damages have to be taken into account, as far as their seriousness warrants legal protection’.

The accusation of corruption is certainly harmful to a politician’s honour and reputation. Therefore, if no legal justification applies,

greater emphasis on the importance of an injunction for the protection thereof. In addition, Portuguese case law has also always placed more importance on injunctions. The amount of compensation awarded by Portuguese courts is usually low, which shifts the focus from claiming for compensation to the use of injunctions.

¹⁸⁰ STJ 13.03.1986. ¹⁸¹ STJ 10.10.2002.

the publication of the newspaper article in question would give rise to both civil liability under Arts. 70 and 484 CC, and criminal liability for defamation under Art. 180 CP. These two liabilities can be assessed by a civil and a criminal court respectively in parallel procedures. However, in case the politician decides to file a criminal complaint for the violation of Art. 180 CP, the request for the payment of damages can be made within the criminal procedure (Art. 129 CP, on civil liability for damage arising from a crime). Although made within a criminal procedure, this request is still regulated by the civil liability provisions contained in the Civil Code. Furthermore, even if the accused is acquitted in the criminal procedure, the court may still require him/her to pay damages (Art. 377 Criminal Procedure Code, CPP). If the criminal court does not possess the necessary elements to establish the amount of damages, it is for the civil court to determine the amount of damages in a later court procedure (Art. 82(1) CPP). The criminal court can also, of its own will or upon request, determine provisory damages or refer the parties to the civil courts if it does not think it can provide a rigorous decision or doing so would require intolerable delays to the criminal procedure (Art. 82(2) and (3) CPP). Finally, although testimonies and expert opinions (but not confessions, Art. 355(3) CC) given in a judicial procedure can, under certain circumstances, be used against the same party in another judicial procedure (Art. 522 CPC), judges retain their autonomy in appreciating the value of evidence in each procedure (Arts. 655 CPC and 127 CPP).

Both civil and criminal responsibility for press statements harming one's honour and reputation might be excluded by a lawful exercise of the constitutionally guaranteed freedom of the press (Art. 37 CRP). According to Art. 37(4) CRP, when the exercise of freedom of the press infringes a legal provision, any natural or legal person harmed thereby has the right of reply and rectification, and is entitled to compensation for the damage. Several decisions of the STJ have stated that once the journalist proves that the affirmation published was true or that he/she had legitimate reasons to believe so, there is no place for the payment of damages (*exceptio veritatis*).¹⁸² The publication of a true fact only gives rise to civil liability if it concerns the private life of the person envisaged and is offensive or uses prohibited expressions,¹⁸³ or if the

¹⁸² STJ 17.03.93, 5.03.1996, 26.09.2000, 14.05.2002, 5.12.2002.

¹⁸³ STJ 27.05.1997.

specific context leads to a particular attack on the honour and reputation of that person.¹⁸⁴

Although the above case law approach is the prevalent one in Portugal, some decisions have acknowledged an obligation to compensate the damage even if the fact that harms the honour is true, unless the publication of this fact serves a public interest.¹⁸⁵ However, these decisions seem to be in the minority. In any case, the balance between the fundamental, constitutionally protected rights to honour, reputation and freedom of the press is to be reached according to the principles of proportionality, necessity and adequacy.¹⁸⁶

Therefore, when reporting facts, the journalist must compose the text in the manner that is least harmful to the reputation of the persons referred to in it. This means that, even though the journalist has the right (or even the duty) to report a fact and to inform the public about it, he/she must not do so in a way which exceeds what is strictly necessary. The right and the duty to inform do not entitle the journalist to unnecessarily offend and harm the honour and personal reputation of persons.¹⁸⁷

In the case at hand, the politician may, at the outset, use the right of reply and publish such a reply as he deems to be adequate in the same newspaper, occupying the same space and with the same emphasis as the original statement. He may also complain to the High Authority for the Media if this right is not respected, as well as lodge a complaint with the High Authority against the newspaper should he consider that the publication of the text constitutes conduct that could infringe the legal rules applicable to the media (Art. 4 of Act 43/98 of 6 August).

The politician targeted may also bring criminal proceedings against the journalist who wrote the published text and against the editor, the assistant editor, the sub-editor or whoever specifically substitutes them, if they failed to prevent the publication despite having the power

¹⁸⁴ STJ 10.10.2002.

¹⁸⁵ STJ 26.04.94, 3.02.99.

¹⁸⁶ STJ 5.03.1996, 29.10.1996, 26.09.2000, 14.05.2002.

¹⁸⁷ Court decisions in this sense are common. See, e.g., STJ 26.09.2000 (in the event of a collision of the rights to freedom of the press and of information and expression of thought, both having the same constitutional hierarchy, one must seek to harmonise them, applying the provisions of Art. 335 CC. This means that freedom of expression cannot, in principle, threaten the right to good name and reputation, unless the public interest is at stake, which goes beyond the former, provided that the disclosure is made so as not to exceed what is required for the said disclosure); STJ 27.05.1997; STJ 05.03.1996, BMJ – Boletim do Ministério da Justiça – 455, 420.

to do so. If the article can be qualified as an opinion (and not as news) only the author may be held criminally liable. The qualification of the article as news or as opinion is therefore very important, a distinction that will have to be determined exclusively by the court.

The journalist may defend him or herself, alleging that the imputation was made in the pursuance of legitimate interests, for example, the defence of the general interest and of the good functioning of the political system and he/she may endeavour to prove the veracity of what he/she wrote (*exceptio veritatis*). If he/she is unable to prove the veracity of the imputation, he/she will have to convince the court that he/she had serious grounds to believe it to be true in good faith. With regard to proving good faith, the court will consider whether or not the journalist fulfilled the duty of information as imposed by the circumstances of the case, which is reflected in the final instance with due regard to *legis artis* and the rules of good practice. The duty of not making accusations without proof and respect for the presumption of innocence as imposed by the Journalists' Statute (Art. 14(c) *EJ*) and for the guidelines of their Code of Practice are of particular importance in this regard.

Specifically with regard to situation (a)

The journalist's action is clearly unlawful. It corresponds to committing the crime of defamation (Art. 180 *CP*), aggravated by the fact that it was committed by means or in circumstances which facilitated the dissemination of the defamatory statements (Art. 183(1) (b) *CP* and Art. 30(2) *LI*). It constitutes abuse of freedom of the press because of the violation of the right to one's good name, enshrined in Art. 3 *LI*. It grants the injured party the right of reply in the same newspaper (Arts. 24–27 *LI*). The journalist's action also infringes the duty imposed by the Journalists' Statute not to make accusations without proof and to respect the presumption of innocence (Art. 14(c) *EJ* and the respective Code of Practice).

The politician targeted is also entitled to be indemnified for economic loss and for pain and suffering (Art. 29 *LI* and Art. 483 *CC*). The amount of damages depends on, *inter alia*, the journalist's degree of fault.¹⁸⁸ The text written by the journalist must be held to be an opinion article since it is not supported by facts; to have the nature of a news article it would have to be factual. Therefore, if the journalist is clearly identified as the author of the text which was published, he/she alone will be liable. However, if the article was published with

¹⁸⁸ STJ 27.05.1997.

the consent of the editor then the newspaper company will also be jointly liable along with the journalist.

Compensation may be requested in criminal defamation proceedings if the claimant lodges a complaint with the Public Prosecutor, or in the civil proceedings if the injured party decides not to raise the criminal issue. The injured party often restricts him/herself to securing civil compensation. As a result of the defendant's better procedural position in criminal proceedings, it is easier to condemn him/her in civil proceedings.

In accordance with Art. 70 CC, the politician may bring special proceedings before the civil courts for the protection of personality and claim against the journalist for whatever he deems adequate and appropriate to remedy the injury suffered. If the politician was informed beforehand about the forthcoming article, he is entitled to obtain an injunction from the civil court to prevent the publication. This has already occurred in a case where a well-known architect applied for an injunction knowing that a magazine was about to publish erotic photos of him.¹⁸⁹ Disobeying this kind of injunction is criminally punishable.¹⁹⁰ Injunctions for the protection of personality may also be obtained after the offence; in this situation they shall be deemed to diminish the harm already caused and to avoid future harm if possible. The court may direct the seizure of the newspaper and order the journalist to publish a rebuttal of what he/she had published or even to publicly apologise. However, the court must be careful in weighing the proportionality, the adequacy and the reasonableness of the measure that it decrees. It must not allow the attenuating measure to become a retort or a vengeance.

Specifically with regard to situation (b)

If the journalist merely reproduces facts publicly affirmed by another and does so correctly, only that other person will be criminally liable. Nevertheless, if the facts are relayed to him/her in confidence by another person who is the source of this information, and if these facts are false, the journalist's liability will be neither excluded nor diminished. The risk of the accuracy and reliability of sources of information lies with the journalist. The STJ decided on 5 March 1996¹⁹¹ that 'conduct which

¹⁸⁹ STJ 5.02.1991.

¹⁹⁰ Disobeying a court injunction is criminally punishable according to Art. 348 CP.

¹⁹¹ STJ 5.10.1996, BMJ 455, 420.

affects the honour of another person is unlawful when it attributes dishonourable facts to the latter without the support of reliable sources’.

Scotland

I. Operative rules

The politician has a claim in defamation against the journalist, publisher and editor-in-chief. He will be entitled to an injunction and damages.

II. Descriptive formants

The law of defamation regulates the actionability of the injurious publication of statements or utterances about others. *Defamation* is a civil wrong that gives rise to an action for damages. It covers all communications which are injurious or which tend to lower the person in the eyes of society.¹⁹² The law distinguishes between written and spoken imputations. Whereas written defamation is normally referred to as libel and oral defamation as slander, the demarcation is of less importance in Scots law as it is in English law.¹⁹³ Defamation as a civil wrong is governed by the legal principles expounded by the institutional writers,¹⁹⁴ as supported by the judicial authorities and supplemented by statutory regulation relating to damages¹⁹⁵ and particular defences such as privilege.

A separate claim of verbal injury can be sustained in cases where *non-defamatory* statements may nevertheless be actionable because of malice and falsity.¹⁹⁶ This category refers to all actionable statements that are not in themselves defamatory. It has been referred to with

¹⁹² This classic English reasonable man test was pronounced by Lord Atkin in *Sim v. Stretch* [1936] 2 All ER 1237. The Scots authorities such as *Brownlie v. Thomson* (1859) 21 D 480, 485 and *Duncan v. Scottish Newspapers Ltd.* 1929 SC 14 apply a broader view: ‘What meaning would the ordinary reader of the newspaper put upon the paragraph “complained of?”’, per Lord Anderson in *Duncan* at 20.

¹⁹³ The action is simply referred to as defamation, see W. M. Gloag and R. C. Henderson, *The Law of Scotland* (11th edn., Edinburgh: 2001) at para. 31.1.

¹⁹⁴ See *Stair Memorial Encyclopaedia* (Edinburgh: 1996) Vol. 15, para. 525 *et seq.*

¹⁹⁵ Defamation Act 1952, Ch. 66; Defamation Act 1996, Ch. 31. Parts of the 1952 Act are still in force. The 1996 Act did not fully repeal the previous statute.

¹⁹⁶ Verbal injury includes slander of property, title or business, holding up pursuer to public hatred, contempt and ridicule, third party slander and other malicious falsehoods, see *Stair Memorial*, Vol. 15, para. 557; K. Norrie, *Defamation and Related Actions in Scots law* (1st edn., Edinburgh: 1995) Ch. 1, p. 5. It has since been given statutory sanction in relation to damages for defamation and verbal injury under

authority as a Scottish *equivalent* of the tort of malicious falsehood and is less commonly encountered than defamation.¹⁹⁷

Although Scottish authorities have, on occasion, made reference to the Roman law action of *convicium* as constituting an action in itself, this has recently been refuted with authority.¹⁹⁸ It seems that *convicium* was originally used by the institutional writers in its strict Roman sense of defamation, but has recently been used, possibly erroneously, in the context of malicious falsehood and is only to be equated with that English action.

Defamation constitutes a form of strict liability where malice and intent are irrelevant. In contrast, an action for verbal injury can only be raised where it can be shown that the injurious statements were inspired by malice or *dolus malus*. In the latter case of verbal injury, the pursuer must prove that the statements were untrue and were made with intent to injure.¹⁹⁹

Whether or not the article is defamatory is a question of law for the court, which will be decided after a preliminary summary hearing²⁰⁰ on whether the ‘statement is arguably capable ... of bearing a particular meaning or meanings attributed to it’.²⁰¹

In general, not only the statement complained of but also the heading and context of the publication may negate any possible defamatory effect. Under the notion of innuendo, a statement that is harmless in itself may, however, have connotations or a secondary meaning which, if read or understood in a certain way, could be defamatory. A distinction is drawn between a particular *turpitude* and *verba jacantia* or vague abuse, so that the latter will not constitute defamation.²⁰² The final question as

the Defamation Act 1952, s. 3 and subsequently the Damages (Scotland) Act 1976, Ch. 13, s. 2(4) and the Damages (Scotland) Act 1993, Ch. 5, s. 3.

¹⁹⁷ See *Stair Memorial*, at para. 557.

¹⁹⁸ *Ibid.* at para. 558.

¹⁹⁹ The facts given in question one would support a claim in defamation but not one for verbal injury, as there is no malice.

²⁰⁰ The Defamation Act 1996 now allows claims to be dealt with in summary proceedings, so that a decision as to whether or not the case should proceed to trial is made before a single judge under s. 8(3) 1996 Act. These provisions apply to both Scotland and England, see s. 8(5) 1996 Act. Defamation cases trials in Scotland would normally be heard before a jury at the Court of Session. There appears to be no limitation on the jurisdiction of a sheriff court to hear defamation cases, although there is only one reported trial, *Caldwell v. Bayne*, 1936 52 Sh Ct Rep 334; see Norrie, *Defamation and Related Actions* at 164.

²⁰¹ S. 7 Defamation Act 1996.

²⁰² See J. Erskine in J. Reid (ed.) *Principles of the Law of Scotland* (18th edn., Edinburgh: 1890) at para. 13.

to whether, in the circumstances, an interpretation of the newspaper article renders it defamatory or innocent is left to the court.²⁰³

Imputations or allegations of crime, a lack of moral integrity or dishonesty, either in general society or in the category of persons to which the pursuer belongs, are defamatory *per se*.

This present case clearly falls within the scope of action in defamation. The main defence available in the law of defamation is the defence of *veritas*: a successful claim can only be made where the statement objected to is untrue. If the statement is true, the maxim *veritas convicii excusat* operates as a total defence.²⁰⁴ There is a general presumption of *untruth* in Scots law, so that defenders must prove the truth of statements in their defence.

Various defences are available in cases of defamation, the most common being *privilege*, *fair comment* and *fair retort*,²⁰⁵ although these are not relevant to the case at hand. Privilege is dealt with below.²⁰⁶ No defence of fair comment is available where the facts are *not true* and therefore cannot be used to justify the use of third party sources, whether or not it was known at the time of their validity. The defence of fair retort (*or response*) is only available to those who have been publicly challenged, but does not justify any slander by the injured party. It is also inapplicable here.

The remaining defence to a defamation action is privilege. The law grants either absolute or qualified protection to certain types of communication and in the latter situation, to situations that are founded on the notion of public interest and free debate.²⁰⁷ Privilege has grown as both a common law and statutory defence. Communications in court and parliament are exempt from establishing a claim in defamation. Other types of communication made to persons in situations where they are entitled to receive and act upon them are protected under qualified privilege.

On the facts given in this particular case, there is no information justifying the defence of privilege. Nor is there a duty at common law to name or reveal the source of journalistic information. This has been recognised as a common law pre-trial concession to the freedom of the

²⁰³ The decision in *Auchenleck v. Gordon* (1755) MOR 7348 confirmed the (civil) jurisdiction of the Court of Session to sit with or without a jury, thus heralding the departure from the original criminal focus of defamation.

²⁰⁴ *McKeller v. Duke of Sutherland* (1859) 21 D 222.

²⁰⁵ Gloag & Henderson, *The Law of Scotland* at para. 35.7.

²⁰⁶ See Case 12.

²⁰⁷ Ss. 14, 15 Defamation Act 1996.

press. Whether non-disclosure is upheld during trial depends on the issues at stake.

In both circumstances (a) and (b) of the case at hand, the journalist's statements of corruption are untrue from the beginning. An action in defamation for personal injury will be successful where the statements impugn the politician's character or business reputation.²⁰⁸

Until the implementation of the 1996 Act, liability under the Defamation Act 1952 fell on those who originated the libel and all those who subsequently repeated it. As a result, liability was imposed equally on all authors, editors, informants, printers and publishers in both the law of Scotland and England.

Under the terms of the Defamation Act 1996, there is now a new defence of innocent dissemination,²⁰⁹ by which the genuinely innocent may escape liability. In addition, informants may be sued on their own, unless the material was furnished for the journalist's benefit only, in which case both the Press Industry's Code of Practice²¹⁰ and s. 10 of the Defamation Act 1952 allow journalists and editors to protect their sources. Whether or not the protection is invoked depends on the relationship between the informant and the journalist.

In situation (b), the original source of the false information remains liable for damages.

Damages are available *eo ipso* for libel, and may indeed be nominal.²¹¹ Scots law differentiates between *solatium* in the form of damages for wronged feelings and damages for *patrimonial loss* (see below). A claim for economic loss without *solatium* is permissible in Scots law.²¹² It should be pointed out that English cases provide little assistance

²⁰⁸ *Muirhead v. George Outram & Co.*, 1983 SLT 201.

²⁰⁹ S. 1 Defamation Act 1996.

²¹⁰ The Press Complaints Commission (PCC, see www.pcc.org.uk) operates a public complaints procedure and publishes guidelines for the Press (the latest version available on the above website) which, in terms of the Human Rights Act (HRA) 1998, are rules to which it is bound to comply and the courts bound to apply in any proceedings brought under the HRA for breach of privacy, see s. 12(4)(a) HRA. The self-regulatory value of the Code lies in requirements from publishers that they openly and prominently publish the findings of any enquiries made by the PCC in response to complaints made by the public, see *Sarah Cox v. People*, 7 Jun. 2003 (High Court), unreported, www.guardian.co.uk/media/2003/jun/07/pressandpublishing. privacy.

²¹¹ There is no such thing as *iniuria sine damno*, see *Bradley v. Manley & James Ltd*, 1913 SC 923 per Lord Justice-Clark McDonald at 926; *Cassidy v. Connachie* 1907 SC 112 at 116 per Lord Stormont-Darling; *Allan v. Greater Glasgow Health Board* 1998 SLT 580.

²¹² See Norrie, *Defamation and Related Actions* at 165.

in assessing damages, as both exemplary and punitive damages (the latter only under restricted conditions) are admissible in that jurisdiction. In Scots law, aggravated damages may be awarded where there is proof of deliberate intention or persistent repetition of publication.²¹³

On the facts, the case under examination indicates that both heads of damage might be claimed. The law of defamation requires an assessment of whether the clearly false statements have a negative impact on the politician's professional capacity or fitness for office. If there is no damage to character or reputation, then no more than nominal damages will be awarded. Therefore, damages can easily range from literally one penny to much greater sums.²¹⁴ Special damages can be recovered if there is proof that financial loss and further suffering are likely to occur. Where publication has been deliberate, reckless or malicious, proof of this may aggravate the damages.

Nevertheless, s. 4 Defamation Act 1996 contains formal provisions allowing offers of amends and corrections of defamatory texts to be made along with 'offers' of compensation. Where such an offer is accepted, the pursuer may not bring defamation proceedings or continue them.²¹⁵ These provisions were introduced as a means of speeding up the length and quantity of defamation actions brought before the court.

The remaining question to be addressed relates to interdicts against publication. The importance of interdict lies in the fact that once publication has taken place, the damage may be irreparable and damages only a partial remedy. Both Scottish and English courts operate a

²¹³ *Cunningham v. Duncan* (1889) 16 R 383.

²¹⁴ The law of Scotland is more modest in relation to its level of defamation awards than England, see *Baigent v. BBC* 2001 SLT 427, particularly at para. 22; in *Anderson v. Palombo* 1986 SLT 46 a claim for £10,000 was dismissed as 'utterly ridiculous' and £200 was awarded. *Thomas v. Bain* (1888) 115 R 613 demonstrates a similar approach in the nineteenth century. See *Winter v. News Scotland Ltd* 1991 SLT 828 (£50,000). The wife of the Yorkshire ripper, Sonja Sutcliffe, was awarded £600,000 in her libel case against *Private Eye* (1991); Elton John received one million pounds in the award made in *John v. MGN Ltd* [1996] EMLR 229; the High Court awarded Naomi Campbell £500 at first instance against MGN Ltd in [2002] EWHC 499 (QB); the House of Lords confirmed the award on appeal, [2004] UKHL 22. In *Campbell v. News Group Newspapers Ltd* (High Court), the judge pointed out in detail the discrepancies between English libel and personal injuries awards, this being the background to the power under s. 8 Courts and Legal Services Act 1990 for judges to review jury awards.

²¹⁵ S. 3(1) Defamation Act 1996.

presumption against the wrongfulness of a publication.²¹⁶ The greatest divergence between Scots and English defamation procedure relates to pre-trial injunctions. Whereas the English courts operate the rule against restraint of publication in defamation cases, commonly known as the *Bonnard v. Perryman* rule²¹⁷ or the *rule against prior restraint*, this approach is unknown in Scots law. The test applied in Scotland in relation to the interim interdict is as follows:

the court is in use to have regard to the relative strength of the case put forward in averment [affidavit] and argument by each party at the interlocutory stage as one of the many factors that go to make up the balance of convenience. Whether the likelihood of success should be regarded as a matter of convenience or as a separate matter seems to me an academic question of no real importance ... If the pursuer appears likely to succeed at the end of the day, it will tend to be convenient to grant interim interdict.²¹⁸

Interdict will not, however, be granted when the case is based on innuendo, as then the case itself is not clear. Where the case is unlikely to proceed in the face of a defence such as privilege, then there can be no place for interdict.

III. Metalegal formants

These formants relate to the willingness of the defendants to agree to early settlement under the new 1996 Act and also relate to the politician's standing, which is reflected in the level of damages. Liability now only falls on those involved in the publication (i.e. the author, editor, publisher), other than the genuinely innocent under s. 1 Defamation Act 1996. A Scottish interim interdict will be awarded, not under the *prior restraint* rule but on the averment that the allegations are obviously unfounded. If a genuine offer of amends is made to the pursuer, it then operates as a defence to any defamation claim that a reasonable offer has not been accepted. Damages will be higher than just a nominal award in view of the pursuer's standing and potential patrimonial loss. As noted above, damage awards in Scotland are less generous than in English law as the law does not recognise exemplary or punitive damages.²¹⁹

²¹⁶ See Norrie, *Defamation and Related Actions* at 176.

²¹⁷ [1891] 2 Ch 269.

²¹⁸ *NWL Ltd v. Woods* [1979] 3 All ER 614, 628 per Lord Fraser (not a defamation case itself).

²¹⁹ See Norrie, *Defamation and Related Actions*.

Spain

I. Operative rules

Where the journalist's statement is not supported by any facts, the politician is entitled to rectification and to sue the journalist, publisher and editor-in-chief for compensation. The author, editor-in-chief and publisher are jointly and severally liable.

Where the politician was informed beforehand about the forthcoming article, it is possible for him/her to claim an injunction to prevent publication.

Moreover, the politician has a right of reply and can demand the publication of the judgment.

The politician does not have a claim where the journalist alleged some facts related by a third person, which then turned out to be false.

II. Descriptive formants

The operative precedent rules are provided by the Spanish *Ley Orgánica 2/1984* of 26 March, on the right to correct information (*LO 2/1984*). According to Art. 1 *LO 2/1984*, a person 'has the right to correct information on facts related to him broadcasted by the mass media, which he considers untrue and the dissemination of which can cause him some damage'. *LO 2/1984* provides for a quick summary trial in order to obtain the rectification of this information. This action is compatible with any other civil or criminal action that could assist the defamed person. The defamed person can ask the media to correct the information up to seven days after publication, and this correction should be done within three days after the receipt of the claim, otherwise the injured party has an action against the media, which would fall to be considered by a civil court.

Moreover, the defamed politician can sue the journalist, the publisher and the editor-in-chief of the newspaper for damages and an injunction according to Arts. 7.7²²⁰ and 9 *LO 1/1982*,²²¹ engaging a standard of

²²⁰ Under Art. 7.7 *LO 1/1982*, 'the imputation of facts or dissemination of value judgments through actions or expressions damaging the dignity of a person, lessening their reputation or attempting to lessen the respect of that person' is to be considered an illegitimate interference with the right to honour, privacy and one's own image.

²²¹ Art. 9 *LO 1/1982* provides:

1. (...)
2. The courts will adopt all necessary measures to end the illegitimate interference and restore the victim's rights, as well as to prevent or impede

fault liability. These provisions also award a right of reply and a claim for the publication of the judgment. Additionally, accusing a politician of being corrupt is considered criminal defamation in Spain under Art. 205 Spanish Criminal Code and thus can be criminally prosecuted.

The question is more difficult where the journalist alleged some facts related by a third person, which then turned out to be false. In deciding such cases, courts will take the so-called Neutral Reportage Doctrine into account. This doctrine provides a privilege to those who, without any alteration or changes, fairly and accurately reproduce reports or statements made by a third party.²²² Thus, if the journalist reproduces information related by a third person without adding anything to it and which does not appear to be false, publishing this information is legal. Therefore, in situation (b), the defamed politician does not have any legal action regarding false information.

Despite the Neutral Reportage Doctrine, some recent decisions also consider that the mass media has a minimal duty of investigating and checking the content of the news and its veracity. If the facts alleged by a third person are clearly false then liability could be imposed on the journalist.

Where the politician was informed beforehand about the forthcoming article, as a matter of principle the fundamental character of the right to honour would support an action aimed at preventing damage arising from the forthcoming false publication. Given that fundamental rights and property rights are both absolute rights and that courts afford them similar treatment, there is certainly a possibility to stop the publication with a type of injunction.

new interferences. The measures include an injunction, the right to retaliate, to extend the judicial ruling and to compensation for losses.

3. Damages are presumed if an illegitimate interference is proved. The compensation will include pain and suffering, which will be quantified using the specific circumstances and the seriousness of the damage effectively produced. For this quantification, the Court will take into account (i) the extent or audience of the media that spread the illegitimate interference; and (ii) the benefits obtained by the party causing the damages.
4. (...)
5. The statute of limitation to initiate actions is four years, beginning when the party could file the action.

²²² The following decisions of the Spanish Constitutional Court (STC), *inter alia*, contain the Neutral Reportage Doctrine: STC 41/1994, Feb. 15 (RTC 41); STC 3/1997, Jan. 13 (RTC 3); STC 134/1999, Jul. 15 (RTC 134); STC 76/2002, Apr. 8 (RTC 76); and STC 54/2004, Apr. 15 (RTC 54).

Furthermore, the Spanish Civil Procedure Act admits the possibility of adopting preventive measures before filing the claim (Art. 730). These measures could support the immediate seizure of a publication before it is published. It is necessary to sue up to twenty days after the adoption of the preventive measures; otherwise, they will be removed.

Switzerland

I. Operative rules

In both cases, the politician has the right to claim economic and non-economic damages. He can claim for both compensatory and injunctive relief against the journalist, the publisher, and/or the editor-in-chief. In situations where an injunction would be ineffective because it would be applied too late, the politician may have the 'right to respond' with respect to erroneous factual statements made against him.

II. Descriptive formants

Art. 28, para. 1 of the Swiss Civil Code (CC)²²³ affords legal protection to anyone who suffers an unlawful infringement of his or her 'personality'. Under para. 2, an infringement is 'unlawful' provided that it cannot be justified by the consent of the injured party, by a preponderant public or private interest, or by statute.

On the basis of this provision, Swiss law protects an aspect of personality rights called the '*droit à l'honneur*', hereinafter referred to as the 'right to one's reputation'. This right includes consideration of both the individual's internal and external moral integrity. Thus, the right to one's reputation aims to protect the individual's self-esteem, as well as any other aspects necessary for an individual to be respected in his or her economic, social and/or professional spheres.

The extent of protection granted to a person's reputation varies depending on his or her social status.²²⁴ A politician is usually considered a public figure. As such, the politician's personality rights will be weighed differently than those of a private individual. According to the case law stemming from Art. 17 of the Swiss Federal Constitution,²²⁵ the press is authorised to publish reports on the activities of a

²²³ Code civil suisse du 10 décembre 1907 (CC) (RS 210).

²²⁴ H. Deschenaux and P.H. Steinauer *Personnes physiques et tutelle* (4th edn., Berne: 2001) at 178, n. 559.

²²⁵ Art. 17 of the Swiss Federal Constitution protects the freedom of the press, Constitution fédérale du 18 avril 1999 (RS 101).

politician that would probably be impermissible if a private citizen were concerned.

However, a depreciation of the politician's personal or professional reputation²²⁶ may still constitute an unlawful infringement of his/her rights. In order to determine whether a declaration, such as 'corrupt person', unlawfully smears the politician's reputation, one must use the 'reasonable reader' standard to consider the concrete facts.²²⁷ The politician's interest in the integrity of his/her personality must be balanced against the interest of the press in informing the public; although the press functions as a 'watchdog,' its general mandate to inform the public does not constitute a license to say anything it considers newsworthy. The press must have a valid motive for infringing the individual's personality interests.²²⁸ According to case law, the public has an interest in being informed of the derelictions of public officials and in knowing the names of the public officials who have committed such wrongs.²²⁹ However, mentioning the name of the public figure concerned is only permissible to the extent that the report can be justified by the facts at hand and by a legitimate public need to be informed.²³⁰ Likewise, 'even a person who is the object of public interest is not obligated to allow the media to report on more than what is justified by a legitimate need to inform; the individual's interest in keeping things undisclosed must, to the extent possible, be taken into account'.²³¹

(a) *The journalist's statement is not supported by any facts.*

Opinions or value judgments are only permitted – and protected by the freedom of opinion held by the media – to the extent that they appear factually well-founded.²³² However, they may still constitute an unlawful infringement of the individual's reputation where the language used is unnecessarily hurtful.²³³ If they degrade the politician in the eyes of the public and create a false picture in the public mind, freedom of opinion is not a sufficient justification and the infringement will be considered tortious.

²²⁶ ATF/BGE 129 III 49 c. 2.2, JdT 2003 I 59.

²²⁷ *Ibid.*, JdT 2003 I 59; ATF/BGE 127 III 481 c. 2b/aa, JdT 2002 I 426.

²²⁸ ATF/BGE 126 III 209 c. 3a, JdT 2000 I 302.

²²⁹ ATF/BGE 126 III 209 c. 4, JdT 2000 I 302.

²³⁰ ATF/BGE 126 III 305 c. 4b/aa, JdT 2001 I 34.

²³¹ *Ibid.*

²³² ATF/BGE 126 III 305 c. 4b/bb, JdT 2001 I 34.

²³³ *Ibid.*; ATF/BGE 106 II 92 c. 2c.

The Swiss Federal Court recognised for instance that publishing a magazine article in which the district police commander was described as ‘a snoop’, ‘gun-crazy’, and an ‘expert at FBI spy tactics’ intruded on the police commander’s right to reputation, and therefore constituted an unlawful infringement of his personality.²³⁴ More recently, the Court of First Instance of Geneva held that two articles insinuating that a politician took advantage of information to benefit himself financially gave readers the impression that the benefits had been obtained in a dishonest way, which constituted an unlawful infringement of the politician’s reputation.²³⁵

(b) The journalist alleged some facts related by a third person, which then turned out to be false.

The publication of inaccurate facts is unlawful, and it is only in rare and exceptional cases that the dissemination of such facts is justified by a sufficient interest.²³⁶ However, according to the case law of the Federal Court, every imprecision, generalisation or uncertainty does not automatically violate personality rights. Inaccurate information is unlawful if it does not conform to the truth on the essential points, and if it presents a person in such an erroneous light or paints him/her in an image which is so clearly false that the individual finds himself degraded in the eyes of his fellow citizens.²³⁷

The fact that the journalist received the information from a third party does not provide him with a defence. A media outlet cannot evade responsibility for the content of what it publishes by asserting that it has simply reproduced the statements of a third party.²³⁸ The journalist has an obligation to verify his/her sources and their objectivity in addition to verifying the truth of the information.²³⁹ Media organisations must decline publishing a suspicion or supposition where the source of the information makes restraint advisable. The publication will be unlawful if the suspicion or supposition proves to be unfounded. Therefore, publication of the politician’s

²³⁴ ATF/BGE 119 II 97, JdT 1995 I 167.

²³⁵ Judgments of the Court of First Instance of the Geneva area, 9 Oct. 2003, JTPI/11565/2003 and JTPI/11566/2003.

²³⁶ ATF/BGE 126 III 209 c. 3a, JdT 2000 I 302; ATF/BGE 126 III 305 c. 4b/bb, JdT 2001 I 34.

²³⁷ ATF/BGE 123 III 354 c. 2a, JdT 1998 I 333.

²³⁸ ATF/BGE 126 III 305 c. 4b/aa, JdT 2001 I 34.

²³⁹ ATF/BGE 113 Ia 309 c. 5a; ATF/BGE 107 Ia 304 c. 5b.

name is likely to unlawfully infringe the politician's right to his reputation.

In both scenarios, the politician first has the right to take defensive action outlined under Art. 28a, para. 1 CC. More precisely, he can take action to prevent the infringement, including provisional measures that seek to prevent publication of the statement (Art. 28a, para. 1, (1) CC).

Under Art. 28, para. 1 CC, a claim may be brought against any person or entity who participates in the unlawful infringement.²⁴⁰ If the politician is unable to prevent publication of the article, Swiss law grants the right to respond (Art. 28g CC). Nevertheless, in general, the right to respond will not preclude a claim for unlawful infringement of personality due to harmful language published in the press. In effect, the right of reply serves only to oppose two different descriptions of facts, without establishing whether the description presented by the media has unlawfully violated personality rights.²⁴¹ The politician may, however, request a judgment declaring that the publication is unlawful where the trouble caused by the infringement persists (Art. 28a, para. 1, (3) CC). The politician may also subsequently demand damages.

The available remedies are governed by Art. 28a, para. 3 CC and are based on Art. 41 *et seq.* of the Code of Obligations (CO). The injured politician may demand payment of damages to the extent that he can establish the existence of harm. He may also claim damages for pain and suffering (Art. 49 CO) due to the unlawful loss of reputation and esteem in society.²⁴²

According to Art. 49, para. 2 CO, it is also possible to substitute alternative types of remedy – e.g. publication of the judgment. Moreover, the Federal Court has recently affirmed that monetary damages do not necessarily constitute an adequate remedy for pain and suffering, because the person needs to be indicated rather than consoled.²⁴³ Therefore, the tort suffered by the individual may sometimes be better remedied by the declaratory judgment of unlawfulness than by the payment of monetary damages.

²⁴⁰ Judgment of the Swiss Federal Court 5P.308/2003 c. 2.4, SJ 2004 I 250.

²⁴¹ ATF/BGE 119 II 97 c. 2, JdT 1995 I 167.

²⁴² RVJ 1995. p. 118 and 121. In a judgment published in REP 1982, p. 85, a politician who had been unfairly treated in the press was granted damages of 5,000 CHF for the pain and suffering resulting from the infringement of his reputation.

²⁴³ ATF/BGE 131 III 26 c. 12.2.2.

III. Metalegal formants

The Swiss Press Council is an institution which serves journalists and the public. It functions as an arbitrator of questions related to media ethics. Decisions rendered, although without binding force and sometimes stemming from the Council's own initiative, are interesting because they examine questions relating to professional ethics in journalism, namely with regard to the use of information.²⁴⁴

According to the Swiss Press Council:

the duty to abstain from factually unfounded accusations requires that the publication of criticism of individuals be abandoned unless plausible proof of the accusation exists. Accuracy of the information must be verified before its publication. Journalists who base their research on a thesis must not destroy any element of information that can weaken this thesis [...] It is not permitted to elaborate on theses and to present them as fact in such a way that the reader is unable to ascertain that the theses are not founded on indisputable facts, but rather only on assumptions drawn from weak indications.²⁴⁵

Before accusing a politician of 'corruption' without valid substantiation, the journalist in this particular case is required to consider the foreseeable consequences of his/her allegations. Neither the use of the conditional tense nor the protection of the source circumvents the obligation to verify the veracity of such sources.²⁴⁶

Comparative remarks

This is a typical case of defamation by the press, concerning a classic conflict between freedom of speech and freedom of the press on the one hand, and the right to honour and reputation on the other hand. The hypotheses (a) and (b) reflect two major kinds of offensive statements made in writing: the expression of a mere opinion or value judgment in situation (a), and the allegation of facts in situation (b).

Three questions are raised in this case: Is there any liability? Which remedies are available? Who is liable? Before discussing these issues,

²⁴⁴ To be found at www.presserat.ch.

²⁴⁵ Conseil suisse de la presse: www.presserat.ch/vm_personnalite5.htm (5 Sept. 2005).

²⁴⁶ Conseil suisse de la presse: www.presserat.ch/vm_sources2.htm (5 Sept. 2005).

the applicable law governing the protection of honour and reputation in the different legal systems has to be mapped out.

I. Foundations of liability

The first distinction is to be made between the continental European civil law systems and the common law of the UK and Ireland. In England, Ireland and Scotland defamation is primarily a civil tort. In this regard, criminal law plays a minor role, if at all. On the contrary, in the continental and Nordic systems, defamation is also (or even primarily) a criminal offence. In some countries such as France, Italy and Finland the obligation to pay damages to the victim is a direct consequence of criminal responsibility.

1. In England, Ireland and Scotland, claims can be made under the tort of defamation developed by traditional common law. A distinction is drawn between a written (libel) and an oral form (slander) of defamation. The former applies to press publications. Liability for libel is strict. Reputation is protected by defamation law as is bodily integrity, and property is protected by the law of trespass. Libel does not require any fault or damage to be shown by the claimant but is actionable *per se*. The lowering of a person in the estimation of right-thinking members of society is both necessary and sufficient. This has to be assessed by a jury. In this regard, it does not make any difference whether the defamatory statement is the expression of an opinion or the allegation of facts. This distinction plays a role, however, with regard to possible defences. In situation (b), the journalist may escape liability when he/she proves the truth of the defamatory statements.

In situation (b), in addition to defamation law the English tort of malicious falsehood and the corresponding Scots tort of verbal injury also apply, insofar as the alleged facts are untrue and the offender acted intentionally.

The illegitimacy of defamatory publications is assessed through a judicial balancing of conflicting interests, both in the common law and in the civil law countries. Common law courts take freedom of expression into account, as is inherent in the common law and under Art. 10 ECHR (which is now almost always expressly mentioned) and balanced with interests in reputation (albeit not treated as a fundamental right but certainly a fundamental interest in the common law).

2. In relation to the legal bases for the protection of honour and reputation within the continental and Nordic legal systems, two models are highlighted.

- (i) In France, the solution of the conflict between freedom of the press and right to honour has been left exclusively to a special statute. The French *Cour de Cassation* has made it clear that where the Freedom of the Press Act 1881 applies, a concurrent application of the general tort law provisions of the Civil Code is excluded. The Freedom of the Press Act 1881 provides for the paramount position of freedom of the press vis-à-vis personality interests. The balance between these conflicting values has been struck by legislation, not by a judicial weighing of the constitutional rights. The French Press Act contains detailed criminal law provisions regarding the publication of defamatory statements. Two separate crimes of defamation by the press exist: *difffamation* applies to allegations of facts, *injure* to all other offensive statements. Criminal liability is not strict in theory, but almost strict in practice: malice is required, but presumed. The journalists who made the defamatory statements can exculpate themselves by proving that the alleged facts are true, or that they have made serious efforts to verify the facts (*'bonne foi'*). A serious obstacle to the protection of persons offended in their honour and reputation who sue under the French Freedom of the Press Act is the prescription period of three months, within which a detailed complaint must be filed before the criminal court.
 - (ii) In all of the other countries, the protection of honour and reputation against offensive press statements results from the combined and concurrent application of a plurality of legal bases: constitutions, international conventions such as the ECHR, general tort law provisions enshrined in the national Civil Codes, special statutory provisions of civil and criminal responsibility, Press Acts, etc. In many countries such as Austria, Germany, Italy, the Netherlands, Portugal and Switzerland, the illegitimacy of defamatory publications from the perspective of tort law is assessed through a judicial balancing of conflicting fundamental rights: on the one hand, personality rights (honour and reputation), and on the other hand, freedom of speech and freedom of the press. Whether one or the other prevails depends on several circumstances, such as the truth of the alleged facts, the extent to which the journalists fulfilled their duty of professional care, and the necessity, proportionality and adequacy of the published statements with regard to the public interest in the subject matter (see *II* below for further details).
3. In several countries such as Austria, Germany, Finland, Spain and Switzerland and the common law countries, in order to hold a tort or crime to be defamatory it is necessary to take the victim's

notoriety and public function into account. Public figures, especially politicians, must tolerate much harsher criticism than ordinary citizens.

4. In many legal systems, both in common law and civil law, self-regulatory instruments such as codes of conduct play a major role in determining the duties of care of press organs and therefore their civil liability. Sometimes self-regulatory instruments also provide for methods of alternative dispute resolution, which may precede, accompany or incorporate the ordinary tort liability proceedings. This is, for example, the situation for the Belgian *Raad van de Journalistiek*, the English Press Complaint Commission, the Finnish Council for Mass Media, the German *Presserat* and the Swiss Press Council.

II. Infringement of honour and reputation

1. Situation (a)

The blunt affirmation that a politician is corrupt, without any factual reference, may be interpreted in two different ways: as a mere expression of opinion or a value judgment, or as an unsubstantiated accusation. All legal systems considered agree that the accusation of corruption – which is a criminal offence – cannot be made without any reliable factual support, not even in political debate. The vast majority of countries acknowledge an unlawful infringement of the politician's reputation in situation (a).

In most legal systems, the distinction between opinions and value judgments on the one hand, and the allegation of facts on the other, does not seem to be relevant for the solution of the present case. This distinction only plays a role in Germany and Switzerland. In both countries, the statement in question would be considered as the expression of an opinion or a value judgment. This expression of opinion would probably be deemed lawful in Germany, but unlawful in Switzerland.

According to German courts and scholars, in case of doubt over whether a statement is an opinion or an allegation of facts, it is presumed to be an opinion. Personality rights and media rights have equal rank in principle, but in a conflict of values concerning the expression of opinions there is a presumption that freedom of speech and freedom of the press would prevail, at least as far as public figures are concerned. Opinions are only deemed to violate personality rights when they primarily aim to damage the victim's reputation (*'Schmähkritik'*). This requirement does not seem to be met in the instant case.

In Switzerland, opinions or value judgments are only permitted to the extent that they appear to be factually well-founded. Since the journalist's statement in this situation is not supported by facts, freedom of the press will not be sufficient to justify the infringement of the politician's reputation.

2. *Situation (b)*

If a defamatory statement is supported by facts, the liability of the journalist first depends on the proof of truth and secondly on compliance with their professional standards of care. In every private law system – civil and common law – the defendant journalist is entitled to prove the truth of the statements. If such evidence is shown, in most cases this will free him/her from liability. Stating false facts is not protected by freedom of speech. If evidence is missing, the journalist is liable in the strict common law of defamation. Liability requires malice or negligence under civil law fault regimes. The respective standard of professional care varies from country to country. In Austria and Spain, it is sufficient that a journalist fairly and accurately reproduces the allegation of a credible third party, which does not appear to be false. Therefore in both countries, in situation (b) the politician would probably not have any claim. In all of the other countries, a journalist who reports facts provided by a third party without further investigation commits a wrongful act. Journalists are under a duty to verify their sources of information. In some countries such as Belgium and Germany, the more serious the accusation, the higher the standard of care. In most countries, the alleged corruption of politicians is of the highest public interest.

In the majority of legal systems considered, the burden of proof of compliance with the journalists' duties lies with the journalists themselves. They must prove that they have at least made serious efforts to verify the facts.

In some countries such as Italy and Portugal, a third aspect plays a major role in the balancing, which is the adequacy of the publication from the point of view of correctness and politeness. Press statements should not contain more than what is strictly necessary to inform the public, and should be formulated in the manner which is least harmful to the reputation of the persons involved.

III. Remedies

Three main types of remedies are envisaged: damages, injunction, and right of reply.

1. Damages

(i) In most countries, a tort of infringement of the politician's reputation is present in both situations (a) and (b). The injured party can recover both economic and non-economic loss.

In France, compensation is limited to non-pecuniary loss. In Greece, pecuniary damages are always recoverable, while compensation for non-pecuniary loss is only possible if the infringement was committed intentionally.

In England, a jury determines the amount of damages to be awarded. The Court of Appeal may reduce an excessive amount of damages awarded by a jury. Damages under English law can be nominal (symbolic award for the injury itself), general (compensation of non-economic loss), or special (compensation of economic loss).

In the Netherlands, in assessing non-pecuniary damages the judge can take the profits gained by the wrongdoer from the publication into account. However, the injured party can only claim either compensation for this kind of damage or pecuniary damages for lost profits; a combination of the two is not possible.

(ii) According to the majority opinion in Austria and Spain, the journalist's behaviour in situation (b) is deemed legally correct, therefore no damages can be claimed. With regard to situation (a), however, the protection of the injured party's honour also prevails in both of these countries, thus the politician can claim both pecuniary and non-pecuniary damages.

According to Spanish legislation, once an illegitimate interference with the right to honour is shown, damages are presumed. Compensation includes pain and suffering, which is to be quantified by considering the circumstances under which the statement was published, the circulation of the publication and the benefits obtained by the wrongdoer.

In Austria, a much discussed issue in academic literature concerns the amount of non-pecuniary damages to be awarded for privacy violations committed by the media. The Austrian Media Act sets a maximum limit of €20,000, which is arguably too small. Criticism has also been raised in relation to the practice of the Austrian courts, which usually award damages in notably smaller amounts than allowed for by statute.

(iii) In Germany, damages can only be claimed in situation (b). Both economic and non-economic losses are recoverable, however compensation for non-economic loss is only granted in cases of serious violations of personality rights.

(iv) Exemplary or punitive damages can be awarded in England, Ireland and Scotland. In Greece and Italy, besides pecuniary and non-pecuniary damages, the victim of a defamatory publication is entitled by statute to an additional sum of money, which serves the function of a private penalty. In Greece, this monetary remedy can be claimed against the person responsible for any violation of personality rights under Art. 59 Civil Code, provided the violation was intentional. In Italy, this sanction is specifically provided for by the Press Act in cases of defamation by the press. The amount of the award varies according to the gravity of the offence and the circulation of the publication.

2. *Injunction*

In Belgium, France and Finland, freedom of speech and freedom of the press are considered so fundamental that it does not seem possible to impede the publication of defamatory statements by asking for a preventive injunction. In Belgium, however, an injunction is possible after publication to prevent the further dissemination of a defamatory article.

In all the other countries, the injured party can also claim for a preventive injunction. In England, a problem arises from the fact that an interlocutory injunction is granted by a court, while defamation is decided upon by a jury. Therefore, interlocutory relief only seems to be possible in the clearest cases where any jury would recognise defamation.

In some countries such as Portugal and Greece, an injunction may also be granted after publication to mitigate the injury and prevent future harm. In the Netherlands, the victim who still has an interest in preventing the further dissemination of the defamatory statement after publication can request the recalling of the issues of the newspaper in question.

3. *Right of reply*

In cases of untrue defamatory statements the majority of countries grant the victim of press defamation a right of reply, i.e. the right to have a rectification published in the same journal, newspaper, etc. As a rule, this remedy is available regardless of the defamatory character of the publication. This is a special remedy provided for by the Press Acts.

No right of reply exists in England, Scotland and Ireland. A rectification can only be made by the press itself in case of an offer of amends.

In Austria, Finland and Spain, the person aggrieved by a false statement has the right to have it revoked or corrected by the press organ itself. In Spain, the press is obliged to do this within three days of the receipt of the request.

In Finland, Italy and Switzerland, the aggrieved person can also request the publication of the defamation judgment.

IV. Addressees of liability

In all of the countries considered, liability for defamation by the press falls (although often in different forms and to a variably great extent) on the journalist, the editor-in-chief and the publisher. In England, Scotland and Ireland, the joint liability of the author, editor, publisher, printer, distributor and seller is strict, but several defences are available. In particular, printers, distributors and sellers can escape liability by proving innocence in the dissemination of the publication.

In Austria and Greece, the liability of the owner of the newspaper is strict, while that of the journalist is based on negligence. In Austria, the publisher's liability follows that of the owner, while in Greece the liability of both the publisher and the editor-in-chief is fault-based.

In Germany, an injunction can be claimed against any person who objectively contributed to the offensive act (author, editor-in-chief, publisher, distributor, etc.), independent of fault, while liability for damages always requires negligence. However, the publisher's negligence is presumed.

The journalist, editor-in-chief and publisher are jointly and severally liable in Finland, Germany, Italy, Portugal and Spain. In most countries, their liability is fault-based. In Portugal, the owner of the newspaper is only liable if the article was published with the knowledge of the editor-in-chief or his/her substitute and without his/her opposition. The burden of proof of knowledge and lack of opposition lies on the claimant.

In Italy, only the editor-in-chief and the publisher can be sued for injunction and rectification, while only the journalist is addressed by the punitive reparation mentioned under III.2.(iv). However, all of these persons are jointly and severally liable for damages.

In France, liability is *en cascade*: the directors, editors, writers, printers, vendors and distributors are called one after the other, in function of their rank. A similar rule applies in Belgium, where the publisher,

printer and distributor are not liable if the writer is known, and the distributor is not liable if the publisher is known. In Belgium, journalists who are employed enjoy special protection; they are only liable in cases of serious and deliberate offences or recurrent negligence. Slight negligence is not sufficient. The vicarious liability of an employer is quite controversial in Belgian scholarship.

5 Case 2: Convicted law professor

Case

A law professor was convicted by a court of having committed a crime. The day after the judgment, the case was published in a newspaper mentioning the professor's name. Does he have any claim against the newspaper? Distinguish the following two situations:

- (a) The crime consists of causing the death of a person in a car accident due to drunken driving.
- (b) The crime consists of promising female students better grades in exchange for sex.

Discussions

Austria

I. Operative rules

In both situations, the law professor does not have a claim against the owner/publisher of the newspaper.

II. Descriptive formants

§ 7a *MedienG* provides for a personal right to remain anonymous under certain conditions. This right conflicts with the right of freedom of the press and information (Art. 10 ECHR). Therefore, it is necessary that a claimant has good reasons for claiming compensation under § 7a *MedienG*.

Under § 7a *MedienG*, persons who are suspected of having committed a crime or on whom sentence has already been passed may sue

the owner/publisher of the newspaper who disclosed their identity for compensation of non-economic loss, if:

- (1) there is a sustained infringement of their protected interests through the disclosure of their identity; and
- (2) there is no prevailing public interest stemming from the position of the claimant in public life or from another comparable connection with public life.

A law professor is a person of relatively high public interest. When he/she commits a crime – in the case at hand by causing a fatal traffic accident due to drunken driving or by promising female students better grades in exchange for sex¹ – the disclosure of his/her identity through the publication of the story with his/her full name in a newspaper is justifiable under the abovementioned regulation.

The higher Regional Courts of Austria have found that there is sufficient public interest in the disclosure of identity when, for example, a leading police officer,² a prominent doctor,³ or a respected adoptive father of six children⁴ were convicted of having committed criminal offences. In all of these cases, the freedom of the press and information, as well as the public interest in being sufficiently informed about the behaviour of the middle/upper class, prevail over the interests of the claimant in remaining anonymous.

Among the considerations taken into account in balancing these interests are: the prominence of the person in question, the importance of the issue for the press; and the originality of the news.

§ 7a, subs. 2(2) *MedienG* provides that the protected interests of a claimant will be affronted if the publication (of his/her name, image or other characteristics) concerns a minor party or a less serious type of crime. In this case, however, neither the age of the party, nor the type of the crimes committed may – in contrast to the arguments above – establish a protectable interest for the claimant.

¹ Cf. RV zur Mediengesetz-Novelle 1992, 13 (Government Bill for an amendment to the Media Act): the identity of a top sportsman who caused a fatal traffic accident may be disclosed regardless of whether he caused the accident when driving to a sporting contest or during his leisure time.

² OLG Innsbruck MR 1995, 95.

³ *Ibid.* at 160.

⁴ OLG Vienna 9.7.1997, 24 Bs 129/97.

Belgium

I. Operative rules

The professor does not have a claim against the newspaper. An injunction is not possible.

II. Descriptive formants

According to Art. 149 of the Constitution, all judgments are delivered in open court and journalists are granted the right to access them and to report and comment on them, even if they are not final.⁵ However, that right must be exercised with caution. For example, they should double-check the identity of the convicted criminal.⁶

Moreover, the journalist's conduct will be weighed against Art. 1382 CC. The fact that the professor may have appealed against the judgment, the scope of the article, etc., will be taken into account. In case the information is wrong⁷ or contains details about the professor's private life which are not relevant to the crime in question, he would be able to attain compensation.⁸

The existence of a right of reply is doubtful.⁹ The right of reply in a newspaper can be exercised to rectify a factual element or to defend oneself against defamation.¹⁰ In both hypotheses, the newspaper can report on the judgment.

It is also very unlikely that the professor could obtain an injunction. The right to report on judgments can be categorised under the umbrella of the fundamental right to freedom of speech.¹¹

England

I. Operative rules

In both situations (a) and (b) the law professor will not be able to successfully claim against the newspaper.

⁵ P. Lemmens, 'Parlando ma non troppo' (1999–2000) *AJT* 277.

⁶ E.g. Civil court Brussels 22 Dec. 1996, *CDPK* 1997, 666, note by D. Voorhoof, where another person with an identical name was named as a convicted criminal on television.

⁷ E.g. Civil court Liège 7 May 2002, *AM* 2002, 370.

⁸ D. Voorhoof, *Handboek Mediarecht* (Brussels: 2003) at 194 *et seq.* Cf. Civil court Brussels 29 Jun. 1987, *JT* 1987, 685.

⁹ See Case 1.

¹⁰ Art. 1 of the Right of Reply Act 8 July 1961.

¹¹ See Case 1.

II. Descriptive Formants

(a) *The crime consists of causing the death of a person in a car accident due to drunken driving.*

1. Defamation and malicious falsehood

In principle, the case could come under the tort of libel since the publication is clearly defamatory. However, the newspaper has the defence of justification available since the statements are true. For the same reason, there is no malicious falsehood. English courts have consistently held that it is in the public interest that the right to free speech is one which individuals should possess and exercise without impediment, so long as no wrongful act has been committed and no wrong is done if it is true.¹² Furthermore, under s. 14(1) of the Defamation Act 1996, the newspaper is absolutely privileged if the report is fair and accurate. In fact, defamation law has even led to very accurate identifications by the press of persons found guilty in court proceedings since any confusion between the name of the person convicted and the name of another innocent party may render the press liable to the latter.¹³

2. Negligence

The tort of negligence is usually not available in defamation cases. There is no duty of care to take reasonable measures not to injure the claimant's reputation, even through the publication of true statements.¹⁴

3. Breach of confidence

Breach of confidence is actionable in equity. It does not require the breach of a contractual obligation to confidentiality.¹⁵ The general principle is that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he/she has noticed, or is held to have agreed, that the information is confidential, with the effect that in all circumstances it would be just that he/she be precluded from disclosing the

¹² *Bonnard v. Perryman* [1891] 2 Ch 269, at 284, CA; *Fraser v. Evans and Others* [1969] 1 QB 349, at 360–1, per Lord Denning MR. See also S. Kentridge, 'Freedom of Speech: Is it the Primary Right?' (1996) 45 *International and Comparative Law Quarterly* 253 *et seq.*

¹³ See *Newstead v. London Express Newspaper, Limited* [1940] 1 KB 377. See also B. Brömmekamp, *Die Pressefreiheit und ihre Grenzen in England und der Bundesrepublik Deutschland* (Frankfurt: 1997) at 38.

¹⁴ *Spring v. Guardian Assurance plc* [1994] 3 All ER 129.

¹⁵ *Prince Albert v. Strange* (1849) 1 H&T 1, at 25; *Duchess of Argyll v. Duke of Argyll and Others* [1967] Ch 302, at 318 *et seq.*

information to others. This includes situations where the confidant has deliberately closed his/her eyes to the obvious.¹⁶ This duty of confidence is also imposed on a third party, such as a publisher, who is in possession of information which he/she knows is subject to a duty of confidence since the law of confidence would otherwise be of little value.¹⁷

Traditionally, three requirements had to be satisfied. Firstly, the information itself had to have the necessary quality of confidence about it. Secondly, the information had to have been imparted in circumstances giving rise to a duty of confidence. Thirdly, there had to be an unauthorised use of that information to the detriment of the party communicating it.¹⁸

Recently, the courts have altered the requirements of the equitable doctrine with respect to the misuse of personal information. An action for breach of confidence can now be exercised in cases where there was no pre-existing relationship of confidence between the parties, but the 'confidence' arose from the defendant having acquired information by unlawful or surreptitious means that he/she should have known he/she was not free to use.¹⁹ The current standing of the doctrine is best summed up by Lord Nicholls in *Campbell*:

Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential ... The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private.²⁰

Later Baroness Hale stated 'the exercise of balancing Article 8 and Article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential'.²¹

¹⁶ *Advocate-General v. Guardian Newspaper (No. 2)* [1990] 1 AC 109, at 269, per Lord Griffiths.

¹⁷ *Ibid.* at 268, per Lord Griffiths.

¹⁸ *Coco v. A. N. Clark (Engineers) Limited* [1969] RPC 41, per Megarry J. For further detail, see Case 5.

¹⁹ See *McKennitt v. Ash* [2006] EWCA Civ 1714, at para. 8, per Buxton J. See also, e.g., *Campbell v. MGN Ltd* [2004] 2 AC 457 and *Douglas v. Hello! Ltd (No. 3)* [2006] QB 125.

²⁰ [2004] 2 AC 457, at 465.

²¹ *Ibid.* at 495.

The High Court cases of *McKennitt v. Ash*²² and *HRH The Prince of Wales v. Associated Newspapers*²³ and the Court of Appeal decision in *McKennitt v. Ash*²⁴ have utilised the ‘reasonable expectation’ test as espoused in *Campbell*.

However, breach of confidence cannot be argued where information has already become public knowledge, since no reasonable expectation of privacy can exist in such cases. Since criminal proceedings are held publicly, information about such proceedings, or about convictions, is information that is publicly available. Unlike in some other countries, in English law reports the parties to the criminal proceedings are identified by name, with rare exceptions such as in cases involving minors. Thus, in this particular case, no confidential information was imparted to the public by the newspaper. The press and broadcasters are entitled to publish the results of civil and criminal proceedings without restrictions.²⁵ Protection is only afforded to the relatives, and, in particular, the children of persons convicted or accused of crime.²⁶

4. The Data Protection Act 1998

The Data Protection Act 1998 regulates the processing of information regarding individuals. Its application to breach of confidence cases, as a result of the Data Protection Directive 95/46/EC²⁷ was elaborated on in *Campbell v. MGN Ltd*.²⁸ In brief, the Data Protection Act 1998 comes into play where personal data has been processed, as usually occurs in today’s production of print media. S. 1 of the Act indicates that the newspaper can be taken to be a data controller. According to Lord Phillips, the Data Protection Act 1998 applies to the publication of newspapers and other hard copies containing information that has been subjected to data processing.²⁹ Under s. 2 of the Act, an article

²² [2005] EWHC 3003 (QB).

²³ [2006] EWHC 11 (Ch).

²⁴ [2006] EWCA Civ 1714.

²⁵ *R. v Central Independent Television plc* [1994] Fam 192, at 202, per Neill LJ. See also J. von Gerlach, ‘Persönlichkeitsschutz und öffentliches Informationsinteresse im internationalen Vergleich’ (1997) *Archiv für Presserecht* 1, at 2.

²⁶ See *R v. Central Independent Television plc* at 192. See also Clause 10 of the Code of Practice of the Press Complaints Commission.

²⁷ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ 1995 L281/31.

²⁸ *Campbell v. MGN Ltd* [2003] EMLR 2, 39, at 59 *et seq.* See also the summary by Lindsay J in *Michael Douglas and Others v. Hello! Ltd and Others* [2003] EWHC 786, at para. 230 *et seq.*

²⁹ *Campbell v. MGN Ltd* at 66 *et seq.*

can contain sensitive personal data. Therefore, the data has to be processed fairly and lawfully. This is problematic in cases where data has been obtained by breach of confidence.³⁰ In contrast, where publicly available personal data is processed, there is no breach of the Data Protection Act 1998. Thus, in the present case, no claim arises under the Data Protection Act 1998.

(b) *The crime consists of promising female students better grades in exchange for sex.*

No distinctions can be made between this answer and the answer to (a). The only restriction that springs to mind is that the newspaper would be in breach of confidence if it published the names of the victims, i.e. the female students involved. Rape victims have long been protected from being named. This protection has been extended by the Sexual Offences (Amendment) Act 1992³¹ in order to include all types of sexual offences.

III. Metalegal Formants

English law has denied the existence of an all-encompassing tort of invasion of privacy until now.³² Some judges have been critical of this stance.³³ In the Court of Appeal in *Douglas v. Hello!*,³⁴ Sedley LJ seemed to state that a right to privacy was in existence, which the English courts would recognise.

However, he went on to state that this was merely pigeonholing court practice, yet, significantly declared that this enabled the courts to ‘recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy’. Lord Phillips MR for the Court of Appeal has repeated the view that the invasion of private life should be considered as a breach of privacy rather than a breach of confidence.³⁵ Two subsequent House of Lords decisions – *Wainwright v.*

³⁰ *Michael Douglas and Others v. Hello! Ltd and Others* at para. 235 *et seq.*, per Lindsay J.

³¹ 1992 Act, Ch. 34.

³² See, in particular, the landmark case of *Kaye v. Robertson and Another* [1991] FSR 62, at 66, per Glidewill LJ. The notion of ‘privacy’ is used in s. 143 of the Broadcasting Act 1990 but this Act contains no definition, and the entitlement of the Broadcasting Complaints Commission to rule that a particular transmission was an unwarranted infringement of someone’s privacy triggers no legal sanction but the duty to publish the Broadcasting Complaint Commission’s finding.

³³ See, for example, *Kaye v. Robertson and Another* at 70, per Bingham LJ.

³⁴ *Douglas v. Hello!* [2001] 2 All ER 289.

³⁵ *Campbell v. MGN Ltd* [2003] EMLR 2, 39, at 58.

*Home Office*³⁶ and *Campbell v. MGN Ltd*³⁷ – have bluntly affirmed that there is no separate tort of privacy. Compliance with the ECHR does not require the creation of such a tort as long as its objectives are met by other means.³⁸

The courts have argued that the matter of the establishment of a right to privacy, which affects the freedom of the press so fundamentally, should be left to the legislature rather than the judiciary.³⁹ In 1981, the Law Commission strongly recommended no less than the codification and amendment of the law concerning breach of confidence.⁴⁰ In 1989, pressure by Members of Parliament forced the government to establish a committee headed by Sir David Calcutt QC, which delivered the so-called Calcutt Report in 1990.⁴¹ Nevertheless, the legislator has generally remained passive until now and has merely regulated some specific aspects of privacy.⁴² Statutory law and common law are complemented by self-regulatory instruments, such as the Code of Practice drawn up by the Press Complaints Commission.⁴³

English law has relied on a variety of torts under common law and equity, such as the torts of breach of confidence, trespass, nuisance, malicious falsehood, passing-off, etc.⁴⁴ In practice, breach of confidence

³⁶ *Wainwright v. Home Office* [2003] 4 All ER 969.

³⁷ *Campbell v. MGN Ltd.* (2004) 2 WLR 1232.

³⁸ The Human Rights Act 1998 (HRA) that entered into force in 2000 has undoubtedly brought new impetus to the debate. The HRA requires the interpretation of primary legislation and secondary legislation in a way which is compatible with the rights granted by the European Convention on Human Rights and Freedoms (ECHR), among them Art. 8 on privacy, see s. 3(1) HRA. It also makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, s. 6(1) HRA. Courts are, as such, public authorities under the terms of s. 6 (3)(b) HRA, and their obligation to consider the Convention even applies to private law cases. There is a debate as to whether the courts must interpret the law as being compatible with ECHR or only have to take it into account.

³⁹ *R v. Central Independent Television plc* at 204, per Hoffmann LJ.

⁴⁰ For a review of the various recommendations made by the Law Commission, see *Michael Douglas and Others v. Hello! Ltd and Others* [2001] QB 967, at 993 *et seq.*, per Brooke LJ.

⁴¹ Report of the Committee on Privacy and Related Matters, Cm 1102, Jun. 1990.

⁴² See, e.g., the Rehabilitation of Offenders Act 1984, the Defamation Act 1996, and the Harassment Act 1997.

⁴³ For an analysis of the Press Complaint Code, see G. Gounalakis and R. Glowalla, 'Reformbestrebungen zum Persönlichkeitsschutz in England (Teil 2)' (1997) *Archiv für Presserecht* 870 *et seq.*

⁴⁴ A well-known extra-judicial analysis is provided by Sir B. Neill, 'Privacy: a challenge for the next century', in B. Markesinis (ed.), *Protecting Privacy* (Oxford: 1999) at 1 *et seq.* For a useful survey of case law prior to the House of Lords decisions see G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right

is becoming the most important tort, to the extent that it could be described as a *de facto* tort of invasion of privacy.

Finland

I. Operative rules

The professor does not have a claim against the newspaper in case (b) and probably not in case (a) either. An injunction is not possible.

II. Descriptive formants

Although Ch. 24, s. 9 of the Finnish Penal Code (see Case 1) provides that it is a punishable act to present true facts about a person in order to insult that person, that is probably not the situation in this particular case.⁴⁵ The provision in Ch. 24, s. 9(2) makes it lawful to criticise and impart facts about persons in political and business life, about civil servants, scientists and artists or other persons working in the public sphere.

Recently, in decision 2005:136, the Finnish Supreme Court established the rule that information about a crime committed by a person belongs first and foremost to that person's private sphere.⁴⁶ The justification is that, according to s. 11 of the Finnish Personal Data Act, criminal behaviour is sensitive information about a person.⁴⁷ As a counter principle, there is a legitimate public interest to receive information concerning crimes and criminals. According to the Supreme Court,

of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726 *et seq.* For monographs from the perspective of continental lawyers, see, e.g., M. Branscheid, *Zivilrechtlicher Persönlichkeitsschutz gegen die Presse in England* (Münster: 2001). See also A. Ohly, 'Der Schutz der Persönlichkeit im englischen Zivilrecht' (2001) 65 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 39 *et seq.*

⁴⁵ Until case 2005:136, the Supreme Court had not dealt with the question of when it is lawful to publish the name and picture of a criminal, although case 2001:96 *prima facie* seems to have dealt with these questions. In a newspaper article in *Helsingin Sanomat* dated 19 Oct. 2003, two Supreme Court judges explicitly stated that the latter case merely dealt with the legal question of whether it is lawful to publish the picture of a criminal taken in that criminal's home and not with the question of whether it is lawful to publish the name and a picture of the criminal *per se*.

⁴⁶ The Supreme Court took the opposite position to Vaasa Appellate Court 1994:12, according to which the publishing of the picture of a criminal could not constitute a violation of the criminal's privacy as the crime was committed in a public place and subject to public prosecution.

⁴⁷ It is also to be noted that the Supreme Court refers to the case law of the ECtHR as a justification for interpreting the scope of private life broadly.

there is no clear answer on how the balance between these opposite interests should be reached.⁴⁸

Thus, Ch. 24, s. 8 of the Finnish Penal Code can also be applicable to the reporting of crimes and mentioning of the criminal's name in the press. This provision states that it is a crime to unlawfully reveal information about someone's private life to a large number of people in a way which is likely to cause damage or suffering to the offended person. Nevertheless, there is an exception under s. 8(2) concerning information about a person in politics, business life or public administration. According to s. 8(2), information can be revealed if it is relevant to the evaluation of the person's activities in these fields and the revelations are needed for dealing with a socially important matter.

The Finnish Council for Mass Media has already provided more detailed standards on when it is legitimate to disclose information about the personality of a criminal. According to these guidelines, 'the publication of a name or other identifying facts when dealing with crime can only be justified on the grounds that considerable public interest is served by this'.⁴⁹ Considerable public interest can be based on many considerations. Firstly, the criminal act has to be taken into account. If the crime is directed against society or its citizens and has a severe impact on the economic life or the health of those citizens, this will lower the requirements for revealing the name of the criminal. Secondly, the position of the criminal is decisive. The more political, economic or administrative power the criminal possesses, the more legitimate it is to reveal his/her name. Thirdly, the point in time when the name is revealed is important. The publication of the name of a criminal is more legitimate directly after a court decision than at a time when he/she is only a suspect.

In case 2005:136, the Supreme Court further mentions the need to protect the victim and possible third parties as a decisive condition. Moreover, the way in which the newspaper deals with the crime and the criminal is of importance. If the article also reveals other facts relating to the criminal's private life it is more likely that mentioning the name or the identity of the criminal is unlawful.⁵⁰

⁴⁸ See also P. Tiilikka, *Sananvapaus ja yksilön suoja – Lehtiartikkelin aiheuttaman karsimyksen korvaaminen* (Vantaa: 2007) at 147–8.

⁴⁹ See www.jsn.fi/english/guidel.html#Protection (28 Feb. 2003). See also Tiilikka, 'Yksityiselämän suojan tulkinnasta korkeimmassa oikeudessa', in *Mitä saa sanoa? Viestintäoikeuden vuosikirja 2003* (Helsinki: 2003) at 97–9.

⁵⁰ See also Tiilikka, *Sananvapaus ja yksilön suoja* at 507–29.

With regard to case (b), there is no doubt that crime in the form of demanding a bribe (i.e. sex) has a direct impact on the professor's position as a university teacher and the public will have a legitimate interest to know his name. In case (a), there is no connection between the crime as such and the professor's public office. In this case, however, the crime, i.e. driving under the influence of alcohol and thereby causing someone's death, is a severe threat to the security of the public. The position that the professor holds involves teaching at the highest academic level and this indicates that there is quite evidently a public interest in revealing his name. Therefore, it is not likely that the professor could claim damages.⁵¹ In both scenarios, his name was only revealed after the conviction, which is more legitimate than the publication of a name before a conviction or even before a trial.

As was described in Case 1, injunctive relief is not possible in connection with matters that can be categorised under the use of the fundamental right of freedom of speech.

France

I. Operative rules

The law professor has no cause of action against the journal.

II. Descriptive formants

The principle that justice be administered in public is essential to French law. It not only implies that the debate on and delivery of the judgment take place publicly,⁵² but also that the press can report freely on these facts.⁵³ As long as the court proceedings have not yet been completed, the principle that inquiry and investigation proceedings are secret (Art. 11 Code of Criminal Procedure) and the presumption of innocence (Art. 9-1 *C.civ.*) limit the freedom of journalists. Moreover, the protection of the presumption of innocence has been strengthened recently, notably by the Act of 15 June 2000.⁵⁴ However, by definition, it

⁵¹ See Tiilikka, *Päätoimittajan ja toimittajan vahingonkorvausvastuu* (unpublished licentiate (master's) thesis, University of Helsinki: Sept. 2000) at 295, who states that it is common in Finland that crimes involving violence while intoxicated are reported in the newspaper mentioning the names of the criminals.

⁵² With the exception of certain cases concerning minors or sexual attacks.

⁵³ Art. 41(3) of the 1881 Act.

⁵⁴ Act no. 2000-516 of 15 Jun. 2000 reinforcing the protection of the presumption of innocence and the rights of victims has notably modified Art. 9-1 *C.civ.*, which now looks at the person who 'before any sentence (...) is publicly shown as being guilty of facts under inquiry or preliminary investigation'.

only protects persons who have not yet been convicted. Once the conviction has been handed down, the person concerned cannot oppose a report of that fact in the press or the mention of his/her name therein. Furthermore, as the judgment in this case was published the day after the proceedings had ended, the professor here cannot assert any 'right to be forgotten' (see Case 3) or any injury to his capacity for resocialisation. As soon as he is convicted, he has no cause of action against the journal which reports the judgment.

Germany

I. Operative rules

There are no claims against the newspaper, although this result may be disputed with regard to situation (a) since the law is not clear in such circumstances.

II. Descriptive formants

In contrast to Case 1, the allegations in Case 2 are undoubtedly true. Nevertheless, it is harmful to any law professor's reputation when details about his/her unlawful behaviour are published. Therefore, his/her honour and reputation are affected. However, the right to honour and reputation only protects the honour and reputation deserved, not the honour and reputation which is actually, but falsely, attributed to the person by society.⁵⁵ Therefore, a person who is concerned by a true but embarrassing publication has no entitlement based on his or her right to honour to prevent the press from reporting.

To the extent that the true fact, whether it is embarrassing or not, stems from the inner private sphere of the person, there is a claim against the invasion of this part of privacy based on the general personality right, protected by general tort law under § 823(1) BGB. Details about one's sexual life usually fall under the sphere of intimacy.⁵⁶ However, in general there is no right of privacy in court proceedings.⁵⁷ These events, even if originally derived from private situations, fall under the social life of a person and not his/her private life and the press may report on these proceedings, even by mentioning the names

⁵⁵ BVerfG NJW 1989, 3269, 3270; OLG Karlsruhe, ZUM-RD 2006, 76, 77.

⁵⁶ BGH NJW 1981, 1089, 1091; OLG Karlsruhe NJW 2006, 617, 618.

⁵⁷ However, German procedural law does not allow cameras or recordings in court rooms (Court TV) in order to prevent any undue influence on judges, parties and witnesses, see § 169 *Gerichtsverfassungsgesetz* (GVG), BVerfG NJW 1996, 310; BVerfG NJW 1996, 581, 583.

of the parties involved, as long as the facts reported are true and complete, i.e. the professional duty of full and fair comment is met (see Case 1).⁵⁸ This right results from the fact that the press acts in the public interest by reporting on criminal cases. The right of the public to be informed about criminal court proceedings is limited by the right of the convicted individual to be left alone as part of his/her interest to social adjustment and rehabilitation.⁵⁹ However, this interest only arises a certain time after the conviction has passed. Therefore, in the case at hand, the press has a right to report on the trial proceedings by publishing the name of the professor if this report is published right after or in close temporal proximity to the judgment. An exception to the right of the press to report on the identity of the convicted is only made for juvenile delinquents and minor offences.⁶⁰

Doubts might appear concerning the exact content of the publication and whether the press may publish the full facts of the case. As press privileges must always be weighed against the personality interests of the convicted individual, courts make distinctions with regard to the question of how intensively the press may report. The more serious the offence and the more eminent the position of the convicted person, the more intensively the press may report.⁶¹ With respect to this difference, situation (b) will justify a more extensive report than situation (a). In situation (a), the breach of law is serious with respect to the death of a person. However, the relationship between the act and the function and status of the professor is less intensive than in situation (b), therefore the public interest in knowing about the offender is less. One might argue, however, that for a law professor any breach of law which concerns his/her professional obligation to serve as an example to his/her students is serious. Therefore, there is a relevant link between the crime and the professional function of the convicted.⁶² A balancing of interests could therefore come to the result that an anonymous report

⁵⁸ BVerfGE 35, 202, 232 = NJW 1973, 1226 - 'Lebach'-case I; OLG Nürnberg NJW 1996, 530; OLG Saarbrücken NJW-RR 1998, 745; BVerfG NJW 2000, 1859 - 'Lebach'-case II; OLG Frankfurt/Main AfP 2006, 185 - Cannibal of Rothenburg.

⁵⁹ BVerfGE 35, 202, 237; OLG Hamburg ZUM 1995, 336, 338; OLG Frankfurt/Main NJW-RR 1995, 476, 477.

⁶⁰ BVerfGE 35, 202, 232; BGH AfP 2006, 62, 63.

⁶¹ BVerfG AfP 2006, 354, 355 f.; BGH NJW 2006, 599, 600; OLG Hamburg AfP 2006, 257, 258.

⁶² Similar case: OLG Düsseldorf AfP 1980, 108, 109: shoplifting by an important state government official.

would not have been sufficient to satisfy the public interest in the case. Therefore, there is probably no claim.

In situation (b), the professor's function as a teacher implies that he has a duty to refrain from exercising any undue influence on his students. Although reports about the sexual life of a person will always touch upon this person's intimate life, this no longer holds true when the sexual behaviour also touches upon that person's public sphere.⁶³

III. Metalegal formants

Due to the sociological and political 'watchdog function' of the press, the press have a privilege to report on true facts. Therefore, public figures and figures with public functions have to suffer a more intense observation of their private behaviour. From a psychological point of view, it has been questioned whether this may have the effect of deterring competent persons from taking on a public position.⁶⁴

Greece

I. Operative rules

The professor probably has a claim for compensation of both economic and non-economic loss.

II. Descriptive formants

The act of defamation loses its unlawful character when it concerns journalistic information about severe crimes, an issue that is of significant interest for society as a whole.⁶⁵ Nonetheless, the public interest could be satisfied without mentioning the name of the person involved. As the Supreme Court has decided in a similar case, 'the authors of the article have exceeded the measure that is absolutely necessary for the fulfilment of their duty in that the scope of informing the public could be achieved without reference to the names of the persons involved'.⁶⁶ Furthermore, the journalist acted with fault since he/she was aware of the fact that the publication of the name was not objectively necessary and that this act specifically leads to injury to the professor's honour and reputation.

The act still has an unlawful character, unlawfulness constituting a main element of liability in tort law when the offender is aware

⁶³ OLG Hamburg NJW-RR 1991, 98 (press report on an intimate relationship between the father of former tennis champion Steffi Graf and an ex-Playmate alleging that a child was born as a result of this relationship).

⁶⁴ M. Kriele, 'Ehrenschaft und Meinungsfreiheit' (1994) NJW 1897, 1898.

⁶⁵ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) at 70.

⁶⁶ Supreme Court Decision 825/2002, available in Greek legal Database 'NOMOS'.

that the stated facts are false or when the conditions and the manner in which the facts are stated prove that defamation is intended. Intentional defamation means ‘behaviour that mainly leads to injury to a person’s honour by contesting his moral or social value’.⁶⁷

The protective mechanism of Arts. 57 and 59 CC is set in motion when the offence to one’s personality is a serious one. Apart from this situation, many interferences into the personal sphere occur in everyday life which do not exceed the limits set by social rules.⁶⁸

Vague criteria are applied when establishing, in particular, whether an act by the press is an injury to someone’s honour and reputation. This depends on many factors such as: (a) the content of the insult; (b) the qualitative and quantitative effect of the insult; (c) the medium used for the insulting action; and (d) the reason and the motives for the insulting action.⁶⁹

Ireland

I. Operative rules

The professor does not have a claim against the newspaper in either scenario.

II. Descriptive formants

As outlined in the English report, no action in defamation could exist as the publication is both accurate and truthful. An action in breach of confidence could not exist as the information is already in the public domain by virtue of the professor’s appearance in court.

S. 18 of the Defamation Act 1961 confers a privilege on fair and accurate reports of court proceedings which are held in public. These reports must be contemporaneous, i.e. reporting must occur during the trial or immediately afterwards. Thus, the professor would not have an action against the newspaper as the story was published the day after the verdict.

Italy

I. Operative rules

The professor has no cause of action against the newspaper in either situation (a) or (b).

⁶⁷ *Ibid.* ⁶⁸ Karakostas, *Personality and Press*, at 68.

⁶⁹ *Ibid.* at 70–3.

II. Descriptive formants

Publications concerning crimes committed in the past, which enable the offender to be identified, are not allowed without restriction. As a rule, if the crimes committed have already been made public in the past, further infringements of the privacy of the convicted person are no longer justified by a sufficient public interest; the 'right to be forgotten' prevails.⁷⁰

However, in the present case, the professor's crime was reported in the press for the first time the day after the sentencing. Therefore, there is still public interest in the news. Clearly, this does not justify the publication of all details of the professor's story. As his personal dignity and privacy should be respected, the publication of details concerning his intimate life or other personal data which are not essential to the crime in question should be omitted. That published information must be essential is explicitly required by Art. 137(3) Data Protection Code (DPC) and Art. 6 of the Journalists' Code of Conduct.⁷¹ This principle is also emphasised by courts, scholars and the Data Protection Authority (*Garante per la protezione dei dati personali*).⁷²

If this requirement of 'essentiality' is met and if the right to be forgotten is not at stake, neither Italian legislation nor case law protect the anonymity of the offender after sentencing has occurred.⁷³ The names of the persons whose involvement in criminal offences is certain are usually published in the news, regardless of the type of crime. Anonymity after sentencing does not even seem to be an issue in academic debate (however, under Art. 52 DPC, the offender can oppose the publication of his/her name in law reviews which reproduce the text of the judgment⁷⁴). Nevertheless, the anonymity of persons under investigation is rarely granted, especially if the person concerned is notorious.

⁷⁰ See Case 3.

⁷¹ *Codice di deontologia relativo al trattamento dei dati personali nell'esercizio dell'attività giornalistica*, Gazz. Uff. 3 Aug. 1998 no. 179. The Journalists' Code of Conduct is now provided for by Art. 139 DPC.

⁷² Cf., e.g., *Garante protezione dati*, 12 Oct. 1998, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) at 103; *Garante protezione dati*, 21 Oct. 1998, *ibid.* at 179.

⁷³ *Garante protezione dati*, 21 Oct. 1998; *Garante protezione dati*, 21 Nov. 2001, in M. Paissan (ed.) *Privacy e giornalismo* at 183.

⁷⁴ On this issue see G. Resta, 'Privacy e processo civile: il problema della litigation anonima' (2005) *Il diritto dell'informazione e dell'informatica* at 681.

Thus, in both situations (a) and (b), the publication is to be deemed lawful on the basis of the fundamental rights to freedom of the press and freedom of information (Art. 21 *Cost.*), provided that the facts reported are true, covered by a sufficient public interest, and are respectfully formulated.⁷⁵

The Netherlands

I. Operative rules

The professor does not have a claim against the newspaper.

II. Descriptive formants

(a) The crime consists of causing the death of a person in a car accident due to drunken driving.

If someone commits a crime and is convicted by a court of doing so, it is not necessarily unlawful to publish that person's name and true facts concerning his/her crime. A newspaper has the right to freedom of expression (Art. 7 Constitution). Freedom of expression is only limited if the publication harms the criminal in a disproportional way. If this is the case, the publication of his/her name is a breach of a duty imposed by an unwritten rule of law pertaining to proper social conduct and, for that reason, an unlawful act. This is the situation when there is no reasonable objective in publishing the name of the criminal (see Case 1, circumstance (b)) and/or when the interests of the criminal are unreasonably infringed by the publication (see Case 1, situation (a)).

Normally the public has a reasonable interest to be informed about crimes and criminals and, thus, in the publication of a criminal's name (see Case 1, circumstance (b)). In general, the fact that the publication of the criminal's name infringes his/her interest to be left alone is not decisive for the unlawfulness of the publication. However, it is different if the publication would result in a clear and present danger to the criminal, for instance if it can be expected that citizens might be aggressive towards the criminal if they find out that he/she is their neighbour (see Case 1, circumstance (a)).⁷⁶

Although in this particular case the publication of the professor's name will harm his reputation and weaken his position, these interests do not outweigh the public interest in freedom of expression and in being informed about facts that threaten the important values of

⁷⁵ Cf. Case 1.

⁷⁶ G.A.I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII, (Deventer: 2000).

society. Therefore, the professor does not have a claim either against the journalist or against the journalist's employer.

(b) The crime consists of promising female students better grades in exchange for sex.

In this situation, other public interests are concerned besides the mere public interest in freedom of expression. Arguably, the publication of the professor's name is a warning to other students and thus some preventive effect can be contributed to the publication. Under these circumstances, the only reason the publication of a name would be unlawful is where it would result in a clear and present danger to the life of the criminal (see Case 1, circumstance (a)). For the most part, this danger cannot be distinguished before the name has been published. For that reason the professor does not have a claim.

Portugal

I. Operative rules

The professor does not, in principle, have a claim against the newspaper in either situation.

II. Descriptive formants

There is no 'right to remain anonymous' in Portuguese law. In principle, the conviction of an individual in a criminal case is a public matter, which is not covered by restrictions related to privacy. The identity (name, photo, etc.) of the victims may be withheld as a means of protection, but this does not apply to the identity of the offender. Furthermore, the trial takes place in public (as well as the sentencing), unless the president of the court decides to exclude or restrict its publicity, according to Arts. 321 *CPP* and 206 *CRP*, on the basis of the persons' dignity, public order or good functioning of the proceedings (Arts. 87(2) *CPP* and 206 *CRP*). As a rule, the only cases which are held *in camera* concern sexual offences where the injured party is under 16 years old (Art. 87(3) *CPP*). At any rate, the final decision is always made in public (Arts. 87(5) and 373 *CPP*).

Members of the media are allowed to report the content of all public judicial proceedings, as long as they take the circumstances surrounding those proceedings into account when reporting (Art. 88(1) *CPP*). The identification of offenders is always allowed; the identification of victims of sexual crimes, crimes against honour, or invasions of privacy is forbidden when these victims are under 16 years old (Art.

88(2), para. (c), *CPP*). Of course, some circumstances will inevitably lead to a greater public interest in a specific case, and a case where the convicted person is a law professor would undoubtedly be such an instance. Journalists have a saying that ‘news happens when the gardener bites the dog, not when the dog bites the gardener’. In the minds of journalists and most of the public, there is something complex or unusual about a law professor committing a criminal offence. This makes it more ‘palatable’ to the public curiosity. The negative moral value of drunken driving, connected with the seriousness of the death of the victim (hypothesis (a)), increases the immorality of the case and calls for a more intense social criticism; the same goes for hypothesis (b). This justifies public reproach.

The professor is not entitled to claim compensation unless there are any excessive and unlawful terms used in the report which may be unnecessarily and unduly offensive.⁷⁷ Therefore, the publication of the case in the newspaper is legal and the law professor would have no claim as long as:

- (a) the article reports the final decision taking (or at least not disregarding) the circumstances surrounding it into account (Art. 88(1) *CPP*);
- (b) all information conveyed is accurate and objective (Art. 3 *LI*);
- (c) it is done in a proportional, necessary and adequate manner.⁷⁸

Scotland

I. Operative rules

The law professor does not have a claim.

II. Descriptive formants

Prior to the enactment of the HRA, the issue of press reports on court proceedings following a criminal conviction was simply seen as a matter of open justice. The paramount principle of Scots law, as well as English law, was that a system of open justice requires the correct reporting of what has taken place in court:

The principle on which this rule is founded seems to be that, as the Courts of Justice are open to the public, anything that takes place before a judge ... is

⁷⁷ See considerations in Case 1 regarding the provisions regulating journalistic activity in Portugal, in particular the Journalists Statute and the Journalists’ Union Code of Practice.

⁷⁸ STJ 5.03.1996, 29.10.1996, 26.09.2000, 14.05.2002.

necessarily and legitimately made in public, and being once made legitimately public property, may be republished without inferring any responsibility.⁷⁹

A criminal conviction is proof of the correctness of the reporting.⁸⁰ With the advent of the HRA and Art. 8 ECHR, it is conceivable that the question of an individual citizen's right to privacy as a *perpetrator of crime* and a parallel (competing) right to rehabilitation beyond the public eye may deserve consideration. Case law protecting the privacy of criminals is limited but nevertheless exists.⁸¹ There are, however, some exceptions to the overriding principle of public justice.

At common law and by statute, both English and Scots law may impose reporting restrictions in order to protect *victims* of crime.⁸² The legislation covers proceedings involving sexual offences against women and children in particular.

There is only one specific statutory provision allowing for the protection of the offender in the sense of rehabilitation – the Rehabilitation of Offenders Act⁸³ – but it is neither applicable here nor does it contain any provisions relevant to the protection of identity in the sense of privacy. Furthermore, the Act does not limit press freedom to report on the perpetrators of crimes. Even where it could be argued that the HRA requires a greater assessment and a balance to be struck between the perpetrator's interests in privacy and the public interest, particularly in view of the timing of the publication, the overriding interest is that the public be informed of the truth.⁸⁴

⁷⁹ *Richardson v. Wilson*, (1879) 7R 237 per Lord President Inglis.

⁸⁰ Civil Evidence Act 1968 s. 13(1) for England; Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, Ch. 70; see s. 12(2) Defamation Act 1996.

⁸¹ Restrictions on reporting can be made at common law and under statute for victims to preserve their anonymity, see Calcutt Report, Report of the Committee on Privacy and Related Matters, Cm 1102, Jun. 1990.

⁸² There are various statutes restricting reporting and photographing or sketching in cases involving juveniles and specific categories of crime, see Calcutt Report, appendix F; in the same report, appendix G lists those statutes where there are restrictions on the identification of victims.

⁸³ Rehabilitation of Offenders Act 1974, Ch. 53, ss. 8 and 9. The rehabilitation period for periods of imprisonment of six months and less is seven years; five years for all other periods that are less than six months' imprisonment. The Act also covers discharges or acquittals.

⁸⁴ There is no immediate equivalent authority to the decision of the German Constitutional Court with regard to limitations on media coverage prejudicial to a prisoner on his release, see BVerfG 35, 202 = NJW 1973, 1226 *Lebach*. For a discussion on the balance of interests in German law see G. Brüggemeier, *Deliktsrecht* (Baden-Baden: 1986), no. 229.

The recent release of an infamous child murderer in England, which led to the High Court awarding a lifelong *anonymity order* for both the perpetrator and her child,⁸⁵ is a perfect example of an *exceptional case* relating to the protection of the *criminal*. It should be recalled that such an order can be made at common law.⁸⁶ In the particular circumstances of that case, the court relied on the evidence of a leading psychiatrist who confirmed the paramount medical reasons for making such an award.

Since the enactment of the HRA, there has been no recent Scots authority supporting the principle that the perpetrator of a crime will be granted equal or indeed greater protection than the victim.

Recent *English cases* relating to *pre-trial charges* have led to a renewed call for the introduction of a clear right to privacy. A call for greater protection of the perpetrator, as opposed to the victim, occurred as a result of criminal proceedings (*rape charges*) against well-known persons in public life that were subsequently dropped by the Crown Prosecution Service (CPS) as the damage to the implicated individuals had already occurred through media coverage at the time of the charges.⁸⁷

The questions addressed in this particular hypothetical case distinguish between crimes (a) and (b), both perpetrated by a person of generally well-accepted standing. The only distinction between them is in relation to the sentence imposed.⁸⁸ The law does not prohibit the publication of an individual's criminal convictions, irrespective of the type of crime or misdemeanour.⁸⁹ Both instances referred to here demonstrate behaviour which is not fitting for a person of this particular standing, therefore there is limited room for lowering the professor any more in the eyes of society.

⁸⁵ *X (A Woman formerly known as Mary Bell) and Anor. v. O'Brien & News Group Newspapers Ltd* [2003] EWHC 1101 (QB), Order of 21 May 2003. Such life long injunctions *ad mundum* have only been ordered in three cases relating to child murderers and otherwise in special circumstances involving 'supergrasses'; see *Venables v. News Group Newspapers Ltd* [2001] 1 All ER 908 (child murderers of James Bulger); *Nicholls v. BBC* [1999] EMLR 791. These are all English authorities.

⁸⁶ See Calcutt Report. Such orders are not made for convenience but in order to ensure the administration of justice, see *AG v. Levenson Magazine Ltd* [1979] AC 440.

⁸⁷ *The Times*, 27 May 2003.

⁸⁸ See above n. 83.

⁸⁹ *Campbell v. MGN Ltd* (HL) per Baroness Hale at para. 142: 'On the other hand was the public interest in the free reporting of murder trials. This is not only important in itself, as a manifestation both of freedom of expression and freedom to receive information. It is also an essential component in a fair trial ... the public can have confidence in the system both in general and in the particular case.'

At any rate, hypothesis (b) would go before a jury. As long as the report only covers facts without any additional sting, there is little or no legal remedy, not even a right to protection under the privacy provisions of the HRA.

Nevertheless, should the reporting go beyond the necessary degree of straight fact, the professor could theoretically bring a case of defamation but would need to face the defence's plea of *veritas*. Still, juries can be persuaded that newspaper reports can contain libel or defamatory statements. The recent English libel case of *Alan Campbell v. News Group Newspapers Ltd*, concerning a paedophile (a fact in itself not subject to dispute), demonstrates just how much libel cases turn on the individual wording of the moment. In this particular instance,⁹⁰ the claimant had been seriously maligned in a news report. The fact that he was apparently a paedophile was insufficient in itself to reduce the sting of the libel, which included allegations of appearing in pornographic paedophile videos. On appeal, he was awarded £30,000 in damages.

The remaining defence open to the press in this case is that of privilege. Privilege is both a common law and statutory protection⁹¹ given to court reporting and the subsequent media coverage of what has been said in court. Common law privilege requires the reporting to be fair and accurate. Whether the privilege itself is absolute or qualified it provides a legal defence against claims of defamation. In relation to criminal proceedings, Home Office circulars require that the defendant's name be read out in court to avoid any errors regarding the actual person, so that, unless exceptional conditions prevail, the name will be divulged in court.

There are diverging views as to whether Scots law attributes (reports on) judicial proceedings with *qualified* privilege rather than absolute privilege. The Scots authorities certainly show that if malice is averred, the privilege may be lost. Hence, Scottish cases refer to qualified privilege more.

III. Metalegal formants

In relation to the proper administration of justice, the provisions of the HRA have had no major impact on restricting the freedom of expression concerning what takes place in the courts. If the case can be made

⁹⁰ *Alan Campbell v. News Group Newspapers Ltd* [2002] EMLR 43.

⁹¹ Defamation Act 1996, ss. 14, 15; also regulated in specific statutes such as the 1990 Broadcasting Act.

that rehabilitation is endangered, then special interests will be taken into account (*cf. Mary Bell* above) at that stage. It is unlikely that the current tipping of the balance in favour of fair trial and justice will give way to the perpetrator's overriding privacy interests, as opposed to those of the victim.

Spain

I. Operative rules

The professor does not have a claim.

II. Descriptive formants

Mentioning the professor's name in a newspaper after he has been convicted of committing a crime is not actionable when the information is true and is in the public interest. Some Spanish Supreme Court decisions have dealt with this point. In one such case where a newspaper published that the claimant had been convicted of committing a crime and gave the claimant's name, a conflict arose between the fundamental rights to honour and freedom of information. The court decided in favour of the latter because the information was true and was in the public interest and the report substantially reproduced the contents of the Criminal Court decision.⁹² Art. 120.1 Spanish Constitution provides

⁹² Spanish Supreme Court Decision (STS), 13 Jun. 1998 (RJ 4688). There have been some other notable cases relating to the publication of information that identifies people under arrest for suspicion of having committed a crime. These include STS, 24 Jun. 2000 (RJ 5303), and STS, 29 Mar. 2001 (RJ 6637). In the first case, a letter was published in the readers' opinion section of a newspaper. Its content referred to a speech given by the mayor of Cabrales (a town in Asturias) before several journalists, but in addition to criticising the speech, the anonymous author of the letter also mentioned that the mayor was detained in Barajas airport for cocaine trafficking. The mayor claimed against the editor, the director and assistant director of the newspaper for damages and the publication of the sentence. First Instance Court of Oviedo (30 Dec. 1994) granted the claim and required the defendants to pay €6,000, a ruling that was confirmed both by Court of Appeals and Supreme Court: 'the content of the letter goes beyond the freedom of speech given that the reference to the detention has nothing to do with the speech, and the newspaper has allowed the content of the letter as far as it published a letter without identifying the author.' In the second case, a newspaper published that, after the breaking up a group of thieves, two persons were detained as holders of the stolen goods (*receptador*). These two persons were released and absolved and filed a claim against the newspaper. The Supreme Court rejected the claim as it considered that the news was true - mentioned that the claimants were detained but at fault - and the news is of public interest. The identity of the claimants is also of interest: the right of information includes all information, and not only part of it.

that judicial proceedings are to be held in public, with exceptions regulated by ordinary law.

Thus, in both cases, the professor has no action against the newspaper to protect his rights to honour or personal privacy.

Switzerland

I. Operative rules

If the crime consists of causing the death of a person in a car accident due to drunken driving, publication is unlawful and the professor would have a claim against the newspaper. If the crime consists of promising students better grades in exchange for sex, the professor has no legal claim against the newspaper.

II. Descriptive formants

As a rule, publishing information about a crime and mentioning a person's name therein is an infringement of his or her private sphere and violates Art. 28, para. 1 CC. However, publication can be justified by a public interest. In general, such an interest will be considered dominant where the related events have repercussions on the public activity of the convicted person or if they are based on that person's fame.⁹³ It is commonly understood that a general interest in reporting on judicial proceedings exists, at least where the proceedings are particularly interesting because of the status of the persons involved and the nature of the infractions committed. However, the rule is that such reports must be communicated in an anonymous form.⁹⁴ Thus, the publication of the name or initials of the person indicted, charged, or convicted is not justified, at least where the individual is not already known by a large number of people or where divulging his or her identity does not serve the needs of a police or judicial investigation. The idea behind this is that divulging an individual's identity in the media constitutes a public vilification which complicates reintegration into society. This is especially true in a country as small as Switzerland.⁹⁵

Some may argue that publication could prevent re-offending. However, as Barrelet asserts, warning the public of the risks presented

⁹³ ATF/BGE 126 III 209 c. 4, JdT 2000 I 302.

⁹⁴ ATF/BGE 129 III 529 c. 3.2; ATF/BGE 116 IV 31, JdT 1992 IV 28 ('Proksch').

⁹⁵ D. Barrelet, 'La publication du nom des auteurs d'infractions par les médias' (1998) *Médialex* at 204 and 206.

by an individual, notably related to sexual behaviour, is not a predominant public interest. In fact, a large number of delinquents pose the risk of re-offending, and if a preponderant public interest were present, one could nullify the rule of anonymity.⁹⁶

(a) The crime consists of causing the death of a person in a car accident due to drunken driving.

The Federal Court has recognised that the publication of a judgment can be essential for the public interest as an example, just as a driver reprimanded for traffic violations provides an example to other drivers on the road.⁹⁷ Nevertheless, the rule is anonymity. Therefore, the publication of someone's name must be necessary for the protection of the public. As pointed out earlier, the infraction must be related to the individual's public position and a preponderant public interest must justify the infringement. In the case at hand it is hard to imagine how the publication of the professor's name will serve the public interest, outweighing the infringement. Moreover, the public interest will be equally satisfied if, rather than publishing the professor's name, an impersonal reference such as 'a law professor' were used. Here, since the principle of proportionality between the public interest and the professor's private sphere is not respected, the infringement is unlawful. The situation would be different if the offender were a politician. The public has the right to know about the kind of person they elect, therefore the public interest would be weighty enough to justify the infringement.

Where the trouble caused by the infringement persists, the law professor may request a declaratory judgment holding that the publication is unlawful (Art. 28a, para. 1, ch. 3 CC). He may also subsequently demand damages under Art. 28a, para. 3 CC.

(b) The crime consists of promising female students better grades in exchange for sex.

In this scenario, concealing the name of the professor in connection with this sort of behaviour could cause the public to feel deceived. The sexual behaviour of the professor is part of his intimate sphere, which includes facts and deeds that must be withheld from general knowledge, with the exception of people to whom these facts

⁹⁶ *Ibid.* at 210. ⁹⁷ ATF/BGE 92 IV 184 c. 1, JdT 1967 I 468.

were specifically confided.⁹⁸ However, personality rights are not unrestricted, in particular where there is a public interest at stake.

Publication of the professor's name may be in the public interest. It may prevent the professor from committing further similar offences, since all of his students would be aware of his actions. The infraction is linked to his position as a professor and it is incompatible with his functions. The need to protect the students and provide them with an adequate learning environment justifies the infringement of his private sphere. Therefore, publication is not unlawful and the law professor has no claim against the newspaper.

III. Metalegal formants

Directive 7.6 of the Swiss Press Council prohibits journalists from publishing the name or any other identifying characteristic of a person involved in judicial proceedings. Simultaneously, it outlines the exceptions to the principle of anonymity and to the protection of the private sphere; such exceptions are predominantly authorised 'where the individual exercises a political mandate or an important public function and he is pursued for having committed acts incompatible with such functions' or 'where his notoriety is recognised'.⁹⁹

Recently, the names of two politicians appeared in a Swiss newspaper after automobile accidents or speeding offences. Because both were well known, their identities were revealed. The first politician, accompanied by a passenger, was involved in a car accident that did not result in serious injuries. The second politician was under scrutiny because he caused an accident while driving under the influence of alcohol, after already having had his driving licence suspended numerous times for the same reason.

These two examples bring to light the relationship between the function performed by the individual and the image it represents, which must be maintained. The politicians' non-observance of their political duties, as well as their notoriety, gave rise to the publication of their names and infractions. This is in line with what the Swiss Press Council has also affirmed: 'the publication of identity is essential where the individual concerned is publicly-known by virtue of the importance or the nature of his or her professional activities and where the infraction

⁹⁸ H. Deschenaux and P.H. Steinauer, *Personnes physiques et tutelle* (4th edn., Berne: 2001) at 79, n. 560.

⁹⁹ See www.presserat.ch (5 September 2005).

is attributed in relation to these.¹⁰⁰ These two cases demonstrate that the right to privacy can be limited due to the position or notoriety of a person.

Comparative remarks

The core question in this case is when and to what extent criminal offenders should be granted anonymity in press reports concerning the crimes they have committed. Here, freedom of the press, freedom of information and the public interest may clash with the privacy rights of the offender.

The crimes contemplated by hypotheses (a) and (b) differ significantly both in context and gravity. In situation (a), the crime is negligently or recklessly committed and is not related to the offender's profession. In situation (b), the crime is intentionally committed during the exercise of the offender's profession. From the viewpoint of social damage *tout court*, the crime under (a) may be considered more serious than the one under (b), because of the supreme rank of human life in all European legal systems. From the viewpoint of the offender's social and professional reputation, however, the disclosure of the offender's identity in situation (b) is likely to cause greater scandal and therefore greater damage to the offender than in situation (a).

In most legal systems, no claims would be available to the offender in either situation (a) or (b). In Greece, the offender probably has a claim in both situations. In Switzerland, the offender only has a claim in situation (a).

I. Prevalent solution: no claim

In England, Scotland and Ireland, as a rule only the victim's anonymity is considered worthy of protection. In rare and exceptional cases, the offender is granted anonymity by considering special circumstances, in particular his/her age. However, these exceptional circumstances are not present in the instant case.

Within the civil law family, most countries do not provide for a statutory regulation of the 'right to anonymity' in relation to media reports in criminal matters. A remarkable exception is § 7 Austrian Media Act (*MedienG*). This provision prohibits the disclosure of a criminal

¹⁰⁰ Statement of the Conseil suisse de la presse 1994, n. 7 c. 8.

offender's identity in the media if such disclosure would cause him/her a lasting prejudice, unless the public interest in the disclosure, in respect of the offender's position in public life, prevails. The Austrian courts interpret the 'position in public life' requirement quite extensively, so that no right to anonymity is usually acknowledged for members of the middle/upper class such as university professors.

In most legal systems, the limits of 'good journalistic practice' in reporting about crimes and criminal procedures are defined by case law or self-regulatory instruments. Two interesting examples of self-regulation mentioned in the national reports are the guidelines of the Swiss Press Council and the Finnish Council for Mass Media.

In many countries, the gravity of the crime and the societal position of the offender may play a role in the courts' determination of the limits to lawful press reports. This is true, for example in Germany: the more serious the offence and the higher the offender's position in society, the more intensively the media may report on the crime. Accordingly, in situation (b), a more extensive report could be justified than in situation (a). However, even in situation (a) the publication of the offender's name would presumably be allowed in Germany.

As a rule, in most countries the press can mention the name of an offender when reporting on crimes. Given the intense public interest in these facts, freedom of the press prevails when balanced against the offender's right to anonymity and interest in resocialisation. The latter may only prevail if the report is published a long time after the criminal trial took place (see Case 3). This is not the situation in the present case, where the facts were reported the day after the offender was convicted in court. In this situation, as long as the only intrusion into the offender's private sphere is the publication of his/her name, the offender does not have any claim. Legal remedies may only be granted if the report discloses additional details about the offender's private life or otherwise oversteps the limits of a fair and accurate report (see Case 1).

II. The Greek and Swiss solutions

It seems to be acknowledged in both Greece and Switzerland that the offender has a general right to anonymity, prohibiting the disclosure of his or her identity in the mass media from the very moment that the crime has been committed. In both countries, the rule is that the persons implicated in media reports about crimes must remain anonymous. The publication of the offender's name, in principle, gives the right to claim under Art. 57 Greek Civil Code and Art. 28 Swiss Civil

Code, both of which provide for specific causes of action for infringements of personality.

In Greece, no justification on grounds of the public interest seems to be acknowledged in these kinds of cases. The publication of the offender's name is generally deemed unnecessary. Therefore, a claim for compensation of pecuniary and non-pecuniary loss would probably be allowed in both situations (a) and (b).

In Switzerland, the public interest in being informed may justify the infringement of the offender's personality caused by the publication of his name. According to the principle of proportionality, the public interest has to be balanced against the offender's privacy interests. In situation (b), mentioning the professor's name may be in the public interest as it may prevent the professor from committing further similar offences since all of his female students would be aware of his actions. On the contrary, in situation (a) the public interest will be equally satisfied if, rather than publishing the professor's name, an impersonal reference such as 'a law professor' was used. Therefore, in this situation, the professor would have a claim for damages. Where the trouble caused by the infringement persists, he also may request a declaratory judgment holding that the publication is unlawful.

6 Case 3: The paedophile case

Case

A detailed report containing the names and photographs of several paedophiles convicted by criminal courts is published in a high-circulation magazine. One of the paedophiles, Larry, was convicted three years ago. He was released from prison a week after the publication of the list.

Can Larry sue for damages?

Discussions

Austria

I. Operative rules

Larry's claim for damages will probably fail under Austrian Law.

II. Descriptive formants

If a general right to remain anonymous under § 7a *MedienG* (see Case 1) were acknowledged, this would conflict with the media's duty of 'warning and protecting' as a particular element of the 'watchdog' function of media,¹ as is emphasised by some scholars and courts in Austria.

This is particularly true in cases of sexual offences involving children. Here, the interests of not only the parents but also of the public in protecting children against the long-lasting and severe consequences

¹ Cf. ECtHR since the decision *Sunday Times v. United Kingdom* (1979) 2 EHRR 245: UGrKa 20.5.1999, ÖIMR-NL 1999/3/4, 96. In respect of the media's duties to warn and to protect the public see OLG Graz MR 1994, 193; E. Swoboda, *Das Recht der Presse* (2nd edn., Vienna: 1999) at 88 *et seq.*

of sexual abuse clearly prevail over the interest of the convicted criminal to be reincorporated into society.

The Higher Regional Court of Graz, for example, held that a paedophile who was sentenced to 15 months in jail had no right to remain anonymous when released from prison. The public interest in warning and protecting potential future victims must be considered higher than the interests of the paedophile.²

Applying these rules to our case, there is no chance either for Larry's claim for an injunction (§ 381 EO) or for a claim in damages pursuant to § 7a MedienG.

Belgium

I. Operative rules

Larry can probably sue for damages.

II. Descriptive formants

Larry can refer to his 'right to be forgotten' (*droit à l'oubli*), under the right to privacy³ and to image.⁴ The protection of this right commences once the normal public interest in a crime disappears and applies to offenders during their sentence and on their release.

The right to privacy is guaranteed by Art. 22 of the Constitution. This article provides for the right to privacy and private life, except in some cases set out by law. The right to image has been developed in court decisions but is now protected by Art. 10 of the Copyright Act of 30 June 1994. All persons have an exclusive right to their image and its use, which permits them to prohibit the reproduction and dissemination

² OLG Graz 12.9.1994, 11 Bs 269/94.

³ For a general overview of the right to privacy, see H. Vandenberghe, 'Bescherming van het privéleven en het recht op informatie via de massamedia' (1969-1970) *RW* 1447-1470; B. Oversteyns, 'Het recht op eerbiediging van het privéleven' (1988-89) *RW* 488-98; E. Montero, 'La responsabilité civile des médias', in A. Strowel and F. Tulkens (eds.), *Prévention et réparation des préjudices causés par les médias* (Brussels: 1998) at 95-134; P. De Herdt, *Art. 8 EVRM en het Belgisch recht. De bescherming van privacy, gezin, woonst en communicatie* (Ghent: 1998), 367.

⁴ For a general overview of the right to image, see E. Guldix, 'Algemene systematische beschouwingen over het persoonlijkheidsrecht op de eigen afbeelding', (1980-81) *RW* 1161-92; M. Isgour and B. Vincotte, *Le droit à l'image* (Brussels: 1998) at 160; G. Ballon, 'De rechten van de geportretteerde' (1985-86) *RW* 2648-9; J. Lievens, 'Het recht op afbeelding' (1977-78) *RW* 1857-68; L. Diericx, *Het recht op afbeelding* (Antwerp: 2005).

thereof without prior express authorisation.⁵ Art. 10 does not prohibit the actual taking of a photograph. It only prohibits its reproduction and dissemination.⁶

The right to be forgotten does not prohibit renewed press attention in a crime or a criminal provided the issue is newsworthy, e.g. in an annual review. Furthermore, that attention must be in proportion to the newsworthiness, e.g. only a short report would be justified, not the recapitulation of the entire story in detail. The Civil Court of Brussels condemned the Minister of Justice and a Belgian television station for broadcasting a television programme reconstructing a prisoner's spectacular escape attempt which had taken place years before. The fact that the programme was not related to an important social problem was decisive. The court awarded the (former) prisoner compensation of 100,000 BEF (€2,500) for the non-economic harm caused to him on the grounds of a violation of the right to live an anonymous life.⁷

The judiciary attaches great importance to the right to be forgotten.⁸ However, renewed press attention – with the publication of a name and photograph – could be justified if, for example, a convicted criminal is released on parole and his victims react negatively to this. Attention should then also be paid to interim developments, e.g. the criminal's good behaviour.

In the absence of such 'special circumstances', the publication of a name and photograph would constitute a fault, enabling Larry to sue for damages if no injunction was claimed/obtained.

As mentioned in Case 1, whether or not Larry can obtain an injunction to prevent the publication of the report is disputed in Belgian law.

England

I. Operative rules

Larry does not have a claim unless he can submit special evidence as detailed below.

⁵ L. Diericx, *Het recht op afbeelding* at 62.

⁶ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995-2000' (2001) *TPR* 1630.

⁷ Civil court Brussels 20 Sept. 2001, *AM* 2001, 77. See D. Voorhoof, 'Ook gevangene heeft recht op afbeelding. RTL-TVI en minister veroordeeld wegens schending recht op afbeelding van gevangene' (2001) *Juristenkrant* 1 and 16.

⁸ Civil court Brussels 30 Jun. 1997, *JT* 1997, 710; Civil court Namur 27 Sept. 1999, *AM* 2000, 471; Civil court Brussels 20 Sept. 2001, *AM* 2002, 77.

II. Descriptive formants

1. Substantive law

(a) Defamation The magazine has the defence of justification (truth) available for the libel committed. There is an exception to this defence under s. 8 of the Rehabilitation of Offenders Act 1974⁹ for the ‘spent convictions’ of a ‘rehabilitated person’. Rehabilitation periods are laid down in ss. 5 and 6 of the Act. For example, for a sentence of imprisonment for a term exceeding six months but not exceeding three years, the rehabilitation period is ten years from the date of conviction. After this period it is not permitted to report on the spent conviction. Still, the claimant would have to prove that the publication was malicious, which this particular case does not mention.

(b) Breach of confidence In two recent decisions passed in the aftermath of spectacular circumstances where children killed younger children, injunction orders *contra mundum* were granted in order to protect the child killers from being identified, and indeed ‘named and shamed’ by the press or by members of the public.¹⁰ However, these were extreme cases where persons had been given new identities and who had, in one case, lived in the community for 23 years, while the killing had occurred 35 years earlier.

The first issue in the case at hand would be whether Larry’s name and photograph had already been made public at the time of the conviction and were therefore already in the public domain. However, this would not necessarily exclude breach of confidence since the public forgets such things over time. English courts have held that the unnecessary disclosure of a person’s background to new friends or to the public at large may be an infringement of privacy or confidentiality.¹¹

The name and picture of an offender may be unknown to society at large and the offender may have an interest in keeping these secret. Even if some may have known him/her, this piece of information may still have been unknown to many others and may, therefore, have been

⁹ 1974 Ch. 53.

¹⁰ *Venables v. News Group Newspapers Ltd and Others; Thompson v. News Group Newspapers Ltd and Others* [2001] Fam 430; *X, A Woman Formerly known as Mary Bell, Y v. S O, News Group Newspapers Ltd, MGN Ltd* [2003] EWHC 1101.

¹¹ See *R v. Broadcasting Complaints Commission, ex parte Granada Television Limited* [1995] EMLR 163.

confidential or private information.¹² Thus, Larry's name and photograph may have been private information. It would also have seemed to be obvious that Larry wanted to keep this information private.

Therefore, the lawfulness of the publication of Larry's name and picture would essentially depend on the third criterion of whether the magazine has made authorised use of the information it has obtained. This criterion has come under pressure through the adoption of the Human Rights Act 1998. S. 6(1) HRA 1998 obliges the court to act in a way which is compatible with the right to privacy conferred by the ECHR. At the same time, s. 12 HRA 1998 on freedom of expression must be observed. In the meantime, the English courts have developed their methodology in relation to conflicts between Arts. 8 and 10 ECHR. The methodology that courts will employ to balance these Articles was summarised by Lord Steyn in *In re S (A Child)*.¹³ His guidelines have subsequently been followed by the High Court in the cases of *McKennitt*¹⁴ and *HRH The Prince of Wales*,¹⁵ and the High Court's use of these guidelines were approved by the Court of Appeal in *McKennitt*.¹⁶ They are as follows:

- (i) Neither Art. 8 nor Art. 10 has as such precedence over the other.
- (ii) Where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.
- (iii) The justifications for interfering with or restricting each right must be taken into account.
- (iv) The proportionality test must be applied to each.

The rights may only be interfered with or restricted if three conditions are fulfilled. Baroness Hale outlined the conditions in *Campbell*:¹⁷

- (i) The interference or restriction must be 'in accordance with the law'; it must have a basis in national law which conforms to the Convention's standards of legality.

¹² See *Michael Barrymore v. News Group Newspapers Ltd* [1997] FSR 600. With regard to the accessibility of information that is, in principle, publicly available, see *Jon Venables, Robert Thompson v. News Group International and Others; Attorney-General v. Greater Manchester Newspapers Ltd* (2002) 99(6) LSG 30, where Dame Butler-Sloss held that even information that is available in public libraries or in reports published on the internet may be confidential if the ordinary citizen without background knowledge would not be able to locate it.

¹³ *In re S (A Child)* [2005] 1 AC 593, at 603.

¹⁴ *McKennitt v. Ash* [2005] EWHC 3003 (QB).

¹⁵ *HRH The Prince of Wales v. Associated Newspapers* [2006] EWHC 11 (Ch).

¹⁶ *McKennitt v. Ash* [2006] EWCA Civ 1714.

¹⁷ [2004] 2 AC 457, at 497.

- (ii) It must pursue one of the legitimate aims set out in each article. Art. 8(2) provides for the 'protection of the rights and freedoms of others'. Art. 10(2) provides for the 'protection of the reputation or rights of others' and for 'preventing the disclosure of information received in confidence'. The rights referred to may either be rights protected under the national law or other Convention rights.
- (iii) Above all, the interference or restriction must be 'necessary in a democratic society'; it must meet a 'pressing social need' and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both 'relevant' and 'sufficient' for this purpose.

In *X, A Woman Formerly known as Mary Bell, Y v. S O, News Group Newspapers Ltd, MGN Ltd*, the public interest in the current whereabouts of the claimant was not to be determinative.¹⁸ Instead, her fragile mental and physical condition clearly tipped the balance in favour of her right to confidentiality. However, Dame Elizabeth Butler-Sloss mentioned in passing that there is a different situation in respect of paedophiles, recognising that there is clear and understandable public concern that they will reoffend.¹⁹ She also said that many serious offenders who do not enjoy the protection of the Rehabilitation of Offenders Act 1974 would be unlikely to be granted injunctions in order to be protected from breach of confidence.²⁰ In *R v. Chief Constable of the North Wales Police*, the court refused to grant injunctive relief to prevent the Chief Constable from revealing the past convictions of two paedophiles living on a caravan site to the owner of that site.²¹ Thus, unless Larry can submit evidence relating to the special circumstances of his case, such as immediate danger to his

¹⁸ There is also recent case law available on the publication of the addresses of celebrities, here: Heather Mills. In *Mills v. News Group Newspapers Ltd* [2001] EMLR 41, Collins J was, in principle, in support of protecting Heather Mills under the law of confidentiality even though he did not make an injunction order due to the particularities of the case. The court could not find a particular public interest in the address of Heather Mills, while stalking may be a serious consequence of making the address known to the public.

¹⁹ *X, A Woman Formerly known as Mary Bell* at para. 40.

²⁰ *Ibid.*, at para. 41.

²¹ *R v. Chief Constable of the North Wales Police, ex parte AB* [1999] QB 396. The balance may be different in cases where no criminal convictions have been made, see *Re L (Minors) (Sexual Abuse: Disclosure)*, *Re V (Minors) (Sexual Abuse: Disclosure)* [1999] 1 WLR 299.

life,²² the publication of his name and address would not amount to an unauthorised use of confidential information.²³

If information had been published under breach of confidence, Larry could claim damages. If financial damage cannot be shown, nominal damages could be awarded.

(c) The Data Protection Act 1998 The magazine could have also violated the Data Protection Act 1998 if information on Larry had been published under breach of confidence. However, s. 32 of the Act provides for an exemption from liability for personal data which is processed for special purposes only if:

- (a) the processing is undertaken with a view to the publication of any journalistic, literary or artistic material by any person;
- (b) the data controller reasonably believes that, having particular regard to the special importance of the public interest in freedom of expression, publication would be in the public interest; and
- (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.²⁴

S. 13 of the Data Protection Act 1998 states that an individual who suffers damage due to a data controller's infringement of any of the requirements of this Act is entitled to compensation from the data controller for that damage. An individual may also claim damages for distress suffered because of that infringement. However, the data controller has a defence available to prove that he or she had taken such care as was reasonably required in all the circumstances to comply with the requirements of the Act (s. 13(3)). In cases of breach of confidence, the crucial question identified by Lindsay J in *Douglas v. Hello!* is whether distress is suffered because of the infringement of the Data Protection Act. Lindsay J held that in fact distress was suffered because of the breach of confidence and that the breach of the Data Protection Act did not constitute an additional route to recovery for damage or distress beyond a nominal award.²⁵

²² *Venables v. News Group Newspapers Ltd and Others* at 451 *et seq.* In this respect, one may remember recent cases of mob justice against paedophiles in England.

²³ In practice, injunction orders are more likely to be made in cases in which the well-being of minors is in danger. For an overview, see *R v. Central Independent Television plc* [1994] Fam 192, at 207, per Waite LJ.

²⁴ For a detailed analysis of this exemption, see *Campbell v. MGN Ltd* [2003] EMLR 2, 39, at 69 *et seq.*

²⁵ *Michael Douglas and Others v. Hello! Ltd and Others* [2003] EWHC 786, at para. 239.

III. Metalegal formants

Although the HRA 1998 has explicitly introduced a statutory duty to balance the right to privacy and the freedom of expression, and in particular the freedom of the press, examples of this balancing of interests can be found in earlier cases. English courts have long recognised the defence of public interest in the publication of confidential information by the press.²⁶ Thus, it was not necessary that the claimant had committed a wrong. However, the public interest must not be confused with what is interesting for the public,²⁷ and it must also not be confused with the interest of the media in publishing information.²⁸ Moreover, this balancing process must not be confused with the defence of qualified privilege in defamation cases.²⁹

Finland

I. Operative rules

Larry can claim damages. An injunction is not available.

II. Descriptive formants

As was explained in Case 2, in case 2005:136 the Finnish Supreme Court recently established the rule that information relating to a crime committed by a person belongs to the scope of this person's private life. Therefore, the provision in Ch. 24, s. 8 of the Finnish Penal Code concerning injury to another's personal life is applicable. According to this provision it is a crime to unlawfully disclose information to a large number of people about someone's private life in a way which is likely to cause damage or suffering to the offended person. Taking into consideration that Larry has already served his conviction, the public interest is probably not convincing enough to legitimise the publication.

The new Supreme Court decision is in line with the previous case law of the Finnish Council for Mass Media, according to which it can be 'disastrous for a person who has served his [or her] sentence, if the criminal case including names and pictures is brought into the spotlight again'.³⁰

²⁶ See, for example, *Lion Laboratories Ltd v. Evans and Others* [1985] QB 526; *Shelley Films Limited v. Rex Features Limited* [1994] EMLR 134, at 146.

²⁷ See *British Steel Corporation v. Granada Television Ltd* [1981] AC 1096, at 1168.

²⁸ See *Lion Laboratories Ltd v. Evans and Others; Shelley Films Limited v. Rex Features Limited* at 150.

²⁹ See *Campbell v. MGN Ltd* at 56.

³⁰ The Finnish Council for Mass Media, decision 2915/SL/00. See also Tiilikka, *Päätoimittajan ja toimittajan vahingonkorvausvastuu* (unpublished licentiate (master's) thesis, University of Helsinki: Sept. 2000) at 298–9.

The Council feels that a former prisoner has the right to start a new life without the media reminding the public of the crime.

As the publication thus constitutes a punishable act, following the same principles as in Case 1 compensation is possible for pure economic loss according to Ch. 5, s. 1 of the Tort Liability Act and for anguish according to Ch. 5, s. 6. As for the amount of compensation it is difficult to assess what the amount granted by a court would be. A rough estimate is in the region of €5,000–€20,000.³¹

If the magazine is found guilty of defamation, the profit of the crime can be declared forfeited as was described above in Case 1.

France

I. Operative rules

Larry probably cannot obtain damages, however the solution here is not certain in French law.

II. Descriptive formants

If the principle that justice be rendered in public authorises the press to report on judicial debates and judgments proclaimed by the courts (see Case 2), the question arises whether this immunity is limited in time. This question has been debated in French law in respect of the 'right to be forgotten' (*droit à l'oubli*): the disclosure of a fact referring to a person's private life is not reprehensible inasmuch as it is justified by the necessity of information. However, this is not the case when the press recalls the public's attention to a judgment made many years ago.

The lower courts have tended to follow this reasoning, considering that 'any person who was associated with a public event, even if he/she was the protagonist of the event, may invoke the right to be forgotten and can oppose the reminding of this event in his/her life, which can harm resocialisation and have a harmful influence on his/her private life'.³² However, in a 1990 decision in a case concerning

³¹ Cf. with a case from Forssa Local Court, Helsingin Sanomat 4.6.2002, where a journalist was found guilty of defamation when he had described another (fictitious) journalist as a drunk who had made sexual statements in different restaurants. The court found that it was possible to link the story to the claimant, who was also a journalist. The claimant was granted damages of €5,000.

³² TGI Paris 25 Mar. 1987, D. 1988, somm., 198, concerned a play which reminded the public of a flagrant crime committed by a person who, thereafter, was rehabilitated, went to university and became a psychiatrist. Reminding the public of the person's past in such a way was condemned by the court on the ground that the period of

the re-publication of facts from the private life of the mistress of a former collaborator of the Nazi regime, the Cour de cassation clearly rejected a 'right to be forgotten' in French law. The court held in this case that the facts were once expressly brought to the attention of the public through the accounts of judicial debates which, having been published in the local press, thereby escaped the sphere of private life and that as a consequence the claimant could not 'avail of a right to be forgotten to hinder their republication'.³³ More recently, the Cour de cassation confirmed its refusal to allow a right to be forgotten where the judicial facts were initially disseminated. In that specific case, the claim was raised by the family of the victim and not by the offender.³⁴ Despite these very clear decisions by the highest French civil court, it is not completely excluded that Larry could be successful in his action. Both legal scholarship and the lower courts in fact remain in favour of a certain right to be forgotten, or at least admit that the legitimacy of reporting on old convictions is not automatic. The judge will consequently proceed to balance the interests in the case: on the one hand, Larry's interest in being resocialised after having served his sentence, on the other, the interest of the magazine in informing its readers about paedophilia.

Nevertheless, if reminding the public of the judgment against Larry is considered legal, mentioning his name may be permitted but not necessarily the publication of his photograph. French case law certainly considers that all persons entering the sphere of public attention in contemporary judicial proceedings can expect to see their image disclosed in the press.³⁵ However, again it must be a matter of

time or the event reminded was no longer actual nor corresponded to the public need for information. See also: TGI Paris 20 Apr. 1983, JCP 1985, II, 20434 (similar outcome); CA Versailles 14 Sep. 1989, Gaz. Pal. 1990, 1, somm., 123: 'through the passing of a sufficiently long time, a public event can become, for the person who was the protagonist, a fact of private life which should be kept secret and be forgotten'.

³³ Cass. civ. 20 Nov. 1990, JCP 1992, II, 21908.

³⁴ Cass. civ. 13 Nov. 2003, D. 2004, 1634, upholding a judgment of the Court of Appeal which denied the existence of an injury to image or private life, on grounds that the judicial report already belonged to the history of big criminal cases, thus no longer pertained to the private life of the victim's family. The contested article falls within the scope of the freedom to communicate information, which authorises the publication of images of persons involved in a certain event, with the sole restriction of the respect of their dignity.

³⁵ Cass. civ. 12 Jul. 2001, JCP 2002, II, 10152: 'the freedom to communicate information justifies the publication of the image of a person involved in a case, reserving the respect of human dignity'.

genuine contemporary news. Thus, it has been held that the incarceration of an important public official (a *préfet* to be exact) is information legitimately brought to the attention of the public, but that the article which reports on this cannot show the photograph of the *préfet* behind bars.³⁶ Therefore, it is arguable in this case that Larry could obtain an order prohibiting the magazine from publishing his photograph and that he will be awarded damages for the non-economic loss arising from the violation of his right to image (see Case 7 below).

Germany

I. Operative rules

Larry may claim damages for the economic loss caused to him by the publication as well as for a hypothetical licence fee for the publication of the photograph. There is no claim for non-economic damages in this case.

II. Descriptive formants

According to § 22 *Kunsturhebergesetz* (*KUG*), a person's picture may not be published without that person's consent. § 23(1) *KUG* makes an exception for pictures regarding 'contemporary history'. German doctrine³⁷ and case law³⁸ have transformed this definition into the issue of whether the depicted individual is 'a person of contemporary history'. Criminal offenders are usually categorised as 'relative persons of contemporary history' which means that they are only public figures in relation to the crime they have committed.³⁹ After the court proceedings, this status fades away. Since three years have passed since his conviction, Larry cannot be seen as a public figure anymore and his picture may not be published without his consent.

In relation to the publication of Larry's name together with the information that he is a convicted criminal, no statutory provisions

³⁶ TGI Paris 13 Oct. 1999, CCE 2001, comm., No. 10: 'under certain circumstances freedom of expression (...) authorises the reproduction of the image of a person without his/her authorisation, under the condition that the publication of the photograph in question serves a legitimate information need of the public'. In that case, the journal wanted to 'attract its readers through photographs suitable to satisfy a curiosity which lacks any legitimacy'.

³⁷ Since H. Neumann-Duesberg, 'Bildberichterstattung über absolute und relative Personen der Zeitgeschichte' (1960) *JZ* 114.

³⁸ A summary of the case law is given in BVerfGE 101, 361, 392 (Caroline).

³⁹ J. R. V. Strobl-Albeg in K. E. Wenzel, *Das Recht der Wort- und Bildberichterstattung* (5th edn. Cologne: 2003) at 473.

apply. The German courts rely on the general personality right (§ 823(1) BGB). A violation depends on the result of a weighing of interests.⁴⁰ The Federal Constitutional Court decided in 1973 that a ‘documentary fiction’ film about a murder could not be aired on TV four years after the murder had taken place and shortly before one of the perpetrators was due to be released from prison.⁴¹ The reason given was that the offender had a legitimate interest in rehabilitation which would be endangered if he were to be identified as a murderer.

This prohibitive rule may rely on the fact that the report in question only gave a biased view of the murderer’s personality which was reduced to its negative aspects.⁴² A publication which is less harmful and more objective, e.g. a factual book about certain crimes, could therefore be lawful even if it mentions names.⁴³ In 1999, another ‘documentary fiction’ film about the same crime that was at issue in the 1973 decision was held to be lawful on the grounds that it did not directly mention the names of the offenders and that their rehabilitation interests lose significance thirty years after the crime has been committed.⁴⁴ The court stated that no offender has the right ‘not to be confronted with the crime in public’.⁴⁵

This is especially true if current events give reasonable grounds to speak about past crimes; however, case law is contradictory on the question of what such reasonable grounds are.⁴⁶ In addition, it is acknowledged that the victim of the crime has a right to publicly talk on television about crimes which were perpetrated long ago, even if the mentioning of names leads to the identification of the offender.⁴⁷

⁴⁰ BGHZ 13, 334, 338; but see the critical analysis by K. Larenz and C.-W. Canaris, *Lehrbuch des Schuldrechts* II/2 (13th edn., Munich: 1994) at 498 *et seq.*

⁴¹ BVerfGE 35, 202; q. v. OLG Frankfurt/Main AfP 2005, 185 – Cannibal of Ro(h)tenburg.

⁴² BVerfGE 35, 202, 229; q. v. OLG Frankfurt/Main AfP 2005, 185, 189.

⁴³ See OLG Hamburg, UFITA Vol. 78, 244, 250; A. Halfmeier, *Die Veröffentlichung privater Tatsachen als unerlaubte Handlung* (Frankfurt: 2000) at 94 *et seq.*

⁴⁴ BVerfG NJW 2000, 1859; q. v. LG Koblenz AfP 2006, 576, 580 f. – kidnapping of a banker’s son Jakob von Metzler.

⁴⁵ BVerfG NJW 2000, 1859, 1860.

⁴⁶ Compare, e.g., KG AfP 1992, 302 (twenty-year-old conviction in connection with a gang shooting may be published because the offender is now arrested again for a similar matter) with OLG Frankfurt/Main NJW-RR 1995, 476 (name of a manager who was convicted years ago for fraudulent bankruptcy may not be mentioned although similar accusations have arisen with regard to his current position); for further details J. Soehring, *Presserecht* (3rd edn., Stuttgart: 2000) at 393 *et seq.*

⁴⁷ BVerfG NJW 1998, 2889, 2891.

Larry can therefore claim damages based on § 823(1) *BGB*. If there is economic loss, this must be compensated. Larry may also claim an adequate (hypothetical) licence fee for the publication of the photograph.⁴⁸ Damages for non-economic loss can only be claimed for 'serious and grave' violations of personality rights and where no other remedy is adequate.⁴⁹ This may be the case if the article is intended to be of a derogatory and disrespectful nature. The mere publication of names and photographs of offenders has been held not to be such a grave violation.⁵⁰

Greece

I. Operative rules

A similar case has not come before the Greek courts. However, it is submitted that Larry can sue for damages as the use of his name is a disproportionate method of informing the public (see Case 2).

II. Descriptive formants

As in Case 2, this case concerns the dissemination of information which is potentially damaging to an individual's personality but which is in the public interest. However, the goal of informing the public could be achieved without mentioning the individual's name.⁵¹

On the other hand, one could argue that the printed media republishes a real fact which should be made known to the public. In this case, the publication does not aim to injure the honour and reputation of the person but rather to inform the public about serious anti-social behaviour.

⁴⁸ See BGHZ 20, 345, 353; but see LG Frankfurt/Main, ZUM 2003, 974, 976:

Hypothetical licence fee only for famous people whose picture has monetary value. In the past, it was doubtful whether a hypothetical licence fee could be claimed in cases where the harm suffered by the claimant was essentially non-economic but affected the claimant's honour and reputation. In such cases, it was argued that the claimant would not have agreed to the use of the photograph anyway and therefore there was no economic interest at stake (BGHZ 26, 349, 353). Recently, the Federal Court clarified that a hypothetical licence fee can be claimed in every case of unlawful commercial use of a person's photograph, regardless of whether that person would have been willing or able to allow such use of the photograph (BGH NJW 2007, 689, 690 with note by Balthasar at 664 *et seq.*).

⁴⁹ BGHZ 95, 212, 214 f.

⁵⁰ OLG Nürnberg NJW 1996, 530 (publication of names); AG Charlottenburg, MMR 2000, 772, 774 f. (publication of names and photographs of convicted sexual offenders on the internet); Soehring, *Presserecht* at 670.

⁵¹ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) at 70, see Supreme Court (Areopag) Decision 825/2002, available in Greek legal Database 'NOMOS'.

Ireland

I. Operative rules

It is unlikely that Larry would succeed in an action for defamation as the magazine could rely on the defence of justification because the statements made were true. It is also unlikely that an action in breach of confidence by Larry would succeed as the information could not be described as confidential.

II. Descriptive formants

As outlined in the English report, Larry could not sue for damages in defamation. While the publication of the photographs could be deemed defamatory if the statement made is untrue, the magazine will have a full defence to an action in libel as the statement is in fact accurate. This is known as the defence of justification. Under common law, the defendant must prove that the substance of the statement is correct.⁵² Furthermore, under s. 22 of the Defamation Act 1961, the defence will not fail 'by reason only that the truth of the charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges'. One potential difficulty which could exist for the magazine in this regard is whether in attempting to establish the defence of justification it could rely on the evidence of Larry's conviction as 'conclusive' evidence of his guilt as a paedophile. Previous case law has held that evidence of a previous conviction is inadmissible in civil proceedings dealing with the same issue.⁵³ However, one decision overruled earlier judgments on the point⁵⁴ and has not received wholehearted support from the Irish judiciary.⁵⁵ Thus in *Kelly v. Ireland*,⁵⁶ O'Hanlon J left the question open on whether evidence of a previous conviction could be admitted in civil proceedings where it was relevant to the issue which the court had to decide upon.⁵⁷ In 1991, the Irish Law Reform Commission recommended that the law in this area should be clarified and that 'a conviction should be treated, not merely as evidence of the guilt of the person, but conclusive evidence'.⁵⁸ These proposals have not been enacted into Irish law. Notwithstanding these qualifications,

⁵² *Alexander v. N.E. Railway Company* (1865) 122 ER 1221.

⁵³ *Hollington v. F. Hewthorn & Co.* [1943] KB 587; which has subsequently been modified in England and Wales under s. 13 of the Civil Evidence Act 1968.

⁵⁴ *In the Estate of Crippen* [1911] P 108. ⁵⁵ *Kelly v. Ireland* [1986] ILRM 318.

⁵⁶ [1986] ILRM 318. ⁵⁷ *Ibid.* at 327.

⁵⁸ *Report on the Civil Law of Defamation* (LRC 38-1991) at para. 7.11.

it is unlikely that Larry would succeed in proving that he had been defamed and thus awarded damages.

An action for breach of confidence is also unlikely to succeed. The traditional action for breach of confidence was developed in order to protect the misuse of confidential information.⁵⁹ If the information is to be protected it must be communicated in circumstances where there is an obligation of confidence placed on the person receiving the information. There would appear to be no relationship in existence between Larry and the magazine imposing an obligation of confidence. The Irish courts have not yet shown any desire to extend the definition of 'confidential information' to include information surreptitiously acquired from another in the absence of the existence of a relationship of confidence. Even if Larry successfully made such an argument, it is likely that the court would find that it was in the public interest that the information be published.⁶⁰

An action for breach of privacy seeking to restrain the publication of true but embarrassing facts is unlikely to succeed. While such actions have been recognised in both the United States⁶¹ and in England,⁶² the Irish High Court has specifically rejected the development of the law in this manner to date.⁶³

Italy

I. Operative rules

Larry can recover damages for economic and non-economic loss from the magazine.

II. Descriptive formants

Since 1995, case law has regarded the republication of true but harmful facts which were the basis of a past criminal judgment as unlawful on the ground of a lack of sufficient public interest, unless new facts have created a new public interest in their republication.⁶⁴ Scholars hailed the first decisions as the birth of a new right, the 'right to be

⁵⁹ *House of Spring Gardens v. Point Blank Ltd* [1984] IR 611 (SC).

⁶⁰ *National Irish Bank v. RTE* [1998] 2 IR 465.

⁶¹ *Restatement of the Law, Second, Torts 2d*, The American Law Institute (1977) at 383-394, ss. 652A-652I.

⁶² *Campbell v. MGN Limited* [2004] UKHL 22.

⁶³ *Per O'Hanlon J in Magurie v. Drury* [1995] 1 ILRM 108 at 115.

⁶⁴ Trib. Roma 15 May 1995, *Foro it.* 1996, I, 2566 with commentary by P. Laghezza; *Dir. inf.* 1996, 422 with commentary by G. Napolitano; *Dir. fam. per.* 1998, 76 with commentary by G. Cassano.

forgotten' (*diritto all'oblio*).⁶⁵ Actually, the Italian debate on a *diritto all'oblio* in academic literature is considerably older, as it goes back to the early 1980s.⁶⁶ However, only since 1995 has this right begun to be expressly mentioned by the courts.⁶⁷

The right to be forgotten is deemed to stem from the right to privacy. The latter was first recognised by scholars,⁶⁸ then in 1975 by case law,⁶⁹ and finally in 1996 and 2003 by legislation.⁷⁰ The right to privacy is now commonly seen as one aspect of the constitutional protection of the person under Art. 2 *Cost*.⁷¹ Its violation gives rise to civil liability according to the general clause of Art. 2043 *CC*. Therefore, even supposing that on the facts of this case the publication did not meet the requirement of the crime of defamation,⁷² Larry could have a claim for damages according to Art. 2043 *CC* as his right to be forgotten was unjustly infringed. Moreover, by publishing Larry's name and photograph in relation to his conviction on the grounds of paedophilia, the magazine processed Larry's personal data. Under Arts. 11(1)(a) and 15(2) Data Protection Code, a person whose personal data has not been processed lawfully and fairly can recover damages for non-pecuniary loss.

Metalegal reasons are to be taken into account both for this lawfulness and fairness test and for the unjust harm test under Art. 2043 *CC*.

III. Metalegal formants

One could argue that Larry's right to be forgotten cannot prevail over the freedom of the press because the crime of paedophilia is so

⁶⁵ See e.g. the comment by G. Napolitano quoted in the previous footnote.

⁶⁶ See T. A. Auletta, 'Diritto alla riservatezza e droit à l'oubli', in G. Alpa *et al.* (eds.), *L'informazione e i diritti della persona* (Naples: 1983) at 127.

⁶⁷ Trib. Roma 21 Nov. 1996, *Giust. civ.* 1997, 1979 with commentary by L. Crippa; *Dir. inf.* 1997, 335 with commentary by G. Napolitano; Cass. 9 Apr. 1998 no. 3679, *Foro it.* 1998, I, 1834 with commentary by P. Laghezza; *Danno resp.* 1998, 882 with commentary by C. Lo Surdo; see recently Garante protezione dati 15 Apr. 2004, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) at 311; Garante protezione dati 7 Jul. 2005, *ibid.*, 316.

⁶⁸ G. Morsillo, *La tutela penale del diritto alla riservatezza* (Milan: 1966).

⁶⁹ Cass. 27 May 1975 no. 2129, *Dir. aut.* 1975, 351 (for more detail, see Cases 5 and 8).

⁷⁰ In 1996 the Data Protection Act (Legge 31 Dec. 1996 no. 675, *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali*) was enacted; in 2003 it was repealed and transformed into the Data Protection Code (Decreto legislativo 30 Jun. 2003 no. 196). On this see also Cases 5, 7, 8, 9 and 12.

⁷¹ Cf. Cass. 9 Jun. 1998 no. 5658, *Foro it.* 1998, I, 2387; S. Rodotà, 'Tra diritti fondamentali ed elasticità della normativa: il nuovo Codice sulla *privacy*' (2004) *Europa ediritto privato* 1.

⁷² If the authors of this report committed defamation, Larry would be entitled to the remedies outlined under Case 1.

atrocious that the disclosure of the offender's name and photograph must be deemed lawful, regardless of the time which has passed, for the sake of the public interest. However, this argument is not convincing. A detailed magazine report showing a selection of photographs of several paedophiles convicted years ago can hardly be seen as necessary for the public interest. It is just a pillorying of individuals which satisfies a base curiosity. As explained under Case 1, the content of press reports must be proportional to the public interest. Unnecessary injurious news is not covered by freedom of the press. Photographs of persons who have already served their punishment are unnecessarily injurious publications. This is true regardless of whether or not Larry's story was already in the press in the past, and irrespective of the number of years since he was convicted.

Precisely because paedophilia is such an appalling crime, the greater the dissemination of the news, the greater the harm and the lesser the chance of resocialisation for the offender. It is a well-known fact that even within the prison walls paedophiles are marginalised by other prisoners. Isolation and social stigmatisation increase not only the psychological pain, but also the likelihood of the offender committing the same offence again. On the facts of the present case, the severe threat which the report poses to Larry's resocialisation is unquestionable as he is released from prison just a few days after the publication.

For all these reasons, it is submitted that Larry's personality rights have been unjustly harmed by the report. He is therefore entitled to damages for both pecuniary and non-pecuniary loss according to Art. 2043 CC and Art. 15(2) Data Protection Code.

The Netherlands

I. Operative rules

Larry can recover damages for both economic and non-economic loss.

II. Descriptive formants

According to Dutch law, in a case of this nature the right of freedom of the press (Art. 7 Constitution) has to be weighed against the right to be forgotten, which is derived from the right to privacy.⁷³ An important aspect of this right is the criminal's possibility of rehabilitation,

⁷³ HR 6 Jan. 1995, NJ 1995, 422 (Parool-Van Gasteren); G.A.I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 113.

which is also regarded as an interest of society as a whole. Therefore, the interest in being forgotten increases with the passing of time.⁷⁴ Immediately after a criminal is convicted, the interest in being forgotten is not yet decisive for a publication to be unlawful.⁷⁵

However, in this case the conviction took place three years ago. The publication of the facts and the pictures does not seem to serve any public interest other than the need for sensation (see Case 1, circumstance (b)). For that reason the right to be forgotten outweighs the right to freedom of expression.

In relation to the publication of pictures, Arts. 20 and 21 *Auteurswet* (law of author/copyright) specify the right to privacy in cases involving the publication of pictures. These provisions regulate the right of the artist who creates a portrait (including pictures) on the one hand and the right of the person portrayed on the other hand. A representation of a person (pictured, in clay, bronze, paint, pen, film, video) is a portrait if there is a resemblance between the representation and the facial features of this person. These provisions limit the right of the artist and by doing so they are a legal specification of the protection of privacy.⁷⁶ Art. 20 *Auteurswet* provides that when a portrait is commissioned by the person portrayed, the person who owns the copyright on the portrait is not allowed to publish that portrait without the consent of the person portrayed (or when this person has died, without the consent of his surviving relatives in the ten years after his/her death). Art. 21 *Auteurswet* states that if a portrait has been published by the artist who did not create that portrait under the commission of the person portrayed, the publication thereof is illegal insofar as it infringes a reasonable interest of the person portrayed.

If a picture has been published, the right to privacy, specified in Arts. 20 and 21 *Auteurswet*, has to be weighed against other rights, for instance the right to free speech. The infringement of the reasonable interest of the person portrayed constitutes an infringement of the right to privacy.⁷⁷

Both the infringement of the right to privacy and the infringement of economic interests⁷⁸ are considered to be infringements of a reasonable interest. Art. 21 *Auteurswet* does not apply when the person portrayed gave his/her consent to the publication of the portrait.

⁷⁴ Schuijt, *Losbladige Onrechtmatige Daad* no. 40.

⁷⁵ HR 21 Jan. 1994, NJ 1994, 473. ⁷⁶ Schuijt, *Losbladige Onrechtmatige Daad* no. 121.

⁷⁷ HR 1 Jul. 1988, NJ 1988, 1000. ⁷⁸ HR 21 Jan. 1994, NJ 1994, 473.

It can be difficult for the person whose portrait has been published to clarify what economic loss was suffered due to the unlawful publication thereof.⁷⁹ If Larry could only request damages for economic loss, it would literally be very difficult for him to uphold his right to be forgotten and his right to privacy. Especially in these circumstances, Art. 6:106 *jo.* and Art. 6:95 *BW* recognise the possibility to sue for non-economic loss in cases where the honour or reputation of the injured party has been impugned or if his/her person has been otherwise afflicted.

Furthermore, Larry can ask for an assessment of damages on the basis of Art. 6:104 *BW*. In this situation, the damages are assessed as the amount of the profit (or a part thereof) earned by the magazine from the publication of the picture (Case 1).

Portugal

I. Operative rules

Larry would, in principle, have no claim for damages.

II. Descriptive formants

All criminal convictions are public. Thus, there are, in principle, no restrictions on publishing the names and identities of persons criminally convicted, unless it is strictly necessary for the protection of victims. The identification of offenders is always allowed, regardless of what kind of crime is at stake, as long as the referred information is:

- (1) put into context;
- (2) rigorous and objective; and
- (3) proportional, necessary and adequate.

Although serving a sentence means paying one's debt to society, ex-prisoners must learn to live with their past. However, the journalist here would have had to obtain the information legally, i.e. either through:

- (1) the personal gathering, throughout the years, of information regarding the decisions read in courts; or
- (2) access to criminal records, with the permission of the Minister of Justice – although quite unlikely to take place (Art. 7, para. (i), Law of Criminal Identification⁸⁰).

⁷⁹ This is different when the person is a public figure who gives his/her consent for financial gain.

⁸⁰ Law no. 57/98, 18 Aug. 1998.

Moreover, we should look closely at the fact that the published report also contained the photographs of the paedophiles. The right to image is protected by Art. 26 CRP. Besides this, Art. 79(1) and (2) CC state that someone's picture may not be exposed reproduced or commercialised without his/her consent, unless the lack of consent may be justified because:

- (1) the person is notorious or occupies a certain office;
- (2) there are police or justice related reasons;
- (3) scientific, didactic or cultural aims justify it;
- (4) the reproduction of the image is framed within a public place or facts of public interest or which have taken place in public.

The journalist can, of course, claim that reporting on this information and the use of the image is in the interest of justice and that those facts (the conviction) are of public interest and have taken place publicly. However, Art. 79(3) CC also states that the image cannot be reproduced, exposed or commercialised if it harms the honour, reputation or basic decency of that person (even in the situations stated in Art. 79(2) CC and mentioned above, this is implied). Although this legal rule is quite clear, there is no doubt that pictures of convicted persons leaving the courts are commonly published and shown on television news programmes. There might be some reasons for this:

- (1) these persons have voluntarily and legally limited their personality rights, namely their right to honour and reputation, after having committed a crime, mainly a sexual crime as socially condemned as paedophilia (Art. 81 CC). However, this is probably not the case, since even criminals who have been convicted for sexual offences undoubtedly have the right to honour and reputation;
- (2) it is commonly accepted media behaviour, which criminally convicted persons have not, so far, opposed (maybe this is due to their psychologically fragile condition, other more important legal concerns, etc).

Larry's right to honour or reputation would not be harmed as long as the information published was put into context, rigorous, objective, proportional, necessary and adequate. However, his right to image might be harmed through the publication of the picture, since the publication of the image itself could lead to much more serious damage to Larry's honour and reputation than the mere written information. In this case, Larry could claim for damages, according to Art. 70 CC, for the violation of his right to image.

Finally, Art. 199 *CP* (illegal recordings and photographs) states, *inter alia*, that photographing someone against his or her will, even in events where that person legitimately participated, or using those photographs, is a crime. It is questioned whether this rule aims to protect the right to image⁸¹ or the right to privacy,⁸² although it seems to make more sense that it protects the right to image since the right to privacy is already criminally protected by Art. 192 *CP*.

The *TRP* decided that the consent requested by this penal rule is not necessary when we are facing one of the situations established in the above-mentioned Art. 79 (2) *CC*.⁸³ Therefore, in these situations, there would not be the need for consent and a crime would not have been committed. This ‘crossed interpretation’ of civil and penal rules, although not very common and even questionable, can be justified in accordance with the principle of the unity of law (respect for the juridical order as a whole).

In the case before us, although it seems like consent would nevertheless be needed (since such a publication of image could be considered to harm the honour, reputation or basic decency of Larry – Art. 79 (3) *CC*), different opinions also exist. For example, it has been said that although the right to privacy also exists in public places, it may not obstruct the right to inform, namely concerning the taking of pictures of public events.⁸⁴ However, this preference given to the right to inform, to the detriment of the right to privacy or the right to image, is quite uncommon in Portuguese case law and would hardly be generally accepted. In fact, as seen in the decisions mentioned in reference to Case 1, personality rights are given preference and constitute limits to the right to inform and be informed.

The claim to prevent publication would be based on Art. 70 of the Civil Code. In our opinion, and at least as far as the written report is concerned, the injunction for the prevention of publication would be denied, and so too would a claim for compensation. The facts are of public knowledge and so their publication is lawful as long as the contents of the text are objective, factual and true. We are not aware of any similar case actually pending or which has been decided in Portugal.

⁸¹ Court of Appeal of Porto (Tribunal da Relação de Porto, *TRP*), 19.09.2001.

⁸² Court of Appeal of Lisbon (Tribunal da Relação de Lisboa, *TRL*), Process no. 7860/2001; STJ 06.03.2003.

⁸³ *TRP*, 19.09.2001.

⁸⁴ Public prosecutor on STJ 06.03.2003 and decision on Process no. 7860/2001, *TRL*.

Scotland

I. Operative rules

It is unlikely that Larry will have a claim.

II. Descriptive formants

This addresses a similar issue to that raised in Case 2, with a different slant on the type of crime involved. Information about paedophiles will generally be seen as falling within the category of public interest: there is a real or potential danger to the community at large and to children in particular. The public interest argument in favour of freedom of information overrides any privacy considerations. Under the terms of the self-regulatory Code of Practice of the Press Industry,⁸⁵ the reporting in question falls within the definition of justifiable intrusions of privacy: ‘intrusions and enquiries into an individual’s private life without his or her consent ... are not generally acceptable and publication can only be justified when in the public interest. This would include: (iii) protecting public health and safety.’

Undoubtedly, the effect of such a publication at the time when the prisoner is being released will have a negative impact on the rehabilitation of the offender and can ostensibly lead to either public or media harassment of or physical interference with the offender and his family.⁸⁶ The Rehabilitation of Offenders Act 1974 referred to above applies to convictions of up to thirty months (two-and-a-half years) and provides for various periods after which the offender is rehabilitated and the offence is then ‘spent’. Its provisions do not apply here since the sentence imposed in this case was three years.

If circumstances are such that the press subsequently has to be fended off – for example if there are crowds of journalists surrounding the paedophile’s home – then a grant of interdict against ‘wrong-causing behaviour’ could be issued.

The English case of *A. Campbell v. News Group Newspapers*,⁸⁷ discussed in Case 2 is a reflection of the very facts contained in this question and illustrates the balance that has to be struck between the competing

⁸⁵ See Case 1, Press Code of Practice of Press Complaints Commission, first published in 1990. In the House of Lords appeal in *Naomi Campbell*, Baroness Hale relied strongly on the Code in conjunction with the test under s. 12(4) HRA in reaching her conclusion that there had been an unwarranted intrusion of privacy.

⁸⁶ See Case 2.

⁸⁷ See *Alan Campbell v. News Group Newspapers Ltd* [2002] EMLR 43.

rights of privacy or individual informational rights and public information.⁸⁸ With regard to defamation, reference is again made to what was said in Case 1, in particular that even if it is averred that the plaintiff is a known paedophile, the crux of any defamation or libel action remains whether the statement is disparaging and not simply factual description. Facts alone are not defamatory. Only where the information is wrong in tone or sting might there be an arguable case of defamation under s. 7 Defamation Act 1996. Human rights aspects of privacy do not prevail in a matter of overriding public safety and interest.

III. Metalegal formants

The role of privacy and rehabilitation has to be balanced against regulatory preventive measures towards potential repeat offenders. A national sex offenders register has been created under the Sex Offenders Act 1997, mainly with the latter purpose in mind. This could be read as implying that there is a higher priority given to the protection of the public rather than privacy of the individual criminal. The law of privacy in relation to protection of criminals has yet to be developed from a human rights perspective.

Spain

I. Operative rules

Whether or not Larry will have a claim against the magazine depends on the matter of public interest.

II. Descriptive formants

Taking for granted that the information published by the magazine is true, the Spanish courts will position Larry's claim against the public interest.⁸⁹ There is no such thing in Spanish law as a right to be forgotten. Nevertheless, the publication should contain correct information about Larry's release in the sense that he has already paid for his crime. In general, such a case does not fall under the protection of the law of honour in Spain.

⁸⁸ *Ibid.*

⁸⁹ STS, 9 Feb. 2004 where a newspaper published a headline affirming that a man was detained by a group of women as an alleged rapist, but in the body of the news the journalist referred to him as the sexual aggressor of a woman, alleging that he had been convicted for a previous sexual criminal offence, although he was later exonerated.

Even if the publication had specified that Larry had later been released and, thus, had been substantially true, the information would not have met the necessary requirement of general interest: the concrete information concerning the fact that a person was found guilty and later released from prison would have been irrelevant for the information and not in the general interest.

Switzerland

I. Operative rules

Larry may bring a claim for infringement and demand economic and non-economic damages.

II. Descriptive formants

Under Swiss law, an individual's personality may be unlawfully infringed if he/she is reminded of his or her criminal background (Art. 28, para. 1 CC). More particularly, it may infringe upon the right to one's reputation and violate the private sphere.⁹⁰ Thus, unless the infringement can be justified by a preponderant public interest, the media will not be authorised to associate an individual with criminal proceedings that have already been concluded at least after a certain time. The Federal Court has held that even if an individual played a part in current events at the time, a criminal who has paid his or her debt to society has a 'right to be forgotten'.⁹¹ Citizens who, due to a past event, find themselves under pressure in the present may oppose the renewed public disclosure of such past events after a certain period of time. However, according to the Federal Court, the right to be forgotten does not exist to the same extent for public figures and the press has the right to reveal their past convictions under certain circumstances.⁹²

The situation discussed here can be compared to recent Federal Court case law. One decision concerned a reformed criminal who, more than twelve years after his criminal conviction and after having successfully reintegrated himself into professional life, was confronted with his past following the publication of an article in the press. In the article, a journalist named each member of a gang that the ex-convict

⁹⁰ Judgment of the Swiss Federal Court, 5P. 254/2002 c. 2.2.

⁹¹ ATF/BGE 122 III 449 c. 3b, JdT 1998 I 131. For a comparative analysis, see Franz Werro, 'The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash' in Aurelia Colombi Ciacchi *et al.* (eds.) *Haftungsrecht im Dritten Millennium* (Baden-Baden: 2009), p. 287.

⁹² ATF/BGE 111 II 209 c. 3c, JdT 1986 I 600.

had belonged to, in addition to listing their robberies.⁹³ As a result of the article's publication, the reformed criminal's employer learned the details of his past, and the latter felt forced to leave his job because of the revelation. He received compensatory damages as well as non-economic damages amounting to 40,000 Swiss Francs (approximately €25,000). Another judgment concerned an article originally published in the British press that was hung in the window of a kiosk in Geneva. The article reported on an individual who was tried for the sexual abuse of minors.⁹⁴ Both the full name and photographs of the individual were printed. The Federal Court found that there was an infringement of his personality rights and held that the public interest in preventing sex crimes against minors did not justify such a publication.

These two Federal Court decisions suggest that, in the case before us, Larry will be able to successfully claim the unlawful infringement of his personality. He may also claim related damages (Art. 28a, para. 3 CC and Art. 41 *et seq.* CO), to the extent that he is able to establish the existence of a loss. Such loss could be established, for example, by lost wages as a result of the denial of employment following the publication of the article. However, the causal link between the denial of employment and the journalist's article will be difficult to establish. Larry could also demand restitution of the profits made by the magazine as a result of the article (Art. 28a, para. 3 and Art. 423 CO), as well as damages for pain and suffering (Art. 49 CO).

In addition to violating Larry's right to be forgotten, the journalist's article also infringes upon Larry's rights to his reputation, to his private sphere, and to his image. The right to one's image is one of the personality rights protected by Art. 28, para. 1 CC and states that an individual's image cannot, in principle, be reproduced by drawing, painting, photography, or any similar process – such as distribution – without the consent of the individual in question.⁹⁵ It is clear that the publication of such an image tends to hinder the reintegration of the individual into society.

III. Metalegal formants

Judicial information allows the public control of justice. It consolidates the legitimacy of the judicial process and fosters public trust. However, once a judgment has been rendered, anonymity is the rule. The Swiss Press Council highlights this point and uses it to specify that 'the

⁹³ Judgment of the Swiss Federal Court, 5C. 156/2003.

⁹⁴ Judgment of the Swiss Federal Court, 5P. 254/2002.

⁹⁵ RVJ 2003, p. 252 c. 4a.

respect of personality rights benefits the convicted, which facilitates reintegration. It also aims to protect the convicted person's family and loved-ones. In most cases, media coverage of judicial proceedings does not require the disclosure of the identities of those involved.⁹⁶

Comparative remarks

In broad terms, this case raises the question of whether or not an individual who served his/her sentence has a right to oppose the dissemination of information about this conviction. Specifically, the case considers the extent to which the press can (re)publish information after the sentence has been served on the grounds that it is in the public interest to do so. This is the conflict that lies at the very heart of this case – the balancing of the rights to freedom of the press and freedom of information with the offender's so-called 'right to be forgotten' in the context of his/her resocialisation.

In one form or another, most countries recognise a 'right to be forgotten' with regard to served sentences. Interestingly, while a statutory version exists in both England and Scotland, most civil law systems have recognised this right through case law. In the UK, the Rehabilitation of Offenders Act 1974 sets out certain time limits after which it is not allowed to report on a person's time in jail. In Belgium, Finland, Germany, Italy, the Netherlands and Switzerland the courts have, at different stages, recognised the interests of the offender not to have information about a served sentence republished thus endangering his/her resocialisation. In France, there is a dispute as to the exact nature of a 'right to be forgotten' (*droit à l'oubli*). The Cour de cassation has clearly rejected such a right but it appears that legal scholarship and the lower courts favour a certain form of it.

The offender's right to be forgotten will invariably be balanced against the freedom of the press to report issues that are of public interest. Depending on the legal system, it appears that up to three factors will play a role in determining the public interest: the seriousness of the crime, the length of time since the crime was committed and whether or not current events necessitate the reporting of the past crime. As regards the first factor, in England it appears that many serious criminals will not enjoy the protection of the Rehabilitation of Offenders Act or the doctrine of breach of confidence. It seems

⁹⁶ Statement of the Conseil suisse de la presse 1994, n. 7 c. 4.

that this is particularly true in respect of paedophiles where there is 'understandable public concern about their reoffending'. This factor also plays an important role in Austria, but not in the other legal systems. In the majority of private law systems under consideration, the factors most relevant in assessing the public interest are the length of time since the crime was committed and whether or not reporting the crime is relevant in the contemporary setting. Generally, the interest of the offender in being forgotten increases with the passing of time. However notwithstanding this general rule, French and German jurisprudence declare that certain current events may make it permissible to refer to crimes from the past.

Another factor which will be taken into account in the balancing process is the nature of the information itself. Generally, in those countries where the public interest legitimates the reporting of Larry's served sentence, the publishing of the offenders' name is just a corollary. However, in some countries, different rules will apply in regard to the publication of photographs. In France, the publication of Larry's photograph would have to be genuine contemporary news. Similarly, under German law, serious criminal offenders are usually regarded as 'relative persons of contemporary history'. In this respect, three years after the trial Larry will no longer be regarded as a public figure and consent will be needed to publish his photograph. Similar arguments will apply in the Netherlands.

The results of this balancing process can be divided into two broad categories. In the first category of countries, as a rule, freedom of the press and freedom of information will prevail and therefore the publication will be deemed lawful. These countries include Austria, Portugal, England, Ireland and Scotland. However, in the UK the publication might be unlawful if there are exceptional circumstances in the particular case, for example if the publication of the information puts the offender's life in danger.

In the second group of countries, the legitimate public interest in the crime is considered to decrease over the course of time so that three years after the crime was committed Larry's right to be forgotten will presumably prevail. Therefore the publication will be unlawful. These countries include Belgium, Finland, Germany, Italy, the Netherlands and Switzerland. Nevertheless, again with regard to special circumstances, a publication might be allowed. One example is in Germany where publication might be lawful if current events give reasonable grounds to refer to crimes from the past.

In France, the situation is less clear-cut. A 'right to be forgotten' is acknowledged by academic literature and lower courts but the *Cour de cassation* has not yet accepted this doctrine. Nevertheless, in balancing the public interest in the crime against the offender's right to be resocialised after a served sentence, a French court might consider the latter as prevailing and declare the publication unlawful. Even in cases where the public interest in the crime will prevail, the publication of Larry's photograph might be unlawful as it is no longer a piece of genuine contemporary news.

In Greece and Spain, cases of this kind have not yet been adjudicated by civil courts nor discussed by scholars. However, it seems that Spanish law does not recognise a 'right to be forgotten', not even implicitly. In a balancing process the freedom of the press and the public interest in the information would probably outweigh Larry's personality interests. On the contrary, in Greece, Larry's personality interests would possibly prevail, as under Greek law a disclosure of the offender's identity is not deemed necessary in order to satisfy the public interest in information about crimes (see Case 2).

Taking the above into account, one can examine the question of damages. As already stated, in Austria, Ireland, Portugal, Spain and England and Scotland, Larry will generally not be entitled to damages. On the contrary, in Belgium, Italy, the Netherlands and Switzerland (and also possibly in Greece), Larry can claim compensation for both pecuniary and non-pecuniary loss. In Finland and Germany, Larry can only recover pecuniary loss. In France, Larry would probably have a claim for damages (non-pecuniary loss only) resulting from the unlawful publication of his photograph.

7 Case 4: An invented life story?

Case

A well-known author published a successful novel. Its protagonist was a man, depicted as opportunistic, cynical and corrupt, with wicked sexual habits. The detailed description of his life, career, etc. corresponded perfectly to a real person – the famous actor X. However, the essential negative features and actions attributed to the character in the novel did not match X, they were invented by the author. The novelist himself stressed at various occasions that he just wanted to create the perfect, typical figure of a deceitful intellectual. Moreover, on the last page of the novel he wrote: ‘All persons in this book represent types, not portraits.’

Does the actor X have any claim against the author of the book?

Discussions

Austria

I. Operative rules

The actor X does not have a claim against the author of the book under Austrian law.

II. Descriptive formants

To solve the problem of a so-called ‘roman à clef’, Austrian courts and scholars apply a flexible system of arguments around which clusters of cases are established which have something in common.¹ This flexible

¹ See O. Triffterer and K. Schmoller, ‘Die Freiheit der Kunst und die Grenzen des Strafrechts’ (1993) *ÖJZ* 547 *et seq.*, 573 *et seq.*; U. Brandstetter and H. Schmid, *Kommentar zum Mediengesetz* (2nd edn., Vienna: 1999) § 28 no. 42.

system is governed by the rule ‘the higher the artistic value, the broader the artist’s freedom of expression’.²

In the first cluster of cases tortious conduct is present, which is only garnished with some artistic behaviour. Here, the author is using literature as a ‘weapon’. Since the minimum requirements of art are not met, the author cannot rely on the right of freedom of art.³

In a second cluster of cases there are high-ranking novels of artistic quality but these are more or less ‘enriched’ by personal attacks against protagonists who are only slightly concealed and therefore easily recognisable to the public.

The book *Holzfällen*, written by Thomas Bernhard, a famous Austrian author, was held to be an example of the latter.⁴ In this book, a character, which could – primarily thanks to his name – be easily identified as an Austrian composer and patron, was insulted, ridiculed and accused of dishonourable behaviour. In the course of a criminal trial, the Higher Regional Court of Vienna had to decide if the novel should be confiscated according to § 36 *MedienG*.

The court held that, according to the classic criteria for assessing whether a piece of literature is art or not, the novel is of unquestionable artistic quality and the author therefore enjoys the protection of Art. 17a *StGG* (*Staatsgrundgesetz*, a provision of constitutional law regulating the right to freedom of art). The characters in the novel act in their own – fictitious – reality and characteristics attributed to them cannot be projected onto real living persons simply due to similarities to the figures in the novel.

The court continued that some parts of the novel, however, seemed to indicate that the author’s personal conflict with the claimant was predominate. The insulting content of these parts was held to be obvious; thus not necessitating further reasoning.

Despite this assessment, the court held that overall confiscating the novel would be too harsh a measure and would mean a loss in respect of art. Accordingly, the claimant’s application for confiscation was dismissed. In contrast to these arguments, one might argue that a civil claim, even for damages, could have been successful since in the novel *Holzfällen* the defamatory assaults were substantial and the author directly sought confrontation with the claimant.

² OLG Wien MR 1995, 52.

³ U. Brandstetter and H. Schmid, *Kommentar* § 28 no. 42.

⁴ OLG Wien MR 1985/1 A 9 *et seq.*

In the present case, the situation appears to be different. The artistic ambition of a well-known author has more weight than the personality rights of a depicted character unless the author primarily aims to insult the offended person. Considering that the author repeatedly emphasised that the figures in his novel are fictitious characters, this does not seem to be the case. Consequently, the famous actor X does not have a claim against the author.

III. Metalegal formants

It is difficult for the courts to decide whether and to what extent a piece of literature or any other opus represents artistic value, especially since a general definition of what art is cannot be provided. In any case, it must be considered that the understanding of what art is substantially depends on the trends of thinking in society; often it is determined by fringe groups.⁵

Belgium

I. Operative rules

X is entitled to compensation for non-economic loss if he proves that the author is at fault.

II. Descriptive formants

Whether or not X could claim damages from the author under Belgian law depends on the particular circumstances. On the one hand, the author depicted a fictitious character, which was not X. He made it clear that he wanted to represent a 'type'. On the other hand, X could prove the similarities between himself and the fictitious person and/or the extent to which these similarities were intended and/or the misuse of these similarities in order to give a semblance of truth to other negative features.

In short, X would have to prove fault to have a claim. That fault could be that too many similarities exist, notwithstanding the use of a fictional name or the clarification that a 'type' and not a person is depicted. The result must be insulting in the given circumstances.⁶

⁵ H. Koziol and A. Warzilek, 'Austrian Country Report' no. 70, in H. Koziol and A. Warzilek, *The Protection of Personality Rights against Invasions by Mass Media* (Vienna/ New York: 2005).

⁶ CA Brussels 12 Jan. 1994, RW 1994-95, 229. Comp. Hoge Raad 9 Oct. 2001, www.rechtspraak.nl and TGI Paris 14 Sept. 1995, JT 1996, 196, note by A. Strowel: the civil court of Paris had to decide on the case of Princess Lilian of Belgium and Prince Alexander of Belgium against the editor of a book entitled 'Une paix royale'. The author gave the impression that his book was the result of several interviews with

The foregoing does not prevent other claims. For example, one could obtain an injunction to prevent publication.⁷

A Belgian case decided in 1999 concerned the publication of a book written by Herman Brusselmans, which caused a lot of commotion. It was published the night before an annual book fair and contained a description of a Belgian fashion designer which was not very flattering. The fashion designer obtained an order for an injunction, temporarily prohibiting the sale of the book.⁸ She later received €2,500 in damages for non-economic loss.⁹

It is important to note that in this case Herman Brusselmans used the fashion designer's real name, admitted malicious intent and claimed his allegations were true. In these circumstances, there can be no plea based on artistic freedom.

A claim can only be made if the use of the person's real name is unlawful. The use will be unlawful if it may lead to confusion. There can be no confusion if the author made it clear that the essential negative features are based on fiction and, of course, that clarification is true.

The violation of the right to privacy is not necessarily conditional on the use of insulting language towards a third person. The civil court of Liège had to assess an advertisement for a theatre performance which presented the performance 'as hardly less funny than the performance of Mr X'. X was a successful artist known for his one man shows, who claimed damages for the violation of the right to his own name. The court decided that his right was not violated because his name was not appropriated or misspelled. However, X received 20,000 BEF (€500) damages for the violation of his right to privacy.¹⁰ This judgment seems disproportionate as Belgian case law normally demands that certain facts or behaviour or opinions are revealed, while the person involved wants to keep these elements to him- or herself.¹¹ In this regard, consider for example the sexual orientation of a famous person.¹²

the princess and prince, while in reality those interviews never took place and were invented by the author. The court decided that the author and the editor committed several wrongs by leaving the public in doubt regarding the degree of truthfulness of the book.

⁷ Cf. the *Mephisto* case leading to BVerfG 24 Feb. 1971, *BVerfGE* 30, 173.

⁸ CA Antwerp 4 Nov. 1999, *Mediaforum* 2000-1, no. 2 note by D. Voorhoof.

⁹ Civil court Antwerp 21 Dec. 2000, *RW* 2000-01, 1460.

¹⁰ Civil court Liège 12 Dec. 1997, *JLMB* 1998, 819.

¹¹ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995-2000' (2001) *TPR* 1606.

¹² CA Ghent 12 Jun. 2001, *AM* 2002, 169.

England

I. Operative rules

The actor X may have a claim in libel if the ordinary sensible reader would understand the defamatory words as referring to the claimant and if no satisfactory defence exists.

II. Descriptive formants

The novel could be defamatory towards X taking the form of libel. Clearly, the description of being opportunistic, cynical and corrupt, with wicked sexual habits, is defamatory. However, the defamation must also refer to the claimant even though it does not need to be express. The test is whether the ordinary sensible reader, in light of the special facts, would understand the words as referring to the claimant.¹³ The defendant in this case is still liable for a work of fiction which is reasonably understood to refer to the claimant, even if the author did not know of his existence, because the words published have a specific meaning which is harmful to the claimant's reputation.¹⁴ The clause that all persons in the book represented types, not portraits, would not necessarily help the author if the ordinary sensible reader regarded this as a mere feeble attempt to avoid liability. Since this appears to be at least possible in the present case, the judge would have to leave the matter to a jury to decide.

However, the Defamation Act 1996 provides a special statutory defence in cases of 'unintentional defamation' by allowing the defamer to make an 'offer of amends' by means of a suitable correction and apology.

Finland

I. Operative rules

Whether or not actor X can claim damages depends on whether the publication constitutes a crime (in this case defamation) or not. An injunction is not possible, as was described in Case 1. If the publishing of the novel is considered a crime then there is the possibility to claim for the forfeiture of the unsold copies of the novel.

¹³ *Newstead v. London Express Newspaper Limited* [1940] 1 KB 377; *Morgan v. Odhams Press Ltd* [1971] 1 WLR 1239. For a description of such an ordinary reader, see *Charleston and Another v. News Group Newspapers Ltd and Another* [1995] 2 AC 65, at 73, per Lord Bridge of Harwich.

¹⁴ *E. Hulton & Co. v. Jones* [1910] AC 20.

II. Descriptive formants

If the author understands that the creation of the character in the novel and the publication of that novel can defame the actor, and the novel is also objectively likely to defame, the author can be sued for defamation according to Ch. 24, s. 9 of the Finnish Penal Code provided that the false statements or insinuations are likely to cause damage or suffering to the offended person.¹⁵ The actor is also entitled to damages according to the principles mentioned in Case 1: compensation for pure economic loss is possible according to Ch. 5, s. 1 of the Tort Liability Act. If the actor can prove that he has suffered pure economic loss, which can be a difficult task, he can obtain damages. In addition, the actor has a claim for compensation of anguish according to Ch. 5, s. 6. As was described in Case 3, a rough estimate of the amount of the damages would be in the region of €5,000 – €20,000.

An injunction – as was described in Case 1 – is not a possible remedy in matters concerning freedom of speech.

If the novel is found to be defamatory and thus constitutes a crime, the copies of the novel can be declared forfeited, according to Ch. 10 of the Finnish Penal Code. In contrast to a newspaper, many copies of a novel are usually printed, resulting in some of them being stored for later sale. Therefore, the offended person has a legitimate interest to have the unsold copies destroyed. As was also described in Case 1, the profit of the crime can be declared forfeited.

III. Metalegal formants

It is difficult to determine what significance one should give to the author's statement that the protagonist is a fictitious person, if, despite this, the reader of the novel gets the sense that the character in the novel refers to the actor X. If the author understands that the average reader nevertheless interprets the protagonist as actor X, the criteria for the crime of defamation can be fulfilled. If the author has made an effort to prevent the public from interpreting the protagonist as actor X, the fact that the author lacks intention will eliminate the possibility of convicting him of defamation. The freedom of artistic expression legitimises elements from real life being mixed with fictitious elements.

¹⁵ A.M. Nuutila, 'Kunnian ja yksityiselämän loukkaaminen', in O. Heinonen *et al.* *Rikosoikeus* (Helsinki: 1999) at 590.

If the public at large understands that the novel is partly fictitious and that the negative features cannot be attributed to the actor X, the novel itself will therefore not constitute a crime.

France

I. Operative rules

The actor X probably has a claim for damages for non-economic loss against the author of the book but case law is not settled on this point.

II. Descriptive formants

In this case, we are concerned with a conflict between freedom of expression and literary creation on the one hand, and the respect of personality rights on the other. In theory, such a conflict is regulated in a different manner depending on whether the work in question is a biography or a work of fiction. Both the statement by the author and the disclaimer which appeared at the end of the work give us reason to believe that we are dealing with the latter. However, such a qualification does not depend on the will of the author and French courts are vigilant in detecting disguised biographies, i.e. the evocation of a story, which is true or allegedly true, concerning a person easily identifiable. Thus, the Cour de cassation has confirmed the injury to private life caused by an opus which ‘though presented as a work of fiction, was in reality a badly disguised biography, easily permitting the identification of various protagonists in their psychological and emotional relations within the family’.¹⁶

Even without using his/her name, the identification of a character in a novel can result from a collection of concordant indices, such as the place where the story occurs, professional similarities, the recitation of notorious facts, etc. In the instant case, the claimant actor enjoys great notoriety. One could clearly notice the similarity between his life and career and that of the character in the novel and thus prove that the author was inspired by the life of X to write the novel.

Once the identification has been admitted, the judges must then check whether the reputation or the private life of the victim has been injured. The second hypothesis is more easily determined. French courts do not hesitate to impose liability where, in spite of the fact that the author claims that the character depicted is fictional, the revelation

¹⁶ Cass. civ. 25 Feb. 1997, JCP 1997, II, 22873. See also TGI Lyon 7 juin 1977, D. 1978, jur., 18; Cass. civ. 9 Jul. 2003, *Légipresse* 2003, No. 205, I, 142: ‘The respect of privacy is imposed upon the author of a novel more compellingly than on a journalist who complies with his/her assignment to provide information’.

of imaginary 'facts', which the reader can misinterpret as true, constitutes an injury to the private life of the person concerned.¹⁷ On the other hand, a simple inexactitude of facts, which originate from the pure imagination of the author without malevolent intention, must be tolerated in the name of freedom of expression.¹⁸

In this case, however, it is not a matter of the disclosure of specific facts but of the attribution of certain negative character traits. Though X may feel that his reputation has been injured it is not certain that his claim will succeed before a French court. An action in defamation on the basis of the 1881 Freedom of the Press Act is not likely to succeed given the different procedural obstacles, notably the very short prescriptive time limit of just three months (see Case 1). On a private law level, and in the absence of a general personality right in French law, the action is only possible upon the basis of general rules of tort liability, i.e. some culpable fault must be able to be attributed to the author of the novel. Thus, though the application of Art. 1382 of the Civil Code does not require proof of intention to injure, nonetheless the French judges tended to favour the freedom of creation until recently.¹⁹

In deciding a case whose facts were similar to those of the instant case, the Cour de cassation recently allowed the claim of a woman who recognised that she was the protagonist of a detective story written by an author who had presented her as an old prostitute. The appellate court had ordered the suppression of four passages of the book containing the complained imputations. The author and the editor appealed to the Cour de cassation. They maintained that

the narration of a purely fictional event, occurring in the life of one of the imaginary characters of a work of fiction which, although taking inspiration from real facts, does not pretend to appear to be true, falls within the scope of the author's freedom of artistic creation. Thus, it does not constitute an injury to the privacy of the person who may identify him- or herself with that character.

However, the Cour de cassation did not share this view. On the contrary, the court decided on 7 February 2006 that 'a work of fiction,

¹⁷ CA Paris 12 Jul. 1991, *Légipresse* 1992, No. 89, I, 32.

¹⁸ N. Mallet-Poujol, 'De la biographie à la fiction: la création littéraire au risque des droits de la personne' (2001) 24 *Légicom* 107-121.

¹⁹ Trib. civ. Seine 8 Dec. 1938, *Gaz. Pal.* 1939, 1, 382: 'the incontestable right of a writer to gain from real life the necessary materials for his/her work is only limited by the respect due to the personality of others, *without however having to excessively take into account the human susceptibility*' (emphasis added); TGI Paris 9 Dec. 2002, D. 2003, jur., 1715, concerning the conflict between works of fiction and privacy; TGI Paris 16 Nov. 2006, *Légipresse* 2007, No. 240, III, 73.

occasionally relying on real facts and using some elements of a person's real life, cannot add to those elements others which, although fictional, disregard the respect due to the privacy of that person'.²⁰ If this principle were applied in the present case, X would be entitled to damages (non-economic loss) for the violation of his right to privacy (see Case 5).

Germany

I. Operative rules

In a very similar case to the case at hand the German courts granted an injunction against the publication of a so-called *Schlüsselroman* (roman à clef) with distorted facts about the life of the real character depicted in the fictitious work.

II. Descriptive formants

There are at least two relevant personality interests in this case. First of all, the actor's honour or reputation might be maligned and secondly his person might be put into a false light by false or misleading descriptions. The peculiarity of the harm in this case lies in the fact that there is no single detrimental action. The novel is derogatory to the whole biography and character of X and therefore of serious intensity. In cases such as this, German lawyers do not speak of a sole violation of a person's right to honour but of a violation of a person's biography (*Lebensbild*),²¹ consisting of all actions, sentiments and convictions which constitute a person's individuality or identity. The right to one's biography may also be called the right to protect one's individuality or identity against false, misleading or incomplete biographical details.²² This right is affected in cases in which a fictitious character can be identified as a real person by her or his relatives, friends or by the public.²³ A violation of the right can occur in two constellations. Persons may bring a claim if their privacy is harmed by making intimate details of their private lives publicly available.²⁴ The

²⁰ Cass. civ. 7 Feb. 2006, JCP 2006, II, 10041. A. Ohly, A. Lucas-Schloetter, H. Bewerley-Smith, 'Artistic Freedom Versus Privacy - A Delicate Balance: The Esra Case Analysed from a Comparative Law Perspective' (2008) iic vol. 39, 526.

²¹ OLG Düsseldorf NJW-RR 2000, 321.

²² K.-N. Peifer, *Individualität im Zivilrecht* (Tübingen: 2001) at 219, 222, 227.

²³ BGHZ 84, 237 = NJW 1983, 1194 (satirical poem about the German department store tycoon Helmut Horten); H. Hubmann, *Das Persönlichkeitsrecht* (2nd edn., Cologne/Graz: 1967) at 304.

²⁴ BGH NJW 1999, 2893 (publication of details about the divorce proceedings of the publicly known aristocrat Ernst August Prinz von Hannover; although in this case, the court found sufficient public interest to make the publication legitimate).

second constellation requires that fundamental facts about the person are changed, suppressed or just invented by the author. This second situation is the one in cases where fictitious works allude to the lives of real people.²⁵ Therefore, the right to one's biography is at stake.

The claimant has an imminent interest in stopping the author and the publisher publishing and distributing the novel through an injunction. The author is primarily responsible for the allegation of false facts. However, the author's behaviour may be guarded by the constitutional protection of freedom of art (Art. 5(3) GG). This requires a balance of artistic freedom and personality interests. In principle, artists may take ideas for their work from the lives of real people. Though the constitutional provision does not refer to limits for artistic expression, courts and scholars agree on the point that freedom of art may not recklessly violate other constitutional values such as the rights to personal freedom and dignity.²⁶ Therefore, freedom of art does not afford the right to debase a person's dignity. Alluding to an existing person as representative of a type without mentioning this person as an individual is within the limits of artistic liberty.²⁷ Thus, courts will determine whether a disclaimer or other measures of distancing used by the author are more than a simple camouflage for a personal attack. Freedom of art does not allow the falsification of facts.²⁸

In a case concerning Klaus Mann's novel *Mephisto*, which depicted the life of the German actor Gustav Gründgens, an injunction was granted in 1966, three years after Gründgens died. The *Oberlandesgericht Hamburg* found that too many details about Gründgens' life had been omitted or changed.²⁹ The mixture of true and fictitious details about the main character would be read as a true biography of Gründgens, not as a fictitious work. While the *BGH* confirmed this decision,³⁰ the *BVerfG* was divided. Finally, in a three against three decision there was deemed to be no violation of constitutional law by the *BGH* decision.³¹

²⁵ Recently *BVerfGE* 119, 1, 29 – *Esra*; *BGH ZUM* 2005, 735 – *Esra*; *KG Berlin*, *AfP* 2004, 371 – *Meere*.

²⁶ *BVerfGE* 30, 173, 193 – *Mephisto*; *BVerfGE* 33, 52, 71; *BGHZ* 84, 237 = *NJW* 1983, 1194; *OLG Karlsruhe NJW* 1992, 647; R. Rixecker, *Münchener Kommentar zum BGB* (4th edn., Munich: 2001) § 12, note 167.

²⁷ L. Zechlin, 'Kunstfreiheit, Strafrecht und Satire' (1983) *NJW* 1195, 1196.

²⁸ *OLG Karlsruhe NJW* 1994, 1963, 1964.

²⁹ *Ufita* 51 (1968), 362. ³⁰ *BGHZ* 50, 133.

³¹ *BVerfGE* 30, 173 = *NJW* 1971, 1645.

III. Metalegal formants

The case shows that artistic freedom is valued more liberally than press freedom. This is due to the sociological fact that less credibility is attributed to artistic works. The reader or spectator is more critically distanced from the realistic background of a fictitious work. Therefore, the decision by the *BVerfG* was heavily criticised in Germany by non-lawyers. In the end, the novel was not published until 1981, almost 20 years after Gründgen's death. This time, nobody sued. The novel was a big success for the publishing company and half a million copies sold within two years.

Greece

I. Operative rules

X does not have a claim against the author of the book.

II. Descriptive formants

This case concerns a conflict between the protection of personality and freedom of expression, particularly freedom of artistic expression.

As already mentioned in Case 2, the particular action has an unlawful character when the conditions and the method of statement prove that there is intended defamation. Intentional defamation means 'behaviour that especially leads to injury to a person's honour by contesting his moral or social value'.³² There is no indication of intention on the part of the novelist to injure the honour and reputation of the claimant.

The description of the person's attributes in the novel have a general character, creating a type of person with specific characteristics, rather than trying to focus the reader on the person claiming to be offended. As a general type of person it is very probable that many others could find similarities with their own character.

Ireland

I. Operative rules

Actor X would succeed in a claim for defamation if it could be established that the ordinary reasonable reader would understand that the character in the book is a thinly disguised portrayal of actor X.

³² Supreme Court (Areopag) Decision 825/2002.

II. Descriptive formants

In order to succeed in an action for defamation, the plaintiff here must establish that he has been identified by the offending statement.³³ Even where the reference to the plaintiff is unintentional, as the novelist has claimed, an action may still exist.³⁴ The strict liability nature of the tort has the potential to cause harshness in cases where the defendant has made a genuine error. Thus under s. 21 of the Defamation Act 1961, the novelist may make an offer of amends to actor X if he can establish that the relevant material was innocently published. The offer of amends could involve the publishing of a correction and an apology.³⁵ Were the offer of amends to be accepted and a correction and apology published then it would bring an end to any proceedings.³⁶ The novelist will only be able to make an offer of amends where he can show that he innocently published the material.³⁷ In order to establish that the material was innocently published the novelist must first show that he did not intend to publish the material concerning actor X and also that he was not aware of the circumstances by which it might be understood by the ordinary reader that the material did refer to the actor. Second, the words used must not be *prima facie* defamatory. Finally, the novelist must prove that he acted reasonably in the publication of the material in all the circumstances. It is unlikely that the novelist will be able to plead the defence of offer of amends based on the foregoing. It could certainly be argued by actor X that the similarities between him and the fictional character in the book are too close to be unintentional and that given actor X's fame the novelist should have been aware that the ordinary reasonable reader would draw similar conclusions. At the very least, the novelist should be aware of this possibility and the mere publication of a disclaimer would not be sufficient to avoid liability.

³³ *Berry v. Irish Times Ltd* [1973] IR 368.

³⁴ *Hulton v. Jones* [1910] AC 20 (HL).

³⁵ S. 21(3). ³⁶ S. 21(4).

³⁷ S. 21(5) of the Defamation Act 1961 provides: 'For the purposes of this section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to another person if, and only if, the following conditions are satisfied, that is to say (a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or (b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection shall be construed

Italy

I. Operative rules

X can probably recover damages against the author of the book but the law is not clear on this point. X's claim for injunction would most probably fail.

II. Descriptive formants

In implementing the Data Protection Directive 1995/46/EC through the 1996 Data Protection Act (now Data Protection Code),³⁸ Italy did not introduce any specific exceptions concerning the use of personal data for literary and artistic purposes, permitted by Art. 9 of the Directive. Consequently, if an author wishes to write a biography about a certain person or, more generally, to report true facts involving certain persons by making use of personal data which is not yet in the public domain, he or she cannot do so without that person's consent. However, in the present case the novelist did not wish to write a biography about X, nor report true facts.³⁹ He simply got inspiration from X's life for creating a fictitious figure which differs notably from the real one. Moreover, the author explicitly made it clear that all characters in his novel are supposed to represent types, not portraits. Thus, one could argue that the Data Protection Code does not apply here.

Nevertheless, X's personality rights may have been infringed through the publication of the novel. If the fictitious figure is so similar to X in terms of life story, main characteristics, etc. that it would be immediately identified with X by all readers who know him, then the novel

as including a reference to any servant or agent of the publisher who was concerned with the contents of the publication.'

³⁸ See Case 3 re the Data Protection Act.

³⁹ In a case decided in 2002 (Trib. Mondovì, 8 Mar. 2002, DPP 2003, 336 with a critical commentary by L. Marocchi) the author of the novel *Fattacci* (*Wicked Deeds*) was released from the accusation of defamation. The novel was a literary re-elaboration of true or at least putatively true facts, which had come to the attention of the media and criminal courts some years before. The novel attributed the commission of criminal offences and very negative character traits to a young man (clearly identified in the novel by his real name) who was addicted to drugs and then murdered. The court, after having balanced the deceased person's fundamental rights to honour and personal identity (Arts. 2, 3 *Cost.*) against the novelist's freedom of speech and freedom of art (Art. 21 *Cost.*), decided in favour of the writer. It held that the personality rights violations contained in the novel were justified by the right to report news (*diritto di cronaca*), since the writer did not invent any of the details of the story but based them on media reports and documents in the possession of the judiciary. On the right to report news, see Case 1.

could indeed cause harm to X's reputation and/or distort his personal identity.⁴⁰ However, this would not automatically lead to the unlawfulness of the publication of the novel, because X's personality rights have to be balanced against the novelist's freedom of artistic expression protected by Art. 21 *Cost.*

A case similar to the present one was decided in Italy in 1997.⁴¹ A female writer was convicted of the crime of defamation for publishing a novel titled *Il bastardo di Mautana* (*The Bastard of Mautana*), which mingled fictional elements with details from the real lives of persons who were already dead at the time the book was published. In the novel, very negative, defamatory characteristics were attributed to these persons. They were easily identifiable in spite of the fictional names given to them in the novel. The court held that the publication of this novel, written without careful reference to historical sources, offended the memory of deceased persons and could not be considered a lawful exercise of freedom of artistic expression. Thus the writer was sanctioned with a penalty and ordered to pay damages (20 million Lire, i.e. approximately €10,000 for non-economic loss, and 10 million Lire for economic loss, approximately €5,000) to the heirs of the defamed persons. However, no injunction was granted and the book is readily available on the market.

III. Metalegal formants

The striking of a fair balance between personality rights and freedom of artistic creation in cases concerning novels which interfere with personality interests requires us to take metalegal elements into account. Freedom of art cannot justify serious interferences with the personality rights of third persons, however the protection of those rights would be too far-reaching if novelists were no longer allowed to derive inspiration from existing persons for inventing their characters. Perhaps the best compromise in the instant case would be to compensate the non-economic loss of the offended person, while not imposing any kind of censorship (i.e. neither prohibiting the dissemination of the novel nor ordering the deletion of the offending sentences from the novel). In substance, this solution seems to match with some trends observed in Italian case law.⁴²

⁴⁰ See Case 15.

⁴¹ Trib. Piacenza 18 Apr. 1997, *Foro it.* 1998, II, 193, with commentary by A. Di Martino: 'La diffamazione a mezzo romanzo: rapporti tra tutela dell'onore e libertà di espressione letteraria'.

⁴² *Ibid.*

The Netherlands

I. Operative rules

X has a claim against the author and publisher⁴³ of the book. The following remedies are available to X: injunction, the recall of books, economic damages (including profits deprived) and non-economic damages.

II. Descriptive formants

In this case, both the freedom of the press (Art. 7 Constitution) and the freedom of artistic expression are engaged, since the statement has been published in a novel. However, Art. 6:162 *BW* implies that every exercise of a right has its limits. Guided by the 'proper social conduct standard' it has to be decided whether the publication in this case is unlawful. The fact that a novel is an artistic expression is not a *carte blanche* to be offensive and/or to infringe someone's honour and good reputation.

The mere fact that the life, career, etc. of the protagonist in the book corresponds perfectly with the life of X is not a reason to render the publication unlawful. Nevertheless, in this case the author implicitly allows the impression that the negative features and actions attributed to the protagonist are in fact features and actions of the actor, whereas it is a given that the author invented those features and actions himself. The publication of these negative features and actions is offensive, since it results in the public getting a bad impression of the person concerned and his honour and reputation being infringed (see Case 1, circumstance (a)).⁴⁴ As far as it is reasonable to get the impression that the protagonist in the book can be identified with the actor,⁴⁵ these facts are not true or at least not based on objective innuendo (see Case 1, circumstance (c)). Consequently the publication of the negative features is an unlawful infringement of actor X's right to honour and reputation.

The mere disclaimer on the last page, 'All persons in this book represent types, not portraits', is not enough to avoid or refute the reasonable impression that the life of actor X has been described. If such a quote were enough, it would be too easy to unrestrictedly publish all kinds of negative facts about people. This would excessively lower the

⁴³ HR 10 Nov. 1989, NJ 1990, 113; G. A. I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 167.

⁴⁴ Schuijt, *Losbladige Onrechtmatige Daad* no. 57.

⁴⁵ HR 9 Oct. 2001, NJ 2002, 76.

protection of the personal interests of people who can be easily recognised as characters in novels.

On the other hand, the mere fact that the fictional figure resembles a real person is not enough to make the publication unlawful. For this, it is necessary that a reasonable reader can recognise the real person in the fictional figure in all respects. This is the case if readers cannot distinguish between facts that are based on reality and remarks that are inspired by the fantasy of the author (see Case 1, circumstance (d)). If it is clear or indeed should be clear to the reader that the facts in the novel are the result of the subjective vision of the author rather than a description of objective facts, there is no basis for this reasonable identification.⁴⁶

Assuming that the suggestion made by the author justifies the identification of the protagonist and actor X, and that therefore the description of the negative features and actions is unlawful, X has actions both against the author of the book and the publisher.⁴⁷ If the book has not yet been published, X can ask for an injunction against the publication. Even if the book has already been published and has been sold to the public, X can ask for an injunction preventing the remaining books being sold. Furthermore, he can ask the publisher to recall the books that were already sold. He can also ask for rectification.

According to Art. 6:95 *BW*, X can claim for compensation of loss and/or of deprived profits. He has to prove that the author's unlawful act caused him to suffer loss. If so, upon the request of the actor the amount of profit that the author and/or his publisher derived from the unlawful act may also be taken into account in the assessment of the damages (Art. 6:104 *BW*).

Damages for non-economic loss can be claimed if the requirements of Arts. 6:106 *jo.* and 6:96 *BW* are met. In this situation, the honour and good reputation of the actor have to be infringed. Presupposing that the publication is unlawful because it is reasonable to be under the impression that the description of the negative features and actions concerns the actor, then his right to honour and good reputation have been infringed. For that reason he is entitled to damages for non-economic loss.

⁴⁶ Schuijt, *Losbladige Onrechtmatige Daad* no. 83.

⁴⁷ HR 10 Nov. 1989, NJ 1990, 113; Schuijt, *Losbladige Onrechtmatige Daad* no. 167.

Portugal

I. Operative rules

The famous actor X can be awarded damages if the judge considers that the character portrayed in the book in question can actually be identified with him and this has caused damage to the actor's personal honour.

II. Descriptive formants

This case concerns a conflict between two personality rights: the actor's right to honour and personal reputation and the author's right to the free development of personality (which protects freedom of artistic creation). Objectively, it is important to ascertain whether the text causes the character to be identified with the claimant, and whether this identification is general and obvious or not. This may vary widely from reader to reader and in different sectors of society, but a general trend has to be established. Furthermore, the court will have to analyse what damaging effects the identification will cause to the claimant. This also depends largely on the circumstances of the case.

Freedom of artistic creation is constitutionally protected by Arts. 42 and 78 CRP. However, when deciding on the particular case, the court shall evaluate if and to what extent the claimant is bound to suffer for the sake of liberty of freedom of artistic creation, or, on the contrary, to what extent freedom of creation must be sacrificed at the expense of personal honour. Casuistry is inevitable. The judge must weigh both sides on the scales of justice and discern the equilibrium.

If the judge considers that:

- (1) the average reader can identify the book's character with the famous actor X;
- (2) it is so offensive to that person's honour and reputation that the freedom of cultural creation should give way to the right to honour; and
- (3) this has caused damage to the actor's personal honour,

then, the famous actor X would be awarded damages, according to Art. 70 and 483 CC. Damages can even be awarded if the author did not act with fault or with '*animus injuriandi vel diffamandi*', since civil responsibility can take place even if the author only acted negligently.⁴⁸

⁴⁸ Arts. 483 and 484 CC and STJ 27.05.1997, 3.02.1999.

Scotland

I. Operative rules

An action in defamation can be raised, although the outcome will depend on whether a court sees the case as substantiated.

II. Descriptive formants

This question addresses the problem of a publication which, while disclaiming the use of a real life character as a model for its main protagonist, nevertheless might lead its readers to draw an inference that it is in fact referring to the actor X.

Again, the law of defamation is involved here, together with the possible use of someone's character for literary gain, although this latter point is refuted by the author.

It is entirely irrelevant in Scots law whether defamation is made intentionally or unintentionally. The disclaimer is also irrelevant in that the question of whether there is a similarity between the characters is one to be left for the court to determine. X does not also need to prove that the defendant author deliberately chose to disparage him as a specific person. It is sufficient that the court and/or jury find that the words – in this case in the context of the fictitious novel – could reasonably be read (and understood) as referring to the particular actor X.⁴⁹

The leading English case of *Hulton v. Jones*,⁵⁰ confirms the foregoing principles and indeed has been followed by Scottish courts in *Wragg v. Thomson*.⁵¹ The former case dealt with exactly the same type of circumstances as here: innocent defamation. Given that s. 9 Defamation Act 1996 now allows a 'short cut' route to either an offer of amends or a declaration that the statement – in this case, the novel – is defamatory, the ceiling limit of £10,000 damages under s. 9(1)(c) HRA could be applied in such an 'innocent' case.

These authorities confirm that it is irrelevant whether X is known to the author or indeed whether he was alluded to in the description of the main character. Only the judge in summary proceedings and/or the jury at trial need to be satisfied that X might *reasonably be alluded to* by the text.

⁴⁹ This still makes defamation a serious threat for fiction writers.

⁵⁰ [1910] AC 20. ⁵¹ 1909 2 SLT 409.

Spain

I. Operative rules

X cannot claim against the author of the book.

II. Descriptive formants

According to Art. 7.7 of Spanish *LO 1/1982* and the facts described above the actor X does not have an action to protect his rights to honour and privacy. Creating a fictitious character is only subject to the limits of freedom of speech. According to this, there is no criminal action unless the facts could be qualified as defamation.

We do not know of any similar case in Spanish case law. However, according to case law, there is no relevant difference between an opinion made in a book or in the media.⁵²

Switzerland

I. Operative rules

The actor may request a declaratory judgment that an unlawful infringement of his personality occurred and ask the judge for an injunction against the future distribution of the book. The actor may also claim damages for the economic and non-economic loss suffered.

II. Descriptive formants

The publication of a book is protected by freedom of expression (Art. 21 of the Swiss Federal Constitution), which includes artistic freedom. However, artistic activity must remain within the limits of public order and respect the personality rights of others, including their reputation and their private spheres.⁵³ Each case requires balancing the individual's rights against the author's freedom of expression.

⁵² Neither ordinary legislation nor case law on the protection of honour make a distinction depending on the different medium of communication of information which intrudes into someone's intimacy. The only relevant distinction made is related to the extent of the dissemination of such information, but this distinction concerns the amount of the damage, not the existence of the loss itself. Accordingly, and specifically under s. 9 *LO 1/182*, the amount of damages can vary depending on the extent of dissemination of the untrue information or the information obtained without the plaintiff's knowledge. This rule seems to be correct.

⁵³ ATF/BGE 120 II 225 c. 3b, JdT 1996 I 99.

The Federal Court has adopted quite a restrictive conception of Art. 21 in the *'Julen'* opinion of 27 May 2003,⁵⁴ where it held a painter who painted a collection of portraits of recognisable semi-nude individuals to be liable. It held that artistic freedom did not provide a defence for the infringement of the reputation of the individuals depicted on the canvas.

In the case at hand, the sentence which appears on the last page of the novel leads us to believe that the book does not depict reality, but fiction. In dealing with a fictional story, the novel must be written in such a fashion that the reader cannot establish a link between the facts described that would infringe a person's reputation and an actual person.⁵⁵ If the actor depicted in the book is easily recognisable and if the book gives this person an image which is falsified to the point of being hurtful in the eyes of his peers, the actor may claim for unlawful infringement of his reputation. It seems here that the two conditions have been met.

Thus, the actor may request specific injunctive relief by asking for a declaratory judgment that the infringement was unlawful and an injunction against future distribution of the novel (Art. 28a, para. 1 CC). He may also claim damages for economic harm suffered (Art. 28, para. 3 CC), for pain and suffering and he may demand restitution of the profits made.

III. Metalegal formants

According to the Swiss Press Council, 'fiction is distinguished from reality and will not be subjected to the exacting demands of veracity in the same way that reported facts are'.⁵⁶ The boundaries between fiction and non-fiction must be clearly marked so that the reader is not induced to believe erroneous information about a person. If this distinction is not clear, freedom of art, protected by Art. 21 of the Swiss Federal Constitution, does not give *carte blanche* to the author and he/she must respect the personality rights of the person he/she is referring to.

Comparative remarks

Case 4 deals with the conflict between freedom of art and the protection of personality. In most continental European legal orders this is a

⁵⁴ Judgment of the Swiss Federal Court, 5C.26/2003.

⁵⁵ See n. 53.

⁵⁶ Statement of the Conseil suisse de la presse 1999, n. 9 c.2.

conflict between constitutionally guaranteed fundamental rights and freedoms (Austria, Belgium, Germany, Greece, Italy, the Netherlands, Portugal). What makes this case particularly difficult is that this type of key novel ('Schlüsselroman', 'roman à clef') may be classified as a borderline case between a biography and novel, a so-called 'veiled biography'.

The unauthorised publication of biographies of celebrities, politicians and other public figures could, under certain circumstances, be justified on grounds of the public interest (see Case 5). On the contrary, most legal systems would only allow the publication of a biography of a private person with the prior consent of that person. In the case of genuine novels with imaginary persons and plots, the freedom of art takes priority. In borderline cases such as this one, continental European civil laws weigh up the freedom of art against the protection of personality. Two criteria are of special relevance here:

- (i) Recognisability of the person portrayed. Is this merely the invention of a particular type or character – or is it clearly the description of an identifiable individual?
- (ii) Protection of personality only takes precedence over freedom of art if the portrayal of this recognisable individual is tantamount to a significant infringement of his or her privacy, identity or honour.

It is hard to determine whether in the present case both prerequisites are given. In Germany in the 1960s the *Bundesgerichtshof* judged in favour of the claimant in the *Mephisto* case,⁵⁷ which the present case was modelled on (the first division of the German Constitutional Court delivered a split vote). Today, a dismissal of the action would be more likely. Furthermore, in Austria, Greece and Spain the publication of such a novel would be lawful. In Austria, Italy, Germany and Greece this outcome would be reached through a balancing of conflicting rights in the framework of the general law of delict of the Civil Code. In Spain, the relevant legal basis is a special statute: the 1982 Act on the civil protection of the rights to honour, personal and family privacy, and one's image.

In Italy, the Netherlands and Switzerland, an unlawful infringement of X's personality would probably be acknowledged and X would be entitled to compensation of economic and non-economic loss. In the Netherlands and Switzerland, X would also be granted an injunction, while this seems unlikely in Italy.

⁵⁷ BGH, 20 Mar. 1968, BGHZ 50, 133, NJW 1968, 1773.

Moreover, in France, an unlawful infringement of X's personality interests is likely to be acknowledged nowadays. Before 2006, French courts tended to let freedom of art prevail over the right to privacy in cases of this kind. In 2006, however, the *Cour de cassation* granted an injunction to a woman who recognised herself as the figure of an old prostitute in a 'fictitious' detective story. Like in X's case, in this French case the novel had also mingled some elements from the claimant's real life with fictional elements.

If an injury to personality rights is affirmed, continental European legal orders provide the following remedies: injunction barring publication; compensation of economic and non-economic loss and (possibly) forfeiture.

In England, Scotland and Ireland the case would be subsumed under the law of defamation (see Case 1). The result would depend on the recognisability of X and the damage to his reputation by the portrayal in the novel. In England, this decision would be taken by the jury. Under the Irish Defamation Act of 1961 and the English and Scottish Defamation Act of 1996, the author and publisher would be able to avoid the payment of damages in cases of unintentional defamation by making an offer of amends.

Unlike in the other European countries, in Finland civil liability for defamation is strictly accessory to criminal liability. In the present case, if the publication of the novel meets the requirements of a crime of defamation, X can recover economic and non-economic loss. Injunction is not possible before publication, but the unsold copies of the book can be forfeited.

8 Case 5: A former statesman's family life

Case

After a famous statesman's retreat from politics, his former secretary published a biography revealing many details about his family life. Can the statesman sue the author and the publisher for damages and injunction?

Discussions

Austria

I. Operative rules

Whether the statesman is entitled to sue his former secretary and the publisher of the book for damages depends on particular circumstances.

II. Descriptive formants

In general, § 7 *MedienG*, which protects the right of 'utmost intimacy' ('*höchstpersönlicher Lebensbereich*'), for example family life, health and sexual life, corresponds with Art. 8 ECHR. In principle, all persons – including politicians, statesmen and other 'public figures' – are protected against unlawful public exposure through media reports, books, etc.

If the allegations made are true, under § 7, subs. 2(2) *MedienG*, it is of central importance whether the published facts relating to the claimant's private life are strongly connected with his/her public life. In addition, the particular behaviour and intention of the party infringing the privacy of the claimant is relevant.

Austrian courts and scholars combine these elements in a flexible way: the less the private details (e.g. conjugal disputes between the

statesman and his wife) are connected with the claimant's public life and the more malicious their description, the more plausible a claim for damages even if the story is true. In contrast, if, for example, the statesman fervently campaigned against homosexuals during his political career, the secretary's story on the statesman's own homosexual tendencies is, of course, of public interest and he may not receive compensation even if some details are untrue and/or very intimate and/or maliciously described.

With regard to this weighing of elements, if the secretary engages in wrongful behaviour the statesman is entitled to sue.

Regarding economic loss, it is possible to sue the author and the publisher for loss of earnings according to § 1330, subs. 2 *ABGB* (see Case 1); consider for example a situation where the statesman fails to secure a well-paid job because of the reports of his former secretary. Compensation for pecuniary loss could be also deduced from the violation of the right to privacy, which is based on § 16 *ABGB* – the general clause for the protection of privacy – together with Art. 8 ECHR.¹ In this particular case, § 1295(1) *ABGB*, the general clause of tort law, would be the basis for the claim.

Furthermore, under § 7 *MedienG*,² the statesman could claim against the publisher for compensation of non-economic loss up to a ceiling of €20,000.

§ 1328a *ABGB*, which provides for compensation of economic and non-economic loss in case of an infringement of privacy, is not applicable either against the publisher or against the author³ due to subs. 2 which reads: 'Responsibility for infringements of privacy by the media is considered exclusively under the provisions of the Media Act ...'⁴

Finally, the statesman may sue the author and the publisher for an injunction under § 381 *EO* to prevent the publication.⁵

¹ Art. 8 ECHR is part of Austrian constitutional law and can be made relevant in civil law through § 16 *ABGB* (*mittelbare Wirkung der Grundrechte im Zivilrecht*: indirect effect of human rights in civil law).

² We would like to point out once again that this provision is part of a strict liability regime (see Case 1).

³ RV (Regierungsvorlage) 173. BgNR 22. GP 20.

⁴ In order to compensate non-pecuniary damage this provision presupposes a serious infringement. See Case 8. Analysing § 1328a *ABGB* in general: E. Helmich, 'Schadenersatz bei Eingriffen in die Privatsphäre' (2003) *Ecolex* 888 et seq.; M. Lukas, 'Schadenersatz bei Verletzung der Privatsphäre' (2004) *RZ* 33 et seq.

⁵ See Case 1, under n. 1; this claim does not depend on fault.

III. Metalegal formants

This case clearly shows that the Austrian legislator has a comprehensive system of protection of personality rights as its objective. On the contrary, there are individual provisions protecting various aspects of personality in different statutes, which are inconsistent in respect of both the factual requirements for their application and their legal consequences.⁶ This shows how urgently a total reform of this area of law is required.

Belgium

I. Operative rules

The statesman can bring an action against the author of the book. He will probably be entitled to damages for non-economic loss because of the violation of his family intimacy. It is not certain whether he will obtain an injunction or not.

II. Descriptive formants

The right to privacy⁷ means that every person has the right to lead his/her life in his/her own way and to be protected against intrusion by third persons. Details about sexual relationships, state of health, sexual orientation, etc. are protected. Such information can only be revealed where the person concerned gives his/her consent.⁸

Under Belgian law, the right to privacy also applies to public figures. For example, the Court of Appeal of Ghent stressed that the members of a famous pop group had the right to remain silent about their sexual orientation. As they had a lot of female fans, they had always kept their homosexuality a secret. A magazine that reported this fact was held to have violated their right to privacy.⁹ In another case, the Civil Court of Ghent stated that a statesman's right to privacy was violated by an article which contained medical information about him. On the grounds of persistent rumours, a journalist stated in that article that the statesman suffered from cancer and that his medical prognosis was rather bad.¹⁰

⁶ Cf. F. Bydlinski, 'Der Ersatz ideellen Schadens als sachliches und methodisches Problem' (1965) *JBL* 173 *et seq.*; H. Mayer, *Persönlichkeitsschutz und Medienrecht* (Vienna: 1999).

⁷ For an explanation of the legal basis of the right to privacy, see Case 3.

⁸ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995-2000' (2001) *TPR* 2001, 1605 *et seq.*; D. Voorhoof, *Handboek mediarecht* (Brussels: 2003) at 147-9.

⁹ CA Ghent 12 Jun. 2001, *AM* 2002, 169.

¹⁰ Civil court Ghent 16 Dec. 1981, *RW* 1983-84, 2968.

In the case at hand, the statesman can bring an action against the author of the book. He can obtain damages on the basis of Art. 1382 *Code civil*. As a result of the principle of multi-staged liability, he cannot sue the publisher for damages.¹¹

III. Metalegal formants

Belgian politicians have not often been the victims of publications such as this one. However, for example, had a book about François Mitterrand's illness and private life been published in Belgium by his doctor, his widow and children would also have been able to lodge a claim against that doctor.¹² That claim could have allowed for an injunction *a priori* as well as damages *a posteriori*.

The disclosure of medical secrets is only allowed in court on legal grounds (e.g. necessity) or in the interest of the patient. In the cited French Mitterrand case there is no political justification for disclosing medical secrets. This could be different if the illness was politically relevant. However, the public interest would have to prevail over criminal law. The doctor must refer to necessity, comparable to his/her divulgence of the hideout of a wounded gunman.¹³

Under the right to privacy it might not be unlawful to reveal that a very conservative politician who adheres to traditional family values has had an adulterous relationship.

England

I. Operative rules

The politician might have a claim for injunction and/or damages. This will depend on the specific facts of the case, particularly whether the politician has courted publicity before.

II. Descriptive formants

1. Substantive law

Breach of confidence would be likely to apply. The information about the politician's family life could be considered private information if it had not been public knowledge previously.

Under the traditional three limbs of a breach of confidence action, information that arises from a confidential relationship, for example,

¹¹ See Case 1.

¹² TGI Paris 23 Oct. 1996, *AM* 1997, 213.

¹³ Cass. 13 May 1987, *JLMB* 1987, 1165, note by Y. Hannequart.

from an employment relationship, is clearly private,¹⁴ and the same would apply under the new reasonable expectations test. In the present case, it the politician's expectation that information relating to his family life should not be made public and this should have been obvious to his secretary and also to the publisher.

Still, as mentioned before, the relevance of the politician's right to confidentiality and the freedom of the press have to be weighed and balanced in each individual case. Generally speaking, a public figure is entitled to have his/her privacy respected like anyone else.¹⁵ In this particular case, it would probably depend upon whether the statesman had courted attention before,¹⁶ and in particular, whether he sought publicity in order to present himself to the public in the most favourable light possible. In such a case, he would not be allowed to complain of an invasion of his private life which portrays him in a less favourable light in the eyes of the public.¹⁷ Had he instead kept his private life out of the media spotlight during his time as a statesman his interest in maintaining his privacy would surely prevail. The same would apply under the new reasonable expectations test as developed in *Campbell*.

2. Remedies

(a) Injunction

An injunction is available as a remedy in equity, and, unlike the plea of justification in defamation cases, merely pleading the public interest defence will not prevent an injunction in cases of breach of confidence. Courts have explicitly rejected the proposal to apply the defamation rules to breach of confidence.¹⁸ In contrast, courts have frequently held that, in a case of a breach of confidence, the claimant would not be adequately compensated by an award of damages for the loss he/she would have sustained, in particular where the damage to the claimant might be irreparable¹⁹ or where the claimant intended to make his/her own commercial use of the confidential information.²⁰ Moreover,

¹⁴ See, for example, *Pollard v. Photographic Company* (1889) LR 40 Ch D 345, at 349. For the confidential nature of a sexual relationship, see *Stephens v. Avery and Others* [1988] Ch 449.

¹⁵ *A v. B plc and Another* [2003] QB 195, at 208, per Lord Woolf CJ; *Campbell v. MGN Ltd* [2003] EMLR 2, 39, at 52.

¹⁶ *A v. B plc and Another* at 208, per Lord Woolf CJ; *Campbell v. MGN Ltd* [2004] 2 AC 457.

¹⁷ *Woodward v. Hutchins* [1977] 2 All ER 751.

¹⁸ *Lion Laboratories Ltd. v. Evans and Others* [1985] QB 526, at 546, per O'Connor LJ.

¹⁹ See *Schering Chemicals Ltd. v. Falkman Ltd and Others* [1982] QB 1, at 29, per Shaw LJ.

²⁰ See, for example, *Shelley Films Limited v. Rex Features Limited* [1994] EMLR 134, at 151.

withholding an injunction might encourage trusted advisers to make money out of the confidential information that they are dealing with.²¹

In relation to personal information, the Court of Appeal held in *Douglas v. Hello!* that following *Campbell* and *von Hannover*²² and taking the mental distress suffered by the Douglases into account, the award of £14,600 could not be regarded fairly as an 'adequate remedy'. Such a small sum could not function as any real deterrent to a newspaper or a magazine planning to publish photographs which infringe an individual's privacy. The only way that the Douglases' interests could have been sufficiently protected was through the granting of an interlocutory injunction.²³

In interlocutory proceedings, s. 12(3) of the Human Rights Act 1998 requires that the court be satisfied that the applicant is likely to establish that the publication should not be allowed.²⁴

(b) Damages

The politician can make a claim if he suffered any damage. In the present case, the politician may have intended to make use of his life story, for example, by writing and selling his memoirs. However, even if he has not suffered financial detriment since the breach of confidence involves no more than an invasion of personal privacy, he is still entitled to damages in order to encourage respect for confidence. If any profit has been made through the revelation of details of a person's private life it is appropriate that the profit should be awarded to that person. Otherwise he/she may claim nominal damages.²⁵

Finland

I. Operative rules

The statesman is entitled to damages. An injunction is not possible as was already described in Case 1. If the biography itself can be considered unlawful (dissemination of information concerning someone's private life), there is the possibility to claim for forfeiture of the unsold copies of the biography.

²¹ *Schering Chemicals Ltd v. Falkman Ltd and Others* at 39, per Templeman LJ; *X Health Authority v. Y* [1988] RPC 379, at 395.

²² (2005) 40 EHRR 1.

²³ [2006] QB 125, at 201-202.

²⁴ See Case 1.

²⁵ See *Attorney-General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, at 255-256, per Lord Keith of Kinkel.

II. Descriptive formants

According to Ch. 24, s. 8 of the Finnish Penal Code, which was already referred to in Cases 2 and 3, it is a crime to unlawfully reveal information to a large number of people about someone's private life in a manner which is likely to cause damage or suffering to the offended person. Nevertheless, there is an exception under s. 8(2) concerning information about a person in politics, business life or public administration. According to this, information can be revealed if it is relevant for the judging of the person's activities in these fields and the revelations are needed to deal with a socially important matter.

In this case we are told that the revealed information concerns the statesman's family life, which clearly lies within the realm of privacy. Thus, it is only possible to reveal information about the politician's private life to the extent that the information is relevant for judging that person's activity as a politician.²⁶ If the pieces of information revealed in the book have no connection with the politician's political activity, they are protected by the Penal Code provision and the statesman is entitled to damages. As was stated in Case 1, damages for pure economic loss are possible if the politician can prove that he has suffered such loss. Furthermore, according to Ch. 5, s. 6, the politician has a claim of compensation for anguish. The allocation of liability between the author and the publisher is regulated as in Case 1.

As was stated in Case 1, an injunction is not possible. If the details revealed constitute a crime, then the copies of the biography can be declared forfeited as was already described in Case 4.

France

I. Operative rules

The statesman can bring an action against the author and the editor of the book which contains the details of his private life. While it is not certain that he will obtain an injunction against the dissemination of the work, he will, on the other hand, probably obtain damages for non-economic loss suffered due to the violation of his family intimacy.

II. Descriptive formants

The details of family life belong to the protected sphere of private life in French law. Not only is information relating to parenthood

²⁶ See Government Bill 184/1999 p. 33 and Tiilikka, *Sananvapaus ja yksilön suoja – Lehtiartikkelin aiheuttaman kärsimyksen korvaaminen* (Vantaa: 2007) at 484–94.

and family ties protected,²⁷ but also more generally love and family relations,²⁸ the number and names of any children, and the state of health of family members, etc. Thus, the author of a biography who intends to divulge such information must first obtain the consent of the person concerned.

One can naturally ask if this also holds true where the subject of the biography is a public figure, *a fortiori* a statesman. French case law consistently affirms that public figures, whatever the origin of their fame, enjoy the same personality rights as private figures in principle.²⁹ In practice, however, the protected sphere is inevitably more limited.³⁰ The right of the public to be informed justifies certain exceptions to the protection of privacy, in particular in the case of persons exercising a public function who must be accountable not only to their voters but also to the nation. The more important the public office, the more important the right of the public to be informed is.

A case comparable to the present case has been recently adjudicated by the French courts. The personal doctor of the former President of the Republic, François Mitterrand, published a book entitled 'The Big Secret' after Mitterrand's death. This book contained details about the illness and the family life of the statesman. Mitterrand's heirs wished to prevent the distribution of the book. However, the case was particular in that it concerned a deceased person and the facts could have equally been considered as constituting the criminal offence of breach of a professional secret on the part of the doctor. The case has led to numerous decisions, all of which have been decided in favour of the heirs, but for different reasons. Nevertheless, the judgment of the summary proceedings (*juge des référés*) is interesting: it stated that the revelations contained in the work 'constitute by their nature a

²⁷ CA Paris 5 Dec. 1997, D. 1998, IR, 32.

²⁸ CA Versailles 19 Jun. 2003 (Claudia Schiffer), *Légipresse* 2004, No. 210, I, 49: the love life of any person is of a private nature.

²⁹ CA Paris 1er Feb. 1989, D. 1990, jur., 48: 'any person, whatever his/her rank, his/her birth, his/her fortune, his/her functions, present or future, has a right to respect for his/her private life', Cass. civ. 27 févr. 2007, Bull. civ. I No. 85 p. 73.

³⁰ See Cass. civ. 25 nov. 2004, *Légipresse* 2005, No. 218, III, 17: 'any person, whatever his/her notoriety, has a right to respect for his/her private life and can oppose the dissemination of information about himself/herself. If a person is notorious or exposed to public interest on grounds of his/her birth, functions or profession, the scope of application of this protection is (however) to be assessed differently than in situations where this protection is invoked by an ordinary person.' Cass. civ. 16 mai 2006, Bull. civ. I, No. 247 p. 216.

particularly grave intrusion into the intimacy of the private family life of President François Mitterrand'.³¹

One can thus expect that in this case the action of the statesman against the author and the editor of the book would succeed, without having to establish the secretary's violation of the obligation of confidentiality. The infringement of the right of privacy encompassed in Art. 9 C.C., according to which '(e)veryone has the right to respect for his private life', largely suffices alone. It is not certain, however, that the claimant would obtain an injunction to prevent the distribution of the work, insofar as French case law is very respectful of the freedom of writers. On the other hand, it is probable that the claimant will obtain damages for the non-economic loss suffered because of the violation of his family intimacy.

Germany

I. Operative rules

The statesman probably has no claims at all, however case law is far from clear in this area.

II. Descriptive formants

There is no contractual claim assuming that the secretary's employment contract was not made with the statesman himself but with some other institution. However, claims in tort may be based on § 823(1) BGB since the publication of true but private facts may constitute an infringement of the general personality right. This group of cases is usually structured by doctrine and case law with reference to three concentric 'spheres' for which different rules apply.³² The innermost

³¹ TGI réf. Paris 18 Jan. 1996, JCP 1996, II, 22632. However, this case led to the condemnation of France before the ECtHR: see ECtHR, 18 May 2004, *Sté Plon c/ France*, CCE 2004, No. 96, 38, www.echr.coe.int (App. No. 58148/00). The ECtHR held that the interim injunction ceasing the distribution of *Le Grand Secret*, which contained revelations about François Mitterrand's state of health and was published shortly after his death by his doctor in violation of professional confidentiality, did not amount to a violation of Art. 10 ECHR. However, concerning the measures ordered after trial on the merits, the Court considered that maintaining the ban on the distribution of *Le Grand Secret* which was in force no longer met a 'pressing social need' and was therefore disproportionate in relation to the aims pursued. The ruling had come more than nine months after President Mitterrand's death in a context which was different from the one in which the interim measure had been ordered, mainly because of the time that had elapsed since then.

³² M. Löffler and R. Ricker, *Handbuch des Presserechts* (5th edn., Munich: 2005) at 325 *et seq.*; the division in spheres goes back to H. Hubmann, JZ 1957, 521, 524; OLG Hamburg 11.5.1967, NJW 1967, 2314, 2316; but see the critique regarding this

sphere is the sphere of intimacy, surrounded by a broader sphere of privacy which in turn is surrounded by the public or social sphere. The intimate sphere is related to health, sexuality and the body as well as personal thoughts and feelings recorded in diaries etc. The intimate sphere is sometimes described as unassailable in the sense that no weighing of interests can justify publications or intrusions regarding intimate matters.³³ Nevertheless, courts in fact use a weighing of interests even in cases concerning intrusions into the intimate sphere.³⁴ It is therefore more correct to say that a publication regarding intimate matters is presumed unlawful unless a special justification is provided.³⁵

The private sphere consists of family, home and marital life; publications relating to this sphere are lawful depending on an open weighing of interests, while publications regarding the social or public sphere – including political and business activities – are generally permitted.

The outcome of the case therefore depends on the content of the book. If it describes 'intimate' matters such as sexual relations, its publication is unlawful unless there is an overriding public interest in the specific publication, which is hard to imagine.

If the book is discrete in relation to sexual matters and describes marital and family life in general, it will be categorised as a publication regarding the private sphere so that a fairly open weighing of interests is applied. The case law here is very contradictory. Typical tabloid-style publications seem to be lawful, for example a report on the marital problems and divorce of a prince. The Federal Court has said in this context that even the public's interest in 'superficial entertainment' can outweigh an individual's interest in privacy.³⁶ If one applied this reasoning to the present case, any claim should be denied since publications regarding a famous former statesman's life seem to be of more legitimate public interest than similar publications about a politically unimportant prince.

picture by K. Larenz and C.-W. Canaris, *Lehrbuch des Schuldrechts II/2* (13th edn., Munich: 1994) at 503.

³³ BVerfG NJW 2000, 2189; BGH NJW 1999, 2893, 2895; OLG Karlsruhe ZUM 2006, 226, 229; BGHZ 73, 120, 124; BVerfG 31.1.1973, BVerfGE 34, 238, 245.

³⁴ BGH, NJW 1988, 1984, 1985; OLG Hamburg, NJW 1967, 2314, 2316; KG Berlin AfP 2004, 371.

³⁵ K. Larenz and C.-W. Canaris, *Lehrbuch des Schuldrechts* at 503.

³⁶ BGH, NJW 1999, 2893, 2894.

A recent lower court case regarding the former German Chancellor Gerhard Schröder sheds a different light on the matter: Schröder successfully claimed an injunction against a local newspaper which had published a story alleging that Schröder had problems with his wife and had an affair with a famous television journalist. The court argued that there was no public interest in such matters. In the words of the court, the ex-Chancellor's alleged extramarital affair did not affect his office and is 'not of relevance for the public and for voters'.³⁷

If one follows this argument where the marital life of an acting statesman is declared to be irrelevant for voters, a former statesman would have even stronger protection. Under this theory, the former statesman could claim an injunction, as well as damages against both the author and publisher. Damages for non-economic loss could only be available if there was an especially 'serious and grave violation' of the personality right which again depends on the content of the book.

However, the lower court decision in the *Schröder* case should not be overrated. Its reasoning is incompatible with the Federal Court decision: if it is lawful to describe the divorce and extramarital relations of a prince who holds no public office, one should think that it must also be possible to describe similar matters regarding a person who holds – or in the hypothetical case here has held – the state's highest office.

III. Metalegal formants

The contradictions in German case law regarding the publication of true but private facts highlight a basic problem: the decisions are based on the assumption that it is proper for the courts to decide which information is worthy for public discourse and which is not.³⁸ It is questionable whether this is an adequate role for the courts in a democratic state. In the *Schröder* case, the defendant newspaper argued that it published a comprehensive portrayal of the politician Schröder which in the view of the journalists had to include his family life since his wife actively participated in the electoral campaign.³⁹ In a less publicised but comparable case, another lower court had ruled that it was unlawful to publish the information that a local politician hit his mother at a birthday party.⁴⁰

³⁷ LG Berlin, AfP 2003, 174, 176; see also LG Berlin, AfP 2006, 394, 395.

³⁸ For details see A. Halfmeier, *Die Veröffentlichung privater Tatsachen als unerlaubte Handlung* (Frankfurt: 2000) at 309 *et seq.*

³⁹ C. Eggert, 'Anmerkung zu LG Berlin 21.1.2003' (2003) AfP 176.

⁴⁰ LG Oldenburg, NJW 1987, 1419. The decision is criticised by Löffler and Ricker, *Handbuch des Presserechts* at 327.

One possible argument against such decisions would be that the voters themselves should decide whether they find such information politically relevant or not.

Greece

I. Operative rules

The statesman can sue both the author and publisher for damages for non-economic loss. In addition, he can request interim measures to prevent the further distribution of copies of his biography. In this case, the heirs of the politician are legally entitled to claim reparation.

II. Descriptive formants

According to Art. 57(1) CC: 'A person who has suffered an unlawful attack on his personality has the right to claim the cessation of such an attack and the non-recurrence thereof in the future. If the attack was directed against the personality of a deceased person such a right shall belong to the spouse, the descendants, the brothers and sisters and the legatees appointed by his will.'

The book revealing many details of a person's private life and illness amounts to an injury to the statesman's privacy. Although public persons should tolerate any interference with their private life as long as it is connected to their public role, they are fully protected against revealing aspects of their private life unconnected with their public role, without previous consent.⁴¹

Ireland

I. Operative rules

It is likely that the statesman would have a remedy against his secretary in the form of an action in breach of confidence. Both an injunction and damages are available to the statesman.

II. Descriptive formants

To obtain a remedy the statesman would have to establish that the information relating to his family life was not already public knowledge.⁴² A duty of confidence has been found in many relationships and whether a duty of confidence exists in any given situation will be determined by the use of the reasonable man test.⁴³ If the secretary

⁴¹ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) at 81.

⁴² *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* [1948] 65 RPC 203.

⁴³ *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41, at 48.

obtained the details of the statesman's family life through her role as his employee, then an obligation of confidence will exist between the parties arising implicitly from the contract of employment.⁴⁴ It should be remembered that the duty of confidence would also extend to third parties – such as the publishers of her biography for example – who also could be restrained from publishing the details.⁴⁵ Notwithstanding the confidential nature of the information, the Irish courts will have regard to the secretary's constitutional right to free expression guaranteed under Art. 40.6.1 and if the publication can be justified in the public interest then its disclosure would be allowed.⁴⁶ However, given the fact that the statesman is no longer part of public life it would be unlikely she could justify the publication on this ground.

An injunction is available to the statesman on grounds similar to those outlined in the English report. The award of such injunctions is governed by the principles established in the decision of *American Cyanamid Co. v. Ethicon Ltd.*⁴⁷ Damages may also be awarded, particularly as there was a contractual relationship between the parties.⁴⁸ Finally, the statesman may decide to choose an equitable remedy of an account of profits which may ensure that the secretary does not profit from her breach.⁴⁹

III. Metalegal formants

In 2006, the Irish government published the Privacy Bill. Unlike the Defamation Bill which was published at the same time, the Privacy Bill has proven to be extremely controversial and has not yet come before the Oireachtas (Parliament) for debate. Whether it will ever be enacted into law in its current form is certainly open to discussion.

The structure and content of the Bill is heavily influenced by the ECtHR's recent decision in *Von Hannover v. Germany*.⁵⁰ The central aspect

⁴⁴ *Campbell v. Frisbee* [2002] EWCA (Ch) 328.

⁴⁵ See *Oblique Financial Services Ltd v. The Promise Production Co.* [1994] ILRM 74 (HC), where Keane J explained: 'It is obvious from the cases and indeed it is a matter of common sense that the right to confidentiality, which the law recognises in these cases, would be of little value if the third parties to whom this information has been communicated were at liberty to publish it to the general public, without the court being in a position to intervene.'

⁴⁶ *Gartside v. Outram* (1856) 26 LJ CH 113.

⁴⁷ [1975] AC 396.

⁴⁸ R. Clark and S. Smyth, *Intellectual Property Law in Ireland* (2nd edn., Sussex: 2005) at 500.

⁴⁹ *House of Spring Gardens Ltd v. Point Blank Ltd* [1984] IR 611.

⁵⁰ (2005) 40 EHRR 1.

of the legislation is the creation of a tort of violation of privacy. S. 2(1) provides, 'a person who, wilfully and without lawful authority, violates the privacy of an individual commits a tort'. Under s. 3(1) the privacy 'an individual is entitled to is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good'. S. 3(2) provides examples of what would, in certain circumstances, amount to a violation of privacy including: subjecting an individual to surveillance, disclosing information obtained as a result of any such surveillance, using the image of another for advertising or financial gain without their consent, etc.

S. 5(1) of the Bill provides a number of defences to an action for violation of privacy. Included among these is the defence that the actions of the defendant were 'an act of newsgathering, provided any disclosure of material obtained as a result of such act was: (i) done in good faith (ii) for the purpose of discussing a subject of public importance, (iii) or the public benefit, and (iv) fair and reasonable in all of the circumstances'. S. 8 of the Bill provides a remedy by means of an injunction or damages. S. 13 provides that such remedies may be sought in private.

As already stated above, the Privacy Bill has been the subject of much controversy since its publication. Proponents of press freedom have particular fears regarding the impact that the Bill could have for investigative journalism. In particular, the rather limited defence that the actions were an 'act of newsgathering' and the fact that a plaintiff could seek a remedy from the courts in private has given much cause for concern.

Italy

I. Operative rules

The statesman can sue the author and the publisher for damages and an injunction.

II. Descriptive formants

As already mentioned in Case 3, about twenty years after the judicial recognition of the right to privacy⁵¹ the Data Protection Act was enacted to protect privacy and other fundamental interests of personality. This

⁵¹ Cass. 27 May 1975 no. 2129, *Foro it.* 1976, I, 2895. According to G. Alpa, 'Privacy', in *I Precedenti. La formazione giurisprudenziale del diritto civile*, I (Torino: 2000) at 259 *et seq.*, this is the leading precedent on the subject. For a description of this case, see Case 8.

Act was passed with the aim of implementing the Data Protection Directive 1995/46/EC. In 2003 it was replaced by the Data Protection Code (DPC).⁵² Like the former Data Protection Act, the DPC also has a very broad scope of protection. It not only applies to computer data banks, but to any kind of ‘processing’ of personal information, undertaken by either private or public bodies.

It can be assumed that the revelation of details of a statesman’s family life by his secretary is unlawful if it is done without consent (Art. 23 DPC). It is accepted under Italian law that even public figures are entitled to some sort of privacy protection. Society’s right to know (and its citizens’ right to information) finds its limit where the private sphere begins. The constitutional protection of free speech (and other fundamental interests such as historical research and artistic creation) cannot be invoked to deprive persons of their basic liberties. An infringement of the privacy interest of public figures can only be deemed lawful if some conditions are met. Among other elements required by case law, the notice has to be *essential* – from an objective point of view – to public debate.⁵³

From the description of this case we cannot say with any certainty if the facts involved are necessary for public debate. This condition would probably be fulfilled if, for instance, the politician was the leader of a conservative political party against homosexuality or the use of drugs, and his biography revealed that he regularly used drugs or had homosexual affairs. Apart from these exceptional hypotheses, where the borderline between the private and the public sphere is extremely subtle, information relating to a politician’s family life should not be published without the prior consent of the person involved.

One should also consider that the secretary is under an implied contractual duty of confidentiality. On the other hand, the publisher, who is not contractually bound, is also answerable because of the tortious infringement of privacy.

The politician can react to the infringement by claiming an injunction and can recover damages for both economic and non-economic loss.

The quantification of such damages is not easy. According to Arts. 1226–2056 CC, the judge has discretionary power in assessing damages

⁵² See Case 3 re the Data Protection Act.

⁵³ See Art. 137(3) Data Protection Code; and Art. 6 Journalists’ Code of Conduct. For some interesting applications of the Data Protection Authority see *Garante dati personali* 31 Jan. 2000, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) at 251 (illness of a politician); *Garante dati personali* 10 Oct. 2002, *ibid.* 260 (prostitution scandal).

where their exact amount cannot be proven. It is likely that the first kind of damages would be determined by reference to the so-called 'consent price': the reasonable amount of royalties that the politician would have gained by allowing an invasion of his right to privacy. Such information usually has a significant market value and the courts are inclined to re-allocate it to the claimant even if he/she did not intend to consent to its commercial use.⁵⁴ However, this issue is debated.⁵⁵

In addition, compensation for non-economic loss is also recoverable. Until the enactment of the Data Protection Act – and, more generally, until the famous 2003 decisions of the Supreme Court⁵⁶ – the claimant could have only been entitled to these damages when the tort amounted to a criminal offence (this rule was based on a restrictive reading of Art. 2059 CC, in connection with Art. 185 CP). The Data Protection Act 1996 and the Data Protection Code 2003 have taken a different approach: according to Art. 15(2) DPC, non-pecuniary losses are always recoverable whenever personal data is processed unlawfully or contrary to the principle of good faith.

The Netherlands

I. Operative rules

Under certain conditions, the statesman can sue both the author and the publisher for economic loss (if he suffers any) and non-economic loss and also for profits which the author or the publisher obtain from the publication. The statesman can request an injunction against both the author and the publisher on the same basis.

II. Descriptive formants

It is decisive whether or not the publication of the details of the famous statesman's family life by his former secretary is a breach of an unwritten rule of law pertaining to proper social conduct. Under the given

⁵⁴ See, among other decisions, Trib. Roma 20 Jul. 1991, *Dir. inf.* 1992, 88 (a picture of the famous politician Bettino Craxi used in an advertisement for a newspaper); Trib. Roma 25 Mar. 1992, *Giur. it.* 1992, I, 2, 644; but, for some limitations, see Cass. 25 Mar. 2003 no. 4366, *Dir. inf.* 2003, 521.

⁵⁵ See, on this matter, P. Trimarchi, 'L'arricchimento derivante da atto illecito', in P. Cendon (ed.), *Scritti in onore di R. Sacco*, II (Milan: 1994) at 1149; A. Barengi, 'Il prezzo del consenso (mancato): il danno da sfruttamento dell'immagine e la sua liquidazione' (1992) *Dir. inf.* 565.

⁵⁶ Cass., 31 May 2003 no. 8828; Cass. 31 May 2003 no. 8827; Cass. 12 May 2003 no. 7281; Cass. 12 May 2003, no. 7283, *Foro it.* 2003, I, 2272; see also Corte Cost. 11 Jul. 2003 no. 233, *Foro it.* 2003, I, 2201.

circumstances, the right to freedom of expression and the right of privacy have to be balanced and weighed against one another.⁵⁷ With regard to the right of freedom of expression, important factors include whether publication of the information serves a public interest (Case 1, circumstance (b)) and whether the publication adds new information to the information that was already known to the public.

In relation to the right to one's privacy, important factors are the degree of intimacy of the information and whether or not the information was not known to the public before the publication. If the information was already known to the public, the mere publication of it does not infringe the statesman's right to privacy. Another important aspect is whether the statesman himself already courted attention regarding his private life (Case 1, circumstance (g)). If he already brought his private life into the public domain, his right to privacy has to be given less weight than if it is the first time that his family life (or information about his family life) has been brought into the public domain.

If the facts were not previously known to the public, it might be taken into consideration that the situation in which the former secretary obtained the information about the family life of the famous statesman is confidential (Case 1, circumstance (h)). The more confidential the situation was in which the information was disclosed to the secretary, the more care the secretary can be expected to take when he/she publishes facts about the statesman. In this case, it is clear that the information obtained by the secretary was imparted in a confidential situation. Without having been employed as a secretary, he/she would not have had access to information about the statesman's family.⁵⁸

Assuming that the situation in which the secretary obtained the information is confidential, another important factor is the way in which the statesman acted before. If he made facts about his family public, the publication of different facts of an equal level of intimacy is not an unlawful act. If the statesman avoided revealing any facts about his personal life, the publication of these facts is unlawful.

In that case the statesman can sue both the author and the publisher for economic loss (if he suffers any) and for non-economic loss (Art. 6:106, s. 1(b) BW) and for profits which are derived from the publication

⁵⁷ G.A.I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII, (Deventer: 2000) no. 104.

⁵⁸ HR 9 Jan. 1987, NJ 1987, 928 (Edamse bijstandsmoeder); Schuijt, *Losbladige Onrechtmatige Daad*, no. 106.

by the author or the publisher (Art. 6:104 *BW*) (see Case 1). On the same grounds, the statesman can ask for an injunction against both the author and the publisher.

Portugal

I. Operative rules

The statesman is entitled to claim for damages against both his former secretary and the publisher for the violation of his privacy. He may also claim for an injunction to prohibit the publication of the biography or to recall the books already on the market.

II. Descriptive formants

It is seriously unethical for a secretary to disclose details of a present or former employer's family life. The fact that the statesman here is a well-known person – a 'public person' – does not deprive him of his right to privacy. Such conduct would only be lawful if founded on a pressing reason of defence of the common good. Even then, it should be so done as to cause as little damage as possible. However, action of this type is generally driven purely by economic interest, rendering it legally unacceptable.

The right to privacy ('right to discretion over one's private life intimacy', according to Portuguese terminology) is protected by Art. 26 *CRP* and Art. 80 *CC*, which states that:

1. Everyone should be discreet regarding another's intimacy of private life.
2. The extension of discretion is defined according to the nature of the case and the situation of the persons.

The rule stated in paragraph 2 makes the extent of each particular right to privacy dependent on the circumstances of each case and how famous the person in question is. However, this does not imply that famous people do not have a right to privacy. Furthermore, accepting a degraded and less dignified status for 'public figures', based on a kind of 'objective consent', would be unconstitutional and would clash with the principle of equality.

According to Portuguese social and political life patterns, a politician's family life is, at least for the most part, included in their right to privacy. Therefore, a judge would most likely consider that both the former secretary and the publisher violated this politician's right to privacy. He would, therefore, be awarded damages to be paid by those two persons (Arts. 70, 80 and 483 *CC*). The politician may also file for

an injunction to prohibit the publication of the biography or to recall the books already on the market (Arts. 70(2) CC).

In addition, Art. 192(1), para. (d) CP considers breach of confidence a crime: it is criminally punishable to divulge the intimacy of the family, sexual life or facts regarding the private life of another person without their consent and with the intention of invading their private life. However, no crime is committed when the facts regarding someone's private life are divulged on the basis of a legitimate and relevant public interest (Art. 192 (2) CP). As the book at the centre of the present case does not invoke any kind of public interest, both the former secretary and the publisher could also be convicted of the crime of invasion of privacy as co-authors (Art. 26 CP).

Finally, Art. 16, para. 1 of the Labour Code (*Código do Trabalho, CT*)⁵⁹ states that both the employer and the employee should respect one another's personality rights, namely, maintaining discretion in relation to the other's intimacy of private life. Furthermore, paragraph 2 of the same provision specifies that the right to privacy includes both access to and the disclosure of issues regarding the parties' intimate and personal sphere, including issues relating to their family, emotional and sexual life, health condition and political and religious beliefs. Although the violation of this particular rule is not considered a specific wrongful act in labour law (Art. 641 CT, *a contrario*), the existence of this rule does increase the degree of wrongfulness of the former secretary's conduct.

Scotland

I. Operative rules

The statesman has a *prima facie* case of breach of confidentiality against his former employee and will be entitled to an injunction and damages depending on a number of factors as outlined below.

II. Descriptive formants

Scots law has always recognised that there are situations where private and professional confidence is paramount and failure to maintain this may lead to a situation of liability.⁶⁰ The equitable notion of breach of confidence has now been reinforced through the HRA to take on

⁵⁹ Law no. 99/2003, 27 Aug., which came into force on 1 Dec. 2003.

⁶⁰ *Argyll (Duchess of) v. Argyll (Duke of)* [1967] Ch 302.

a new form of private information or informational autonomy.⁶¹ In the immediate instance involving the former statesman, the question concerns the degree to which confidence forms an intrinsic part of an employer/employee relationship. The law of confidence can operate as an effective tool to protect privacy in personal and employment relationships.⁶²

Both Scots and English law recognise the notion of breach of confidence. Recent authorities from the English High Court and Court of Appeal have addressed breach of confidence situations – admittedly with varying momentum – to ascertain the correct balance to be struck between privacy, confidentiality and freedom of expression.⁶³ There are various English dicta on what privacy itself can be interpreted as meaning, ranging from the ‘avoidance of publicity’⁶⁴ to ‘notions of what an individual might want to be kept private secret or secluded are subjective to that individual’.⁶⁵ There is no more than a vague Scottish definition of what confidential information is about.⁶⁶

As the law stands at present, the English courts have certainly recognised that there is now a statutory right to protect privacy on the basis of the HRA and the ECHR.⁶⁷ ‘The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim ... it can recognise privacy itself as a principle.’⁶⁸

What the courts have not yet done, however, is agree on a blanket approach to upholding claims of breach of confidentiality and

⁶¹ *Campbell v. MGN Ltd* [2002] EWHC 499 (QB), Baroness Hale at para. 134.

⁶² *Campbell v. MGN Ltd* (HL), para. 134: ‘The position we have reached is that the exercise of balancing Art. 8 and Art. 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential.’

⁶³ *Douglas v. Hello Ltd* [2001] QB 967 [2003] EWCA Civ 139; *ibid.* [2005] EWCA Civ 595 (House of Lords); *Campbell v. Frisbee* [2002] EWCA (Ch) 328; *ibid.* [2002] EWCA Civ 1374.

⁶⁴ *R v. Broadcasting Standards Commission ex parte BBC* [2000] 3 All ER 989, 995 per Lord Woolf, MR.

⁶⁵ *Ibid.*, per Hale LJ at 1000–1001.

⁶⁶ *Dalgliesh v. Lothian and Borders Police Board* 1992 SLT 721 at 724, per Lord Cameron. ‘What is confidential about information is a matter of the precise circumstances of the case, but generally something which is already widely known is not confidential ... what is likewise a confidential relationship is not precisely defined.’

⁶⁷ ‘The Courts are in the process of adapting the law of confidentiality in the light of the Human Rights Act 1998 in order to reflect the conflicting Convention rights of respect for private and family life and freedom of expression.’ *Campbell v. Frisbee* at para. 33, per Lord Phillips, MR, Court of Appeal.

⁶⁸ Sedley LJ in *Douglas v. Hello!* [2001] QB 967 (High Court).

privacy.⁶⁹ The balance needs to be re-struck in each specific case. The Court of Appeal decision in the English case of *Campbell v. Frisbee*⁷⁰ reflects the considerations the court must take into account when striking a balance between the competing rights of privacy and confidentiality against freedom of expression, within the context of a contract for services. In that particular case, a former employee of Ms Campbell passed information on to the press relating to clearly private, if not intimate, matters. Her motives were to inform the public of the darker side of Ms Campbell's character. However, the publication was not deemed justified under Art. 10 in view of the type of information involved. In other words, the balance between these various competing rights relates to the *type* of private information and whether it fell within the public interest. Guidance in the immediate case can perhaps best be sought in the words of Jack J in the post HRA case of *A v. B&C*⁷¹ in which reference was made to Lord Goff of Chieveley in the renowned freedom of expression case *AG v. Guardian Newspapers (No. 2)* (Spycatcher) case.⁷²

'A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.'

The statesman in this case can undoubtedly expect his former secretary to maintain a duty of confidentiality. In the eyes of the law, a statesman or politician, although more exposed to the public eye, is equally entitled to his/her privacy, unless there is an overriding matter of public interest.⁷³

⁶⁹ The judgment of Sedley LJ in the High Court in *Douglas v. Hello! ibid.*, that English courts should immediately recognise a law of privacy has not been directly followed. The Court of Appeal in that case does recognise both privacy and commercial equity in the selection and exploitation of one's own authorised photographs, see *Douglas v Hello!* [2005] EWCA Civ 595. The House of Lords in *Campbell v. MGN Ltd* (HL) regards privacy as a new approach to breach of confidence that no longer requires a relationship of trust or confidentiality but relates more to private information, see the opinions of Lord Nicholls, paras. 13, 24, 30, 31; Lord Hoffmann, paras. 44, 50, 53, 56; *contra* Baroness Hale, paras. 142, 147, 150. The Lords came down in favour of privacy in the individual case but only by a narrow majority. The views as to whether or not the publication of the photograph was an invasion of Ms Campbell's privacy were split so that the issue cannot be seen as settled.

⁷⁰ See n. 63 above.

⁷¹ [2002] EWCA Civ 337; [2002] 2 All ER 545.

⁷² [1990] 1 AC 109 at 281.

⁷³ See *A v. B&C* [2002] EWCA Civ 337; [2002] 2 All ER 545: 'It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy' (per Lord Woolf, CJ at para. 11 (vi)).

Moreover, again:

The court should protect from publication and give remedies for the wrongful publication in breach of confidence details, which have the mark and badge of confidentiality, of the private life which a celebrity or public figure has chosen not to put in the public domain, unless despite the breach of confidentiality and the private nature of the information, publication is justifiable.⁷⁴

Whether or not the statesman can sue the author and publisher for damages and interdict depends on the following:

- (a) the degree to which there was an implied or explicit duty of confidence between the parties. This is likely to be answered in the positive;
- (b) whether or not the information revealed by publication was already known to the public: these facts must be ascertained; and
- (c) whether in fact the publication involves a breach of this confidentiality; and
- (d) finally, under the law of defamation, whether the information reflected in any way on the character of the statesman himself such that the context of the information published cast a false light on the statesman and/or his family members, giving rise to a possible claim in defamation.

For the publication to override either express or implied duties of confidentiality,⁷⁵ the public need to have an overriding public interest in the information.⁷⁶ Although the Court of Appeal decision in *Campbell v. Frisbee* of October 2002 highlights the various types of confidential relationships between an employer and employee, the court was still required to balance the vying interests of privacy and public interest by ensuring that a person, indeed a public figure, is properly portrayed by the press and not permitted to remain in a false light.⁷⁷ Pre-HRA authority exists that maintains even if there is a breach of confidentiality, the public should not be misled and injunctions may even be refused where there is an overriding public interest in the

⁷⁴ Morland J in the High Court in *Campbell v. Mirror Group Newspapers Ltd* [2002] EWHC 499 (QB); [2002] EWCA Civ 1373; *Campbell v. MGN Ltd* (HL); *Campbell v. Mirror Group Newspapers Ltd* [2005] UKHL 61, at para. 70.

⁷⁵ This is due to the so-called pressing public need.

⁷⁶ *Dalgliesh v. Lothian and Borders Police Board* at 724.

⁷⁷ See *Campbell v. Mirror Group Newspapers*, at first instance only, photograph of Campbell coming out of Narcotics anonymous seen as breach of confidence; in the House of Lords decision, *Campbell v. MGN Ltd*, putting the record straight created sufficient public interest in the press report and photograph, per Lord Hoffmann, para.

truth.⁷⁸ This ‘correct image’ approach now appears to be open after the House of Lords decision in *Campbell* in 2004 that came down in favour of balancing the interests in favour of privacy. The Lords indicate in their decision that the information must have initially been revealed through some confidential relationship.⁷⁹ Each case will depend on its own facts. ‘The principle of law is clear that a contractual obligation of confidentiality is not sacrosanct: the Common Law recognises that the public interest may require or justify encroachments and this approach is confirmed by art. 10 and section 12 (HRA).’⁸⁰ The freedom of expression and right to privacy are of equal value.⁸¹

Accordingly, there may well be circumstances of pressing public interest where, in assessing the balance of interests, the UK courts are required by s. 12 HRA to examine the extent to which it is in the public interest to publish such information.⁸² Regard is also to be had to the self-regulating terms of the Press Code on Privacy.⁸³

In addition, the statesman may avail of the defence of privileged information that is not allowed to be published. The general approach even prior to HRA is to suppress information of a political or sensitive nature, particularly in relation to government proceedings.⁸⁴ The authorities are careful to draw a line between what is genuinely subject to privilege and therefore protected, and what can be published with impunity.⁸⁵ Council of Europe Resolution 1165 of 1998, no. 9, gives guidance to courts in finding the right balance: ‘Certain facts

58; in *Campbell v. Frisbee*, the Court of Appeal also encouraged Campbell to ‘put the record right’ and reveal her dependency.

⁷⁸ Philipps MR in *Campbell* [2003] QB 633 (CA), with reference to Lord Denning, in *Woodward v. Hutchins* [1977] 1 WLR 760.

⁷⁹ *Campbell v. Frisbee*. See para. 31: ‘the continuing applicability of these judgments might be open to question on the ground that it did not accord with modern developments in breach of confidence claims’. See further *A v. B&C* n. 71 above: ‘If [the cases] are authorities which relate to the action for breach of confidence prior to the coming into force of the 1998 Act then they are largely of historic interest only’ (per Lord Woolf, CJ at para. 9).

⁸⁰ *Campbell v. Frisbee*, High Court, per Mr J Lightmann at para. 30.

⁸¹ *Ibid.* at para. 24.

⁸² See *Venables v. News Group Newspapers Ltd* [2001] 1 All ER 908 (child murderers of James Bulger) per Butler-Sloss: ‘It is also recognised that it is just in all the circumstances that information known to be confidential should not be disclosed to others.’

⁸³ Code of Practice of the Press Complaints Commission (UK), 1990, see Case 1.

⁸⁴ G. Robertson and A. Nicol, *Media Law* (3rd edn., London: 1992) at 189, 193.

⁸⁵ *Lord Advocate v. Scotsman Publications Ltd* [1989] 2 All ER 852 (HL): no interdict against memoirs of ex-member of MI6 despite source of information being confidential.

relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.'

III. Metalegal formants

The courts in England continue to reject a tort of invasion of privacy, despite the case law inroads into developing a law of private information, albeit combined with breach of confidence, since the advent of the HRA. Scots law will possibly adopt the same position, although it will look at privacy, confidentiality and wrongdoings rather than individual torts. The exact relationship between privacy and breach of confidentiality remains open to further judicial development since the House of Lords decision in *Campbell* in May 2004.

Spain

I. Operative rules

The statesman can sue the author and publisher for damages and injunction.

II. Descriptive formants

Publishing statements concerning the private life of a person or family, which diminishes his or her reputation and good name, constitute an illegitimate interference with the right to privacy.⁸⁶ According to Art. 9.2 LO 1/1982, the claimant can ask for an injunction, putting an end to the interference and prohibiting the re-occurrence thereof in the future.

Moreover, Art. 7.4 LO 1/1982 considers the revelation of details of a person's private life that are known due to a professional relationship as an illegitimate interference.⁸⁷

Switzerland

I. Operative rules

The politician has the right to request a judgment declaring the unlawful nature of the infringement and an injunction against the

⁸⁶ One of the most famous cases decided in Spain was STC 186/2001, Sept. 17 (RTC. 186), a case known as *Isabel Preysler v. Hymosa and others*, which is similar to the one under consideration here.

⁸⁷ Art. 7.4 LO 1/1982 states: 'It will be considered an illegitimate interference with the right to honour, privacy and image (4) to disclose private information of a person or family when the informant has become aware of this information in a professional or official capacity.'

subsequent distribution of the book. He may also sue both the publisher and the author for damages for the economic and non-economic loss suffered.

II. Descriptive formants

Political figures are part of public life. Doctrinal writing draws a distinction between 'absolute' and 'relative' celebrities.⁸⁸ Absolute celebrities are individuals who have a lasting fame in contemporary history. Relative celebrities, on the other hand, are those who have acquired a passing fame or notoriety as a result of a fixed event, such as an accident, a crime, a competition, etc. Generally, a particular public interest in information exists with respect to absolute celebrities. However, the boundaries of these distinctions have been put into question by the *von Hannover* judgment.

According to case law applying Art. 21 of the Constitution, a biography is protected by freedom of expression and by artistic freedom. In the case at hand, the biography concerns a political figure and obviously aims to satisfy the public interest in information. Therefore, the statesman may not prevent the truthful telling of his life story in a book. However, some elements of his private life may be revealed but only to the extent that they report on his public activity or are at the source of his fame.⁸⁹ Thus, reporting events such as his birth, the progression of his studies, or even his marriage, will not constitute an infringement on his personality rights.

The situation is different where facts or family events are part of the politician's private or intimate sphere; in the instant case, they may not be revealed in a book without his consent.⁹⁰ Information belonging to the private sphere is considered sensitive under statutory law⁹¹ and communication of this information to third parties is unlawful as a rule (Art. 3 lit. c(2) and Art. 12, para. 2, lit. b LPD).

Thus, if the facts revealed in the politician's biography belong to his private or intimate sphere, he may legitimately ask the judge to issue a provisional injunction against the publication of the book (Art. 28a, para. 2(1) CC) as well as requesting a declaratory judgment of the

⁸⁸ H. Deschenaux and P.-H. Steinauer, *Personnes physiques et tutelle* (4th edn., Berne: 2001) at 180, n. 561a.

⁸⁹ F. Riklin, *Schweizerisches Presserecht* (Berne: 1996) § 7 n. 60.

⁹⁰ *Ibid.*

⁹¹ Federal Statute on the Protection of Data; Loi fédérale du 19 juin 1992 sur la protection des données (LPD) (RS 235.1).

unlawful nature of the infringement. He may also demand that the sale of the book be discontinued. Furthermore, the politician will be able to claim damages for economic and non-economic loss (Art. 28a, para. 3 CC), as well as restitution of profits and compensation for pain and suffering.

III. Metalegal formants

In this case, the right to information conflicts with the politician's right to private life. Even though freedom of expression is of paramount importance in continental Europe, private life and reputation also enjoys protection, clearly more than it does under US law.⁹² The continental European approach requires the judge to strike a balance between the right to information on the one hand and the individual's dignity and right to privacy on the other. Recent ECtHR decisions have undertaken a rebalancing of these two fundamental values.⁹³

Comparative remarks

This case deals with the conflict between freedom of expression, freedom of information and privacy in a particular context: the publication of a famous politician's unauthorised biography including details about his private life. Unlike in Case 4 (where, if there was a biography at all, it was a veiled one), neither artistic freedom nor defamation plays a role here. Case 5 is a pure privacy case: the core question is to what extent the public interest in knowing the complete truth about a former statesman justifies the publication of details regarding his undisclosed private and family life.

I. The right to privacy: legal bases

In addition to being enshrined in Art. 8(1) ECHR, nowadays the right to privacy is acknowledged in nearly all private laws under consideration. It finds express or implied recognition in the legislation of many countries. In continental Europe, a right to privacy is expressly laid down in the Greek, Dutch and Spanish Constitution and in the

⁹² See on this subject J. Q. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151 *et seq.*

⁹³ Judgment of the ECHR of 25 May 2004, *Oesterreichischer Rundfunk v. Austria*, case no. 57597/00; Judgment of the ECHR of 18 May 2004, *Plon v. France*, case no. 58148/00; Judgment of the ECHR of 24 Jun. 2002, *von Hannover v. Germany*, case no. 59320/00.

French and Portuguese Civil Codes. Furthermore, a right to privacy is implicitly recognised by § 7(1) *MedienG* (Austrian Media Act) (tortious liability for intrusion in someone's intimate sphere – '*höchstpersönlicher Lebensbereich*'), by Ch. 24, s. 8 Finnish Penal Code (harmful diffusion of information relating to someone's private life), by the Italian Data Protection Code and the Swiss Data Protection Act. In Ireland, privacy has been recognised as an unenumerated constitutional right under Art. 40.3 of the Constitution. In England and Scotland, the Human Rights Act 1998 has given express protection to 'privacy interests' as defined by Art. 8(1) ECHR.

In Belgium, Germany and Italy a right to privacy has been acknowledged by case law and academic writings. In Belgium, privacy is dealt with as a subjective right protected by the general provision of the Civil Code's law of delict. However, the same is also true for Germany and Italy, where privacy has a constitutional dimension as a specific application of the fundamental right to personality laid down in the Constitution.

II. Balancing privacy against freedom of expression and information

In all countries under scrutiny, everybody – including celebrities such as politicians, sport and popstars – enjoys the legal protection of his/her privacy. In principle, information concerning the private and family life of a public figure can only be published with his/her consent, unless there is an overriding public interest in the information. In this concrete case, the publication seems *prima facie* unlawful, since it constitutes a breach of confidence between the secretary and the statesman, possibly also giving rise to contractual liability for the violation of a fiduciary duty.

Whether or not the justification of an overriding public interest applies will be assessed through a case-by-case balancing.

In England, Scotland and Ireland, this balancing takes place under the framework of the equitable doctrine of breach of confidence. In the present case, if the facts had not been made public before, the disclosure of private information acquired by the secretary on the basis of a relationship of trust and confidence constitutes a *prima facie* breach of confidence which entitles the statesman to damages. An overriding public interest in this information could only be exceptionally affirmed. For example, if the statesman had sought publicity regarding his private life before, in order to present himself in the most

favourable light a publication of facts from his family life which puts him in a less favourable light would be allowed.

In continental Europe (including the Nordic countries) there seems to be a wide consensus that the disclosure of facts concerning a public figure's intimate sphere (body, health, sex, love) can only be justified by an overriding public interest in rare, exceptional cases. There must be a significant connection between the private information and the public function exercised by the person concerned. If this person is a politician, the information must be politically relevant.

In Germany and Austria, freedom of expression and the public interest in information seem to justify a wider range for the unauthorised publication of private matters than in other countries. In Germany, the statesman would probably not have any claim. In principle, the publication of true but private facts may constitute an infringement of the 'general personality right', entitling the statesman to claim under the general law of delict (§ 823(1) BGB). However, in this case the justification of an overriding public interest would apply, since the public has a legitimate interest in knowing about the behaviour of high-profile politicians. Only if the most intimate details such as sexual relations are at stake, is an overriding public interest in disclosure unlikely to be found.

In Austria, § 7(2) Media Act expressly allows the publication of even intimate facts about public figures when they are true and 'connected with public life'. It is uncertain whether the statesman will be granted legal protection in the case at hand.

Furthermore, in the Netherlands the outcome of the case is uncertain. According to Dutch case law, if a politician has already made facts from his family life public, the renewed publication of the same facts as well as another publication concerning different facts from his family life would be allowed. On the contrary, in most legal systems a public figure's consent to publish certain facts from his/her private life would never justify the publication of different facts as such.

To summarise, in the majority of legal systems considered, privacy interests would probably prevail when balanced against freedom of expression and information. The opposite seems true in Germany, where freedom of expression would probably prevail. In Austria and the Netherlands, the outcome depends on the circumstances of the case.

III. Remedies

In all legal systems considered, except for Germany, Austria and the Netherlands, the statesman would probably be entitled to damages. In Belgium, France and Greece, he would only have a claim for non-pecuniary damages. In the other countries, pecuniary losses are also recoverable. In some states, such as Italy, pecuniary losses include a reasonable amount of royalties which the statesman would have been entitled to if he had commercialised his biography himself. In the Netherlands, England, Scotland and Ireland, the profits gained by the secretary are to be awarded to the statesman as pecuniary losses. In Switzerland, the politician has a separate claim for restitution of the profits.

In England and Scotland, general damages also have a preventive function. They can be awarded 'in order to encourage respect for confidences'. Otherwise, damages would be nominal.

In most countries where the statesman has a claim for damages, he is also entitled to an injunction. Whether or not this is true for Belgium and France, is uncertain. French and Belgian law tend to avoid injunctions limiting freedom of expression. For the same reason, no injunctive relief is available in Finland. Here, however, the statesman could claim forfeiture of the unsold copies of his unauthorised biography if the requirements for the crime of dissemination of private information are met.

In Switzerland, the politician also can obtain a declaratory judgment assessing the unlawful nature of the infringement.

9 Case 6: A satirical magazine

Case

In a satirical magazine, the Prime Minister of a nation is caricatured in a cartoon as a pig copulating with another pig depicted as a judge. Does the Prime Minister have any claim against the magazine?

Discussions

Austria

I. Operative rules

The Prime Minister will probably not have any claim.

II. Descriptive formants

‘Making a fool of somebody’ is the target of satirical art. Therefore, the right to freedom of art (Art. 17a StGG)¹ could be infringed if the Prime Minister was entitled to sue the magazine.

To find the borderline between lawful and unlawful intrusions,² Austrian courts first separate the factual core message of a caricature from the satirical presentation and check whether this factual message is likely to damage the honour or dignity of the person targeted.

Second, the courts look at the satirical presentation itself. Any distortion and exaggeration which is part of the caricature is not measured very strictly or in a narrowminded fashion. The constitutional right to freedom of art may only be restricted if the essence of human

¹ Cf. Case 4.

² Cf. R. Reischauer in P. Rummel, *Kommentar zum ABGB II/2b* (3rd edn., Vienna: 2004) § 1330 no. 7h.

honour and dignity is affected.³ Therefore, satirical cartoons enjoy a wider sphere of freedom compared to other pictures.

In 1992,⁴ the OGH held that the satirical presentation of the editor-in-chief of a newspaper as a pig with the description ‘pig, open to doing everything’ was allowed, after his newspaper had falsely described a woman suspected of murder as a ‘secret prostitute’ and as a ‘pig who is open to doing everything’.

Showing the Prime Minister as a pig copulating with another pig depicted as a judge would therefore not clash with the Prime Minister’s right to honour if there was a comparable factual background demonstrating the concrete method of presentation, e.g. if some connections of corruption between the Prime Minister and judicial authorities could be proven.⁵ Moreover, we have to bear in mind that public figures must have a broader range of tolerance.⁶ Consequently, it is probable that the Prime Minister’s claim would fail under Austrian law.

Belgium

I. Operative rules

The Prime Minister cannot bring an action against the magazine. He/she could sue the artist for damages. Whether or not he/she will receive compensation is uncertain in Belgian law.

II. Descriptive formants

The Prime Minister will probably not have a claim against the magazine; the Belgian Constitution has established ‘multi-staged liability’.⁷ If the artist is known, no claim can be lodged against the publisher, printer or distributor.

Regarding whether the Prime Minister will have a claim against the artist, satire is protected as freedom of speech and freedom of the press. Public figures can be depicted in a humorous way. However, this ‘right to humour’ does not exclude the (general) duty of care.⁸ Freedom of

³ Cf. OLG Wien MR 1995, 52.

⁴ JBl 1992, 246.

⁵ Arguably, here, because the picture transmits some kind of sexual message the right to honour is affected as well as the right to privacy.

⁶ See Case 1.

⁷ *Ibid.*

⁸ See, in general, M. Isgour, ‘La satire: réflexions sur le “droit à l’humour”’ (2000) *AM* 59. In relation to satirical texts: Civil court Brussels 30 Mar. 1999, *AM* 2000, 102; Civil court Brussels 4 May 1999, *AM* 2000, 106.

speech is weighed against the personality rights of the depicted person. Some criminal offences might also be relevant in this context.

Belgian case law is very tolerant of satire. A cartoon depicting local councillors as corpulent men with cigars in their mouths and pockets bulging with money was not considered a legal wrong. Even the use of the expression 'son of a bitch' in this context was not considered a violation of their right to a good reputation.⁹ The Court of Appeal of Brussels decided that caricatures permit an artist to exaggerate features without harming someone's reputation. In a 1998 case, a newspaper made fun of a certain type of film director who, allegedly, was making too much fuss about his own work.¹⁰ However, the satire exception does not justify all invasions of personality rights. For example, the court decided in the *Herman Brusselmans* case that it was not a matter of satire but rather a deliberate personal attack on the fashion designer.¹¹

England

I. Operative rules

The Prime Minister may have a claim in libel depending on how the ordinary reader would understand the cartoon.

II. Descriptive formants

Under the circumstances outlined above, this could be a case of libel since the Prime Minister is recognisable, the caricature has been printed, and its content might suggest that the Prime Minister has an inappropriate attitude towards the separation of powers, i.e. that he/she breaches the duties connected to his/her office. Although English common law is reluctant to protect public authorities under the law of defamation due to the chilling effect on the exercise of the democratic right of public criticism,¹² it still protects holders of a public office from defamation.

The mere fact that the cartoon was published in a satirical magazine does not necessarily prevent liability, although the defendant would certainly plead Art. 10 ECHR. In *Sutcliffe v. Pressdram Ltd*, the wife of the 'Yorkshire Ripper' was awarded damages for a publication in the satirical magazine 'Private Eye' that claimed she had sold her story

⁹ Civil court Nivelles 12 Mar. 2002, AM 2003, 77.

¹⁰ Brussels 30 Sept. 1998, RW 2000-01, 93.

¹¹ Civil court Antwerp 21 Dec. 2000, RW 2000-01, 1460.

¹² See *Derbyshire County Council v. Times Newspapers Ltd and Others* [1993] AC 534.

to the press.¹³ Furthermore, a cartoon does not in itself prevent any defamatory meaning.¹⁴ Nevertheless, the context in which the caricature was presented and the mode of publication have to be taken into consideration.¹⁵

It still depends upon how the ordinary reader would understand the cartoon. Again, one ought to remember that the court merely assesses whether or not the cartoon is capable of bearing a defamatory meaning, while the final decision is made by a jury.

Finland

I. Operative rules

The statesman probably does not have a claim against the magazine.

II. Descriptive formants

According to Ch. 24, s. 9(2) of the Finnish Penal Code, a person can be heavily criticised for his or her activities in politics, business, a public position, science, arts or other similar public activity, unless the criticism clearly exceeds what can be considered acceptable. The more significant a person's social position is, the more criticism he/she has to tolerate.¹⁶ If the criticism exceeds what can be considered acceptable, it constitutes an act of defamation according to Ch. 24, s. 9 or 10 of the Finnish Penal Code. If so, the case is judged as in Case 1.

III. Metalegal formants

In this case, it needs to be ascertained whether the cartoon exceeds what can be considered acceptable. There is no precedent in this area. It has to be taken into consideration that the magazine is a satirical one, that it is a cartoon and that the Prime Minister is a public person and has to endure intense criticism concerning his or her activities in politics. If there have been such events in the Prime Minister's political life that can legitimate this sort of criticism, there are probably no grounds for any claim.

¹³ *Sutcliffe v. Pressdram Ltd* [1991] QB 153. See also *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566.

¹⁴ See *Dunlop Rubber Company v. Dunlop* [1921] 1 AC 367. See also P. Prescott, 'Libel and Pornography' (1995) 58 *Modern Law Review* 750 *et seq.*

¹⁵ See, e.g., *Charleston and Another v. News Group Newspapers Ltd and Another* [1995] 2 AC 65, at 70, per Lord Bridge of Harwich.

¹⁶ See Vuortama, *Journalisti* 15/1999, www.journalistiliitto.fi/journalisti/arkisto/1599/ala/alakerta.htm (9 June 2003) at 107.

France

I. Operative rules

The Prime Minister has no cause of action against the magazine.

II. Descriptive formants

French case law is particularly tolerant of satire and caricature. French judges consider that 'caricature, as a manifestation of the freedom of criticism, authorises an artist to exaggerate features and to alter the personality of those who he/she portrays'.¹⁷ The Court of Appeal of Versailles has thus determined, with regard to the actor Jean-Paul Belmondo, that 'the distortion through a photomontage of characteristics of a public figure and notably of a famous comedian for humorous purposes is lawful so long as it is not outrageous and does not manifestly have the ridiculing of the artist or the smearing of his reputation as its objective'.¹⁸ The satire exception certainly does not justify all injuries to personality, as is reported in certain decisions where such an exception was rejected on the basis that it was not a matter of genuine satire but rather of deliberate insult.¹⁹ The criteria for determining the legality of a caricature appears to be the outcome sought; thus, the *Cour de cassation* puts forward the principle that the 'caricature is legal, according to the laws of this genre, only in so far as it ensures the full exercise of freedom of expression'.²⁰

The instant case concerns a person exercising a public function. The caricature is intended to denote a judgment which is not about the character of the person as such but rather about the exercise of his/her public function. Thus, it is very probable that such a caricature will not be prohibited in French law because of freedom of expression.

¹⁷ TGI réf. Paris 17 Sept. 1984, D. 1985, somm., 16. For a similar statement, see also TGI réf. Paris 17 Jun. 1987, JCP 1988, II, 20957: 'satire, like caricature, is a manifestation of the freedom of criticism and thus permits exaggerations, deformations and heavily ironic presentations'.

¹⁸ CA Versailles 31 Jan. 1991, Gaz. Pal. 1992, 2, 534. See also CA Paris 18 Feb. 1992, D. 1992, IR, 141: 'if an article manifestly intended to present the reported facts in a humorous tone, the appreciation of which as good or bad taste remains free, then this article did not exceed the usual limits of the satirical genre, which is just one of the aspects of freedom of expression'.

¹⁹ CA Paris 22 Nov. 1984, D. 1985, IR, 165; CA Paris 19 Jun. 1987, JCP 1988, II, 20957.

²⁰ Cass. civ. 13 Jan. 1998, D. 1999, 120.

Germany

I. Operative rules

There is a claim against the magazine.

II. Descriptive formants

Depicting a person naked is an invasion of his or her privacy²¹ and also possibly an infringement of the right to one's own image ('*Recht am eigenen Bild*', §§ 22 f. *KUG*).²² However, this is only true if a photograph of an actual person is taken or if the depiction is so realistic that it has photographic value. There have been cases in Germany where the mere imitation of an intimate situation, which was aimed at making a real person identifiable, was seen as an invasion of privacy.²³ However, in these cases the right to honour and reputation has always helped to define the personality interest involved. Therefore, sexually explicit caricatures will be regarded more readily as an attack on a person's honour than as an intrusion into his or her privacy. Offensive acts are not restricted to words. Therefore, an allegation relating to a person may also be established by pictures and drawings.

The principal discussion will concern the balancing of interests in order to decide whether or not there is a violation of a right to honour or if the action is justified by the freedom of artistic expression through satire (Art. 5(3) *GG*). Satirical expression must respect constitutional values, such as the right to personal dignity.²⁴ The German Constitutional Court has created one basic limit to satire: the prohibition of humiliation or disparagement which is an attack on human dignity (Art. 1(1) *GG*).²⁵ The right to human dignity as the 'core' of the right to honour is seen as absolute. Where human dignity is touched, no balancing of interests takes place.²⁶

With special regard to politicians, the Constitutional Court has so far rejected malicious cartoons clearly aimed at attacking the personal

²¹ BGH NJW 1974, 1947, 1949; OLG Munich NJW 1988, 915.

²² Cp. BVerfG NJW 2005, 3271, 3272; BGH NJW 2006, 603, 604.

²³ LG Hamburg NJW-RR 2000, 978: satirical late night comedy show in which an actress who resembled a well-known newscaster was acting in a pornographic scene; the sexual life of a person, however, is not taboo, see OLG Hamburg NJW-RR 1991, 98 (Affair between father of ex-tennis star Steffi Graf and an ex-Playmate).

²⁴ BVerfGE 86, 1 = NJW 1992, 2073 (satirical attacks against a disabled soldier).

²⁵ BVerfGE 66, 116, 151; BVerfGE 82, 43, 51; BVerfGE 82, 272, 283.

²⁶ BVerfGE 6, 32, 41; BVerfGE 87, 209, 228.

dignity of the person or persons depicted. Among these was the satirical drawing alluded to in this particular case.²⁷ Therefore, the Prime Minister will have a claim against the magazine.

III. Metalegal formants

The peculiarity of satirical expression lies in the fact that it has to exaggerate; defensive satire is no satire at all.²⁸ The reader knows this and therefore does not tend to take ‘facts’ and opinions provided by satirical depictions at face value. Courts have therefore granted more freedom to satirical expression than to press reports or quasi-documentaries (see e.g. Case 4). As far as politicians are concerned, the freedom of satire seems to be almost limitless. The exceptions are rare cases where the attack on the dignity of the person was too obvious to be excused, and so courts made an exception to the rule.²⁹

Greece

I. Operative rules

The Prime Minister does not have a claim against the magazine.

II. Descriptive formants

As a public person, the Prime Minister must endure negative expressions, critical comments and satirical representations. Satire focuses on political events and topics referring to political and public persons, and it is protected by the Constitution as an artistic means to express opinions.

Public persons should tolerate any humorous or satirical presentation of their person, as long as this satire refers to their public role, and there is no intention, direct or indirect, to insult or defame.³⁰

As the Greek courts state: ‘in a democratic society, the person who decides to undertake a position which interests the public ... is subjected to the strict control of the press, which he is obliged to endure, unless his social value and honour are unacceptably injured.’³¹

²⁷ BVerfGE 75, 369 = NJW 1987, 2661.

²⁸ *Ibid.* at 2661, 2662.

²⁹ OLG Hamburg ZUM 1995, 280, 281.

³⁰ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) p. 82.

³¹ Revision Court of Athens, Cases 9975/1986: *Elliniki Dikaiosi* 28, p. 300, 3129/1988: *Nomiko Vima* 36, p. 1247, 8908/1988: *Nomiko Vima* 36, p. 1666.

Ireland

I. Operative rules

The Prime Minister could possibly bring an action in defamation claiming that his/her reputation had been damaged by the publication of the cartoon. However, it is likely that the magazine could defend itself from any such action by pleading the defence of fair comment.

II. Descriptive formants

To succeed in an action in defamation, the Prime Minister would have to establish that the defamatory material had been communicated to a third party³² and that he/she has been identified from the piece.³³ It would also have to be established that the information was capable of lowering his/her reputation in the minds of right-thinking members of society or had subjected him/her to hatred, ridicule or contempt.³⁴ It is clear from the facts of this case that the information has been communicated to a third party through the publication of the cartoon in a magazine. Furthermore, it would appear that the Prime Minister is readily identifiable from the cartoon. The most difficult question to be answered is whether the depiction of the Prime Minister in the manner outlined is defamatory. This issue will be determined objectively; would the ordinary reasonable reader understand the cartoon to imply that the Prime Minister had acted in some inappropriate manner? In other words, is the cartoon an innuendo – innocent when first considered, but suggesting another defamatory meaning?³⁵ Such an implication could be drawn by viewing the cartoon by itself (known as the false innuendo),³⁶ or viewing the cartoon armed with the knowledge of certain extrinsic information (known as the true innuendo).³⁷

Alternatively, it could be argued that the publication of the cartoon depicting the Prime Minister as a pig is defamatory in and of itself as it subjects the Prime Minister to ridicule and contempt.³⁸ In their defence, the publishers could plead the defence of fair comment and argue that the picture is satirical.³⁹ That said, a publisher cannot go

³² *Berry v. Irish Times Ltd* [1973] IR 368.

³³ *Ibid.*

³⁴ *Quigley v. Creation Ltd* [1971] IR 269.

³⁵ *Berry v. Irish Times Ltd.*

³⁶ *Campbell v. Irish Press Ltd* (1955) 90 ILTR 105.

³⁷ *Tolley v. Fry & Sons Ltd* [1931] AC 333.

³⁸ *Charleston v. News Group Newspapers Ltd* [1995] 2 AC 65.

³⁹ *Barrett v. Long* (1846) 8 ILRC 331.

too far in this regard and in one particular case, the English Court of Appeal refused to hold that the words 'hideously ugly' were incapable of having a defamatory effect.⁴⁰

Italy

I. Operative rules

The Prime Minister can sue the magazine for injunction and damages (economic and non-economic loss) and the cartoonist for reparation.

II. Descriptive formants

According to Italian case law, satire is a particular form of critical expression, which cannot be completely free of the requirement of formal correctness; otherwise everyone would have a 'right to gratuitous insult'.⁴¹ The *Corte di cassazione* has recently confirmed that the 'limit of correctness' also applies to satire. No justification can be invoked for satirical works 'attributing an illegal or morally dishonourable behaviour to someone, making vulgar or disgusting associations, or deforming someone's image so as to provoke contempt or mockery'.⁴²

This limit of formal correctness is considered to be secondary to the necessity of respect for the fundamental personal rights protected by Art. 2 *Cost.*, even where criticism is expressed by means of satire.⁴³ This limit is held to be applicable to cartoons and caricatures as well as to writings.⁴⁴

On the facts of this case, the magazine published a cartoon, rudely accusing the Prime Minister of dishonest behaviour. Based on the aforementioned *Corte di cassazione* doctrine,⁴⁵ Italian courts would probably not regard the cartoon as covered by freedom of expression under Art. 21 *Cost.*, even where it alluded to true facts involving the Prime Minister and members of the judiciary. The cartoonist would probably be charged with the crime of defamation in the press (Art. 595 *CP*, Art. 13 Press Act). Thus, the Prime Minister would be entitled to all

⁴⁰ *Berkoff v. Burchill* [1996] 4 All ER 1008.

⁴¹ See e.g. Cass. 7 Nov. 2000 no. 14485, *Giur. it.* 2001, 136. For the limits set by Italian case law to the right to express criticism, see Case 1.

⁴² Cass. 11 Jul. 2005 no. 34100, *Guida al diritto* 2005, 42, 84.

⁴³ Cf. Cass. 24 May 2001 no. 7091, *Arch. civ.* 2001, 1130.

⁴⁴ See Cass. 29 May 1996 no. 4993, *Foro it.* 1996, I, 2368; Cass. 7 Nov. 2000 no. 14485 *Giur. it.* 2001, 136. For a recent confirmation of these principles see Cass. 11 Jul. 2005 no. 34100, *Guida al diritto* 2005, 42, 84.

⁴⁵ See n. 42 above.

remedies outlined in Case 1, except for rectification, which does not make sense for satirical cartoons.

III. Metalegal formants

It may be questioned whether or not this outcome is correct. One may argue that political satire, especially when expressed through caricature, should not be restricted by any boundaries of politeness. Suppose that the news truthfully reported that the Prime Minister had corrupt dealings with a judge – how could satirical cartoonists have put this better in a drawing than depicting both as copulating pigs? In such cases, the defamatory cartoon arguably does not aim at just insulting the public figures in question, but at presenting a (putatively) true event in a very impressive, caustic satirical drawing.

In 1996, the *Corte di cassazione* expressed a very important principle: satirical cartoons do not necessarily have to refer to true facts, however, if they denigrate someone, the message expressed by the cartoons must be consistent with the ‘quality of the public dimension’ of the person.⁴⁶ This consistency is lacking if a cartoon refers to defamatory facts which are not true, or to details of the person’s intimate and strictly private life. The consistency is also lacking if the cartoon does not express messages other than an insult to the person.⁴⁷

Arguably, if this prerequisite of coherence is met, the requirement of formal correctness should no longer play a role. Hence, a fair solution could be the following: The cartoon depicting the Prime Minister and a judge as copulating pigs only constitutes a lawful exercise of the right to satire if it refers to (putatively) true facts which lie beyond the untouchable realm of intimate life. Consequently, the cartoon would be unlawful if it alluded to the Prime Minister’s homosexual relationship with a judge, while it would be lawful if it alluded to corruption, abuse of office or similar crimes committed by the two.

The Netherlands

I. Operative rules

The Prime Minister does not have a claim against the magazine.

⁴⁶ Cass. 29 May 1996 no. 4993, *Foro it.* 1996, I, 2368.

⁴⁷ *Ibid*; Cass. 7 Jul. 1998 no. 7990, *Danno e resp.* 1998, 988, with critical commentary by V. Carbone.

II. Descriptive formants

Public figures have to accept somewhat that they are subject to satire, gossip, etc. more than non-public figures. Thus, for public figures the right to privacy is more limited than for non-public figures.⁴⁸ Yet, a public figure still has the right to privacy.

Given this background, it has to be assessed whether this publication is satirical or whether it is unnecessarily offensive (Case 1, circumstance (d)) and for that reason a breach of written law (Art. 266, s. 3 Penal Code)⁴⁹ or a breach of duty. In general, satirical and other negative remarks are rendered to be unlawfully offensive if they purport to make someone appear in an unfavourable light and cause the honour and good reputation of the defendant to be infringed.⁵⁰ This is not the case if it is clear that the publication concerns an expression of the artist's subjective opinion rather than objective facts. In that case, the public interest in freedom of expression and freedom of artistic expression has to be balanced with the personal interests of the Prime Minister.⁵¹ Expressions of art may be confrontational, shocking and provocative and this has to be borne in mind.

Since a Prime Minister is a public figure and the cartoon is an expression of art that expresses the artist's subjective opinion rather than objective facts, the publication of the cartoon is not unlawful. The Prime Minister has no claim against the magazine.

Portugal

I. Operative rules

The Prime Minister has a claim against the magazine both for damages and injunction.

II. Descriptive formants

Bearing in mind the nature of his/her duties and the corresponding public interest, a Prime Minister may be subject to intrusion into his/her private life, which could be warranted by a pressing need to protect the common good. 'Public interest' must not be confused with the 'interest or curiosity of the public'. Furthermore, s. 9 of the Journalists' Union

⁴⁸ HR 4 Mar. 1988, NJ 1989, 361 (De Bourbon Parma); G.A.I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 111.

⁴⁹ Schuijt, *Losbladige Onrechtmatige Daad* no. 56.

⁵⁰ HR 30 Oct. 2001, NJ 2002, 129; Schuijt, *Losbladige Onrechtmatige Daad* no. 57.

⁵¹ HR 12 Jun. 1992, NJ 1992, 554 (Mr Y).

Code of Practice also determines that ‘journalists must have regard for the privacy of citizens except when the public interest is at stake or the person’s conduct is manifestly in contradiction with the values and principles that he publicly defends’.⁵² Gratuitous offence which is not justified by the defence of the common good is prejudicial to the dignity of the democratic system and is, as such, criminally punishable with an aggravated penalty (Art. 184 CP). Depicting a judge as a pig also constitutes an offence against the judiciary and therefore the democratic system.

It could be argued that the right to produce and publish caricature, or satire in general, is protected by the right to inform and be informed and freedom of the press (Arts. 37 and 38 CRP),⁵³ as well as by the freedom of artistic creation (Arts. 42 and 78 CRP).⁵⁴ However, invoking these rights and freedoms would most likely not justify a caricature which is utterly offensive to the dignity of the persons that are targeted, such as in the present case.⁵⁵ Even if a political sense can be attributed to the caricature, there are other means that could be employed to achieve the same political purpose, which are less offensive, or not even offensive at all. As in Case 5, a claim for compensation and injunction may be filed under the terms of Art. 70 CC.

Such caricatures (perhaps not as offensive as this one) are quite common in daily and weekly publications in Portugal. However, they are seldom brought to court. This might be due to the unwritten rules of political fair play and the relaxed public attitude regarding such caricatures. Still, when going beyond certain limits, some judges might consider them a violation of the depicted person’s honour and reputation. That depends on the sole discretion of the judge (Art. 655 CPC and Art. 127 CPP). All considerations made regarding Case 1 are applicable *mutatis mutandis* to this case.

⁵² See considerations in Case 1 regarding the provisions regulating journalistic activity in Portugal, in particular the Journalists Statute and the Journalists’ Union Code of Practice.

⁵³ See answer to Case 1 for more information on these Articles.

⁵⁴ See answer to Case 4 for more information on these Articles.

⁵⁵ On the balance between the fundamental right to personal honour and reputation (Art. 26 CRP) and other fundamental rights and freedoms, see considerations included in Case 1.

Scotland

I. Operative rules

The Prime Minister may have a claim in defamation.

II. Descriptive formants

The law of defamation applies equally to representations such as cartoons in permanent form. S. 16 (1) of the Defamation Act 1952 provides that ‘words shall be construed as including a reference to pictures, visual images’. The particular question raised by this cartoon is whether:

- (a) there is any intention to harm the Prime Minister; and
- (b) whether the cartoon in its context can be seen as inferring or implying any personal attributes of or aspersions on the Prime Minister him- or herself.

Political and social satire is not prohibited by the general law. Nevertheless, the law dictates the limits between tolerable satire and caricature and defamatory depictions. This itself can only be established on a case-by-case basis in relation to what constitutes genuine satire and what is defamatory. It was originally defamatory to call someone a homosexual or make imputations of sodomy, and nineteenth-century case law in particular bears witness to this.⁵⁶ Moral attitudes have changed, with corresponding changes in what is seen as defamatory. Technically, the provisions of s. 10 HRA will apply, but these are merely reinforcing the classic position of freedom of the press and in that sense also of satire.

Regard will be had to the type of publication, i.e. whether it was in a serious periodical or a satirical magazine. The particular context within which the matter is covered is relevant, because this may contribute to the general innuendo and pave the way for a defamation action.

The foregoing remarks serve to remind that whether or not a defamation action succeeds will depend on the particular form the characterisation takes. The decision as to whether a defamation trial should take place is taken in summary proceedings, where the judge determines

⁵⁶ *Richardson v. Walker* (1804) Hume 623; *R. v. Queensbury* 3 Apr. 1895 (England) where the defendant was charged with criminal libel, having accused Oscar Wilde of posing as a sodomite.

whether or not there is an *arguable* case of defamation.⁵⁷ If this is the case, the matter will either be put to jury trial or the provisions on the offer of amends under s. 4 will come into play and determine whether or not a full trial is necessary.

Spain

I. Operative rules

The Prime Minister does not have a claim against the magazine.

II. Descriptive formants

Cases decided by the Supreme Court usually deal with the defamatory status of a text accompanying a caricature, as opposed to the caricatures themselves.⁵⁸ Nonetheless, *LO 1/1982* provides that the caricature of persons is an exception to the interference with one's own image principle (Art. 8.2(b)).⁵⁹ Thus, there is no illegitimate interference when the caricature respects social customs (Art. 2.1), which will be examined on a case-by-case basis. In showing respect for social customs, it is understood that the person caricaturised is not defamed.

Switzerland

I. Operative rules

The Prime Minister does not have any legal recourse against the satirical magazine.

II. Descriptive formants

Satire can be defined as 'a mode of expression in which one knowingly gives words or images a sense other than that which they would normally have'.⁶⁰ It is protected by the freedom of opinion guaranteed

⁵⁷ S. 7 Defamation Act 1996.

⁵⁸ STS, 17 May 1990 (RJ. 3735) and STS 14 Apr. 2000 (RJ 2565). In the first case, the Supreme Court reversed the judicial rulings of first and second instance and considered that the poems written about a professor accompanied by his caricature were written in a joking tone and do not suppose any illegitimate interference with his honour. In the second case, under the caricature of the General Secretary of the President of Catalanian government, a weekly magazine published the words 'thief'. The Spanish Supreme Court ordered the magazine to pay €6,000 because the word 'thief' is an insult, humiliating and unnecessary for the social criticism of the public person, even in the graphic humour scenario.

⁵⁹ 'In particular, the right to one's own image will not impede: ... (b) the use of the caricature of these people, according to social customs.'

⁶⁰ JAAC 68 n. 27 c. 4.1.

under Art. 16 Const., as well as under the freedom of art (Art. 21 Const.). In contrast to a commentary or an editorial, satire not only permits the use of a poisoned pen, but also the use of exaggeration and alteration. In this sense, satire always contains a grain of truth. The limit imposed on satire consists of the idea that the satire must be recognisable as such to the public and must respect the private sphere to the extent demanded by the general interest.⁶¹

The satire here consists of a cartoon likely to harm the reputation of the Prime Minister depicted. One must not forget, however, that the reach of reputation protection depends largely on the social and professional situation of the holder.⁶² As a consequence of his/her political activity and status as a public figure, it will be more difficult to recognise an unlawful infringement of the Prime Minister's reputation than for a private citizen. One must take into account the circumstances that surround the publication of the cartoon, the nature of the charges against the Prime Minister, and their connection to actions or public sentiment, of which satire is only the mischievous and somewhat harmless echo.⁶³

Here, the disputed cartoon was published in a satirical magazine whose role it is to distribute this precise brand of humour. Therefore, its mocking character is well known and not easily mistaken for factual news reporting.

The infringement of reputation must be measured according to objective criteria. Whether harm has been caused to an individual's social esteem or not must be based on a reasonable reader's point of view, not on the harm subjectively felt by the individual.⁶⁴ The fact that, for example, the Prime Minister feels particularly offended by the cartoon does not indicate whether the satire is degrading or not.

Before recognising the unlawfulness of the infringement, many defences may be considered, such as the right to humour and the right to criticise a public position. Restraint must be exercised before judging satirical jokes as degrading, because they play an important role in society. Satire is a humorous way of criticising illustrious figures, and in this way it remains lawful and even necessary to the extent that it is founded on common knowledge and not needlessly hurtful. Unlawful infringement does not just exist because the individual is

⁶¹ Statement of the Conseil suisse de la presse 1996, n. 8.

⁶² RVJ 1984, p. 213 c. 2a.

⁶³ *Ibid.* at 2b. ⁶⁴ *Ibid.* at 2a.

presented in an extremely unfavourable light.⁶⁵ This can be true even where the cartoon presents an individual as a prostitute⁶⁶ or where a couple is represented in an indecent pose.⁶⁷ A judge in Sion refused to recognise an unlawful infringement of the reputation of a professor who was depicted naked in the shower, his head pasted onto the body of a 12-year old boy, in a photomontage accompanying an article in the Carnival newspaper. According to this judgment, the satire could have only been unlawful if the individual targeted had been depicted in 'a degrading or immoral position or activity'.⁶⁸ In light of this judgment and decisions preceding it, it seems unlikely that an unlawful infringement of reputation would be recognised in the Prime Minister's case.

III. Metalegal formants

Swiss case law appears to be rather tolerant of satire. No theme is excluded from journalistic treatment, even in satirical form. It is even permissible for religious symbols to be used in satire, but even so, they should not be needlessly denigrated or ridiculed.⁶⁹ Moreover, the satire must not offend religious sentiment. With regard to the relatively recent events in Denmark concerning caricatures of the Islamic prophet Mohammed, it must be admitted that, although the liberty of expression is fundamental, it is not without boundaries. The sensitivity of others, especially of minorities, must be respected. As Thomas Maissen pointed out in his article: 'What do we lose in terms of freedom, quality of life and possibilities of self-fulfillment if we freely, respectfully and tolerantly give up the right to caricature or represent a prophet of another religion? Nothing.'⁷⁰

Comparative remarks

In the present case, the right to freedom of expression – in its particular form as freedom of satire – comes into conflict with the personality rights of the Prime Minister, notably his/her honour and reputation.

These rights have to be balanced against each other. In this balancing, two factors play an important role: the status of the person

⁶⁵ Decision of the Swiss Federal Court, 5C.26/2003 c. 2.3.

⁶⁶ SJ 1995, p. 669. ⁶⁷ SJZ 98 (2002), p. 208.

⁶⁸ RVJ 1984, p. 213 c. 3.

⁶⁹ Statement of the Conseil suisse de la presse 2002, n. 19 c. 4.

⁷⁰ T. Maissen, 'Was bedeutet Toleranz heute? Überlegungen aus Anlass des Karikaturen-Streits', *Neue Zürcher Zeitung* 6 Feb. 2006.

caricatured, and the boundaries of legitimate satire itself. As to the first factor, all countries recognise that the Prime Minister exercises a public function and therefore must be prepared to endure criticism, even if it is harsh.

As to the second factor, the core question is whether the criticism expressed in the satire remains at a reasonable level or goes beyond this level and unjustifiably attacks the honour and reputation of the Prime Minister. In Austria, Belgium, Finland, France, the Netherlands, Spain and Switzerland, the criticism in the satirical cartoon in question will probably still be regarded as reasonable, as it directly relates to the Prime Minister's official functions. Therefore, the Prime Minister will not have a claim. In the other countries considered there might be a different outcome.

In England, Scotland and Ireland, the Prime Minister may have a claim in defamation or libel depending on how the ordinary reader would understand the cartoon. A satirical cartoon in itself does not preclude any defamatory meaning. The context in which the caricature was presented and the mode of publication have to be taken into account.

In Belgium, the Prime Minister might have a claim against the artist of the cartoon if it is considered to be an unjustified violation of the politician's personality rights. A claim against the magazine would fail on grounds of the 'multi-staged liability' rule established by the Belgian Constitution: if the artist is known, no claim can be lodged against the publisher, printer or distributor.

In Germany, Italy and Portugal, the Prime Minister would probably have a claim against the magazine. In these countries, satirical expression must also respect constitutional values, such as honour and dignity. On these grounds, in Germany and Italy, cartoons such as this one have been found to be acceptable by the courts. In Portugal, no such judgments can be found since cases of this kind are normally not brought before the court.

In Italy, the case law appears to be a bit contradictory. On the one hand, according to the Italian *Corte di cassazione*, there is a borderline of 'formal correctness' which has to be observed even by satirical cartoons, in respect of the fundamental personal rights outlined in the Constitution. Since the cartoon in question can hardly be seen as 'formally correct', it would come under the crime of defamation. On the other hand, however, the Italian Supreme Court has deemed satirical cartoons lawful when they express a message consistent with the

'quality of the public dimension' of the person caricatured. In the present case one may argue that the cartoon expresses a specific political criticism consistent with the public position of the Prime Minister and therefore is covered by freedom of expression.

If, in the above countries, the cartoon was considered an unlawful violation of the Prime Minister's personality rights, he/she would be entitled to the same remedies as in Case 1.

10 Case 7: A snapshot of a person

Case

Sally took a snapshot of person X in a market place without asking this person's permission. Does X have a claim against Sally? Does it make a difference, if:

- (a) X is famous or not;
- (b) X is at work/is attending to his private affairs;
- (c) the picture is published or not.

Discussions

Austria

I. Operative rules

X is not granted a claim in both situations (a) and (b). If, as suggested under hypothesis (c), the picture is published, X only has a claim for forbearance, publication of the judgment, abatement and restitution of both pecuniary and non-pecuniary loss under certain circumstances. A claim of unjust enrichment, however, appears highly improbable.

II. Descriptive formants

With regard to situation (a), it appears rather unlikely that X has any remedy against the mere taking of the picture irrespective of whether he is famous¹ or not. The present case deals with the protection of privacy which can, in principle, be realised through the right to image according to § 78 *UrhG* (*Urheberrechtsgesetz*, Copyright Act).² However,

¹ See Case 1.

² In Austria a provision of the Copyright Act serves as a legal basis for the right to image, although this personality right is not a copyright at all; F. Bydlinski,

this provision only awards a claim if the picture is published;³ the mere taking of the picture is not sufficient to merit a claim.⁴

Other provisions aimed at preventing the violation of privacy which could be applicable are § 1328a ABGB and § 16 ABGB, together with Art. 8 ECHR.⁵ Under both regulations, not only the dissemination or publication of private information results in sanctions but even the mere intrusion into privacy.⁶

However, the crucial question is whether X's right of privacy is really affected in the present case. On the one hand, the picture was taken in the market place, which is a public place.⁷ In addition, the content of the picture is not intimate at all. It presumably just shows X shopping or walking around.

On the other hand, the picture was taken without X's consent. He probably did not even notice that the picture was being taken. However, this would not be a sufficient basis for X to successfully bring an action against Sally.

With regard to situation (b), it is doubtful that professional or business affairs are covered by the provisions for the protection of privacy.⁸ The more information clearly relates to one's profession or business, the more private interests fade into the background. Since the photograph has no specific intimate content, X does not even have a claim if he is attending to his private affairs; this is even more so the case if he is at work.

Under situation (c), if the picture is published not only is § 16 ABGB together with Art. 8 ECHR applicable, but also § 78 *UrhG*. If the picture

'Der Ersatz ideellen Schadens als sachliches und methodisches Problem' (1965) *JBl* 184; W. Dillenz and D. Gutmann, *Kommentar zum Urheberrechtsgesetz und Verwertungsgesellschaftengesetz* (2nd edn. Vienna/New York: 2004) § 78 no. 1.

³ § 78 Abs 1 *UrhG* reads: 'Pictures of persons may neither be displayed in public nor disseminated in another way in which they are made accessible to the public, if the displaying or dissemination infringed upon justified interests of the portrayed person or, if he/she has died without having given consent to the publication, a close family member.'

⁴ Cf. E. Rehm, 'Das Recht am eigenen Bild' (1962) *JBl* 2. § 7 *MedienG*, aimed at the protection of utmost privacy, is not applicable, since this provision presupposes a presentation by the media.

⁵ Cf. Case 5.

⁶ Cf. J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 16 no. 24. Indeed, if § 78 *UrhG* is engaged or the publication takes place in a medium according to the Media Act, § 1328a ABGB cannot be applied. See Case 5.

⁷ A. Warzilek, 'Der "private" Politiker' (5.7.2005) *Salzburger Nachrichten*, 6.

⁸ W. Posch in M. Schwimann, *ABGB-Praxiskommentar I* (3rd edn., Vienna: 2005) § 16 no. 40; J. Aicher in P. Rummel, *Kommentar* § 16 no. 24; see also Case 12.

is published by the media, § 7 *MedienG* also applies against the publisher.⁹ However, the publication of the picture does not necessarily infringe X's privacy. If, for example, the picture is published for the purpose of drawing attention to the opening of the market or that season's fresh produce, X's privacy interests are not violated. If, by contrast, X is a famous person and the publication of the picture primarily serves to economically benefit the newspaper/magazine, X could – in light of the ECtHR decision in the case of *von Hannover*¹⁰ – claim for the violation of his privacy.

In such a case, X could base his action on the violation of the right to image under § 78 *UrhG*. He then has a claim for forbearance (§ 81 *UrhG*), publication of the judgment (§ 85 *UrhG*), abatement (§ 82 *UrhG*) and damages (§ 87 *UrhG*).

The claim for compensation of both economic (§ 87 subs. 1 *UrhG*) and non-economic loss (§ 87, subs. 2 *UrhG*) is awarded independent of the degree of fault; slight negligence is sufficient. However, non-economic loss is only compensated in cases involving particularly serious intrusions.¹¹

The claim for forbearance, abatement and damages could also be based on § 16 *ABGB*, together with Art. 8 ECHR. Moreover, § 7 *MedienG* allows for a claim against the publisher for compensation of non-economic loss without fault.¹² In contrast, the *OGH* would probably not permit a claim of unjustified enrichment.¹³

III. Metalegal formants

It must be emphasised that some personality interests are of economic value to the media. Thus, the courts should take actions for unjust enrichment into consideration.

⁹ § 1328a *ABGB* is not applicable because § 78 *UrhG* and § 7 *MedienG* are 'leges speciales' (see § 1328a subs. 2 *ABGB*; RV 173. BlgNR 22. GP 20; Cf. also Case 5).

¹⁰ MR 2004, 246 *et seq.* The decisions of the ECtHR must be kept in mind when interpreting civil law provisions on protection of privacy.

¹¹ See e.g. *OGH* ÖB 1970, 157; SZ 55/25. However, there is no indication in law for this approach by the *OGH*; Cf. H. Koziol and A. Warzilek, 'Austrian Country Report' no. 163 with further ref., in H. Koziol and A. Warzilek, *The Protection of Personality Rights against Invasions by Mass Media* (Vienna/New York: 2005); F. Mahr, 'Bereicherung, Schadenersatz und Herausgabe des Verletzergerwinns', in R. Dittrich, *Beiträge zum Urheberrecht IV* (Vienna: 1996) 48 *et seq.*

¹² See Case 5.

¹³ In the field of personality rights the courts have only admitted claims of unjust enrichment in cases of unauthorised use of personal characteristics (e.g. name, voice, picture) for commercials (see Cases 10 and 11).

According to § 87, subs. 2 *UrhG*, the seriousness of the infringement should not be a precondition for the award of compensation for non-economic loss.¹⁴ Where there is just a slight infringement, the compensation awarded could simply be nominal.

Belgium

I. Operative rules

In both cases, X will have a claim against Sally unless she can prove that there are circumstances that justify the publication.

II. Descriptive formants

A distinction should first be made between the ‘right to image’ in general and the so-called ‘right to portrait’ in particular.¹⁵ The latter is explicitly regulated by the Copyright Act of 30 June 1994. It only applies when a photograph specifically focuses on a person. Even then, the ‘right to portrait’ does not apply to topical portraits.

The general right to image would not be useful for X. That right prohibits the taking and reproducing of a photograph without the consent of the photographed person. However, this condition does not apply to persons in a public place, whose consent may be presumed, and to photographs used to illustrate a topical theme. Consequently, it is irrelevant whether or not the picture is published or sold, whether X is famous or not and whether he is at work or attending to private affairs. However, a photograph taken in a public place may not be (mis)used in a different context.¹⁶

Under Belgian law, every person has an exclusive right to his/her image. The use, reproduction, and dissemination of a photograph is only possible if the person in the photograph has given his/her express authorisation (*cf.* Art. 10 of the Copyright Act). This principle applies to both public figures and private individuals.¹⁷ However, the consent of famous persons will be more readily presumed than that of private individuals.¹⁸ This applies to all public figures, e.g. politicians, sports-persons, artists, models and temporary celebrities.

¹⁴ F. Mahr, ‘Der “besondere Ärger” als Voraussetzung einer Entschädigung nach § 87 Abs 2 *UrhG*’ (1996) *MR* 9.

¹⁵ See Case 3. For an overview, see L. Dierickx, *Het recht op afbeelding* (Antwerp: 2005) p. 54 *et seq.*

¹⁶ E.g. Civil Court Antwerp 12 May 1989, *RW* 1989–90, 654. see D. Voorhoof, *Handboek mediarecht* (Brussels: 2003), 152.

¹⁷ See L. Dierickx, *Het recht op afbeelding*, p. 97 *et seq.*

¹⁸ E.g. Civil court Bruges 27 Jun. 1994, *RW* 1994–95, 473.

Once a public person has given explicit consent for the use of his/her photograph, this consent must be interpreted restrictively.¹⁹ The photograph can only be used for the purposes to which the consent was given.

A distinction must again be made between portraits and topical photographs. If X is photographed *as a professional*, the photograph will be regarded as topical and no consent is necessary. For example, a picture taken of a policeman directing traffic or a bus driver constitutes a photograph of a profession, not of a person.

If X is photographed while attending to personal affairs, no consent will be necessary for topical photographs/photographs of public places, for example X participating in an animal rights' demonstration or eating an ice cream at a fountain. It is the *right to privacy* that is more important here.

Art. 10 of the Copyright Act does not prohibit the actual taking of the photograph. It only prohibits reproducing and publishing the photograph without the consent of the photographed person or his/her heirs for twenty years after his/her death. The mere invasion of this right can lead to an order for an injunction (*a priori*) and damages (*a posteriori*); no fault has to be proved.

Moreover, the photographed person has the right to obtain damages on the basis of Art. 1382 CC if he/she can prove the fault of the person who took the photograph. From this perspective, the fact that the photograph was falsified or used in an inappropriate context can be relevant.²⁰

The right to image and the right to privacy are seen as distinct personality rights, the violation of which must be separately assessed. The civil court of Bruges had to decide a case concerning the publication of some nude photographs taken in the changing room of the football club 'Club Bruges' after the team had won the 1991-92 national championship. The court decided that the public right to information means that public persons such as football players can implicitly consent to the taking of certain photographs, but this does not mean that all photographs can be published, especially nude photographs. The court decided in this case that the private lives of the photographed persons were violated.²¹

¹⁹ E.g. Civil court Bruges 31 Jan. 1990, RW 1991-92, 234.

²⁰ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995-2000' (2001) TPR 1632.

²¹ Civil court Bruges 27 Jun. 1994, RW 1994-95, 473.

Due to the protection of private life, a person's permission to publish their photograph must be interpreted narrowly. For example, a person who is 'famous' for a limited period as a result of a certain event or opportunity can implicitly consent to the publication of his/her photograph. But he/she preserves the right to return to anonymity and to be forgotten after some time.²²

Nevertheless, Belgian case law is not unanimous on this subject. As part of the infamous *Dutroux* case in Belgium, some photographs of two of the girls who were kidnapped and murdered were published in a book without the consent of their parents. Moreover, in a press communiqué the parents had opposed the publication of these photographs; in their opinion their right to privacy was harmed. The court did not agree however, because of the public right to information concerning matters of public interest. The privacy interests of the persons portrayed have to be weighed against the right of the public.²³

England

I. Operative rules

X does not have a claim against the mere taking of the photograph. X may have a claim in breach of confidence if the picture is published. This will depend on whether there would have been a reasonable expectation of privacy in respect of the photograph.

II. Descriptive formants

In principle, there is no law against the taking of a photograph²⁴ and there is no right to prevent the reproduction of photographs which one does not own the copyright to.²⁵ Whether X is famous or not is irrelevant. In *Creation Records v. News Group Newspapers*, Lloyd J agreed that 'merely because a well-known person tries to stop people taking photographs of him or her it does not follow that any picture taken in evasion or defiance of those attempts is in breach of confidentiality'.²⁶

²² Civil court Brussels 30 Jun. 1997, *JT* 1997, 710.

²³ Antwerp (President) 8 Feb. 1999, *Algemeen Juridisch Tijdschrift* 1998–99, 789, note by D. Voorhoof.

²⁴ *Sports and General Press Agency v. 'Our Dogs' Publishing Company* [1916] 2 KB 880; *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] QB 479, at 488.

²⁵ *Elvis Presley Trade Marks* [1997] RPC 543, at 547–8, per Laddie J.

²⁶ *Creation Records Limited and Others v. News Group Newspapers Limited* [1997] EMLR 444, at 455. See also L.J. Smith, 'Neuere Entwicklungen in der Haftung für Persönlichkeitsrechtsverletzungen nach deutschem und englischem

However, after the entry into force of the Human Rights Act 1998, this latter situation where a person actually tries to stop someone else from taking photographs of him/her may have to be judged differently under the aspect of harassment. Even Clause 4 of the Code of Practice of the Press Complaints Commission requires journalists not to persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist. The rules of the PCC Code of Practice have been referred to in a number of cases prior to and after the enactment of the Human Rights Act 1998.²⁷

However, this particular case could come under breach of confidence if the photograph was published. Breach of confidence normally occurs if information is obtained on a person within a secluded private property but can, in exceptional cases, even occur in publicly accessible places where there is a reasonable expectation of privacy.²⁸ Obtaining information includes taking photographs.²⁹ In the instant case, no such exceptional circumstances are reported.

Finland

I. Operative rules

X does not have a claim against Sally unless the picture is taken and used for business purposes, e.g. published as a part of an advertisement.

II. Descriptive formants

In Finnish law, there is no provision allowing a natural person the right to prohibit snapshots being taken of him/her if the picture is taken in a public place under normal circumstances.³⁰ If a person is

Recht - "Publish and be damned" (1999) *Zeitschrift für Europäisches Privatrecht* 303, at 314. This might be different in the case of secret filming in public places which the Court of Appeal in *R v. William Loveridge and Others* [2001] 2 Cr App R 29, 591, at 599, per Lord Woolf CJ, considered objectionable because it is not open to those who are subject of the filming to take any action to prevent it.

²⁷ See, for example, *Shelley Films Limited v. Rex Features Limited* [1994] EMLR 134, at 150.

See also *Schering Chemicals Ltd v. Falkman Ltd and Others* [1982] QB 1, at 39, where Templeman LJ criticised that the defendant resisted compliance with a rule of professional conduct laid down by the National Union of Journalists for the purpose of maintaining high professional standards amongst journalists.

²⁸ For such an exceptional case see *Creation Records Limited and Others v. News Group Newspapers Limited*. See also Case 8 (b).

²⁹ *Shelley Films Limited v. Rex Features Limited; Creation Records Limited and Others v. News Group Newspapers Limited*.

³⁰ *Kommittébetänkande 1973:1 p. 35, Vuortama, Yksityiselämä ja joukkotiedotus* (Rauma: 1983) p. 44 and 55 and Kemppinen, 'Henkilön ja henkilön kuvan käyttö'

photographed in the street, in a park or in a market place, the photographer is not obliged to first ask his/her permission. The taking of a picture *per se* can seldom constitute a violation of the prohibition on defamation under Ch. 24, s. 9 of the Penal Code, or a violation of the prohibition on unlawful observation according to Ch. 24, s. 6 of the Penal Code.³¹ However, if the photograph is taken in a public place in humiliating or awkward circumstances, the photographing can constitute a defamatory act according to Ch. 24, s. 9 of the Penal Code. It does not make any difference whether the photographed person is a famous person or whether he/she is at work.

In principle, a picture taken of an ordinary person in a public place can be *published* without that person's permission.³² However, if the picture is published in a defamatory fashion, the publication can constitute a crime according to Ch. 24, s. 9 of the Penal Code. Legal scholars have considered that photographing a drunken, non-famous person sleeping in the street as a possible defamatory act, which can lead to sanctions and consequently to damages.³³ If the publishing of the picture constitutes a crime, the victim is entitled to damages according to Ch. 5, s. 1 of the Finnish Tort Liability Act. Consequently, if the photographed person is famous, the scope of his/her privacy is much narrower. A picture of a drunken politician or a famous person can, in principle, be published without negative consequences as the public is considered to have a legitimate right to know of circumstances which can have an effect on a person's capacity to attend to his/her work.

If the picture is used for commercial purposes, the consent of the photographed person is a necessary prerequisite (see Case 8).³⁴ The view has been presented that this right exists without a specific legislative

mainonnassa ja tiedotusvälineissä', in Tommila (ed.), *Tekijänoikeuskysymykset markkinoimissa* (Loimaa: 1986) p. 77.

³¹ Kemppinen, 'Oikeus omaan kuvaan' (1979) *Lakimies* 774. See also Oesch, 'Nordic Countries' in Gendreau, Nordemann and Oesch, *Copyright and Photographs* (Wiltshire: 1999) p. 251 and Kivimäki, *Tekijänoikeus* (Turku: 1948) p. 232.

³² See decision 3107/IL/02 of the Finnish Council for Mass Media and Vuortama, *Journalisti* 15/1999, www.journalistiliitto.fi/journalisti/arkisto/1599/ala/alakerta.htm (9 Jun. 2003) p. 134.

³³ Kemppinen, *Oikeus omaan kuvaan* p. 752.

³⁴ Korkeamäki, Oesch and Taipale, 'Finland', in Ruijsenaars (ed.), *Character Merchandising in Europe* (London: 2003) p. 105. See Oesch, 'Nordic Countries' p. 251, where the author stresses that the consent of the photographed person must be attained not only for commercial use, but also for use that can be compared to commercial use.

provision.³⁵ There are some Supreme Court cases where compensation has been granted to persons who did not consent to the use of their picture. In case 1982 II 36, compensation of 2,000 FIM (about €336) was granted to a person who was photographed dressed in his military uniform and whose picture was used in a brochure advertising Finland as a tourist destination without his prior consent. The same amount of compensation was awarded to the parents of a seven-year-old child whose picture had appeared in an advertisement for a bank without the parents' consent. In an older case 1940 I 10, the father of a child was given compensation of 5,000 FIM when a company had used his child's picture for marketing purposes. An injunction against the company was also granted.³⁶

In the instant case, if person X has his own business or is an employee and Sally is using the photograph for her own business purposes, X (or his employer if X is an employee) can sue for an injunction at the Finnish Market Court according to s. 1 of the Finnish Act on Unfair Business Practices.³⁷ The claim before the Market Court requires that the photograph has been published for commercial purposes.

In addition, X or his employer can sue for damages for pure economic loss if the act is considered to fulfil the criteria of especially weighty reasons for compensation according to Ch. 5, s. 1 of the Finnish Tort Liability Act. The question as to what constitutes an especially weighty reason is problematic as the criterion was added to the provision in Parliament. In case law, there are a few cases where acting contrary to good practices – mainly according to the Finnish Act on Unfair Business Practices³⁸ – has been found to be an especially weighty reason. The criteria for when there are especially weighty reasons are unclear.³⁹

³⁵ Muhonen, 'Henkilön persoonallisuuden kaupallinen hyödyntäminen Yhdysvalloissa ja Suomessa' (1996) 6 *Defensor Legis* 772, Tiili, 'Marknadsföring och rätt till egen bild' (1988) *Nordiskt Immateriellt Rättsskydd* 28 and Melander, 'Intimiteetin oikeussuojasta' (1964) *Lakimies* 792.

³⁶ In the legal doctrine, Sisula-Tulokas, *Sveda, värk och annat lidande* (Helsingfors: 1995) p. 95 argues that compensation is only granted in these cases due to the unlawful use of a picture and not due to any violation of privacy.

³⁷ This happened in Market Court case 1981:18 where a popstar had been depicted on t-shirts. The Market Court found the defendant guilty of unfair business practices and granted an injunction.

³⁸ In Supreme Court case 1991:79 the products of a businessman had been criticised wrongfully in a way which was not in accordance with good journalistic practices. The Supreme Court found that there were especially weighty reasons to award compensation for pure economic loss.

³⁹ Hemmo, 'Selvitys puhdasta varallisuusvahinkoa koskevan sääntelyn uudistamistarpeesta' (2002) 26 *Oikeusministeriön lausuntoja ja selvityksiä* 8.

However, it is important to note that an act contrary to good practices does not automatically constitute an especially weighty reason.⁴⁰

The claim for compensation has to be presented at a local court because the Market Court lacks the power to grant damages. The liability is based on the fault of the person who uses the photograph.

III. Metalegal formants

The right to take pictures of anybody in a public place has been disputed in older doctrine using the argument that only famous persons are obliged to allow others to photograph them.⁴¹

France

I. Operative rules

If X is famous, he cannot enjoin the taking or publication of his photograph. If he is not famous, he can in principle enjoin the publication unless Sally can prove that several criteria likely to justify the admissibility of such a publication are fulfilled, such as the fact that the photograph was taken in a public place, the incidental position of X in the photo, or the fact that X had been photographed while exercising his profession. However, none of these criteria alone will suffice to justify X's lack of consent.

II. Descriptive formants

In French law, all persons have an exclusive right to their image and its use which permits them to prohibit its reproduction and dissemination without prior express and specific authorisation.⁴² The right to one's image ensures protection not only against publication, but also against merely taking that image without the consent of the person portrayed. Furthermore, the fact that the person concerned is in a public place,⁴³ that he is photographed in the course of his professional

⁴⁰ *Ibid.* at 7–8. The Finnish Council for Mass Media has itself criticised the possibility of awarding compensation merely on the ground that the Council found an act of a newspaper was not in accordance with good journalistic practice. See statement 3206/L/02.

⁴¹ Kivimäki, Ylöstalo, *Lärobok i Finlands civilrätt* (Vammala: 1961) p. 17 and Kivimäki, 'Personallisuuden oikeusturvasta', in Linkomies (ed.), *Oma maa 2. Tietokirja Suomen kodeille* (Porvoo: 1958) at p. 29.

⁴² This formulation has been consecrated by unanimous case law.

⁴³ See, e.g. CA Aix-en-Provence 30 Nov. 2001, CCE 2003, No. 11, 39: 'the fact that a person (even of topical interest or known by the public) is located in a public place does not mean that the person renounced his/her rights to image and privacy'; TGI

activity⁴⁴ or that he is famous are not sufficient reasons alone to justify the lack of consent.

The exclusive character of the right to one's image recognised by case law is nothing but a term of art in reality. Two principal justifications, which are of unequal importance in practice, can be invoked by the defendant. The first concerns photographs taken in public, representing a landscape or a street scene, a group or some other public event. In such a situation, the use of an image is legal even without the consent of the person represented because of the difficulty in obtaining the otherwise necessary consent in practice. Here, it is a matter of the constraints of social life.⁴⁵ However, in such a situation, case law requires that the image does not have the representation of the person as its objective and that his/her presence in the photograph is just a coincidence. In the absence of this requirement, the person can demand that the photograph is published in a way that makes it impossible to identify his/her features. Thus, French courts have sanctioned the publication of a photograph of a prostitute taken in the street on the basis that her face was recognisable,⁴⁶ or a photograph of tourists taken in front of the leaning tower of Pisa, which was intended to illustrate a campaign against the sloppiness of summer clothing, on the basis that the persons depicted did not just have an incidental role in the snapshot.⁴⁷ Similarly, French courts have sanctioned the photograph of a person in a synagogue because of its focus on the person concerned,⁴⁸ or that of a child participating in a folk festival

réf. Paris 3 May 2002, *Légipresse* 2002, No. 194, I, 101: 'the fact that the photograph in question was taken on a public street does mean that the protection of the right (to image) disappears'; TGI Paris 15 Sept. 2003, *Légipresse* 2003, No. 207, I, 178: 'it does not really matter that the pictures were taken in a public place, since the moments lived by the plaintiffs with their parents on that beach did not go beyond the family sphere protected by Art. 9 CC'.

⁴⁴ See, e.g., CA Paris 27 Feb. 2002, CCE 2003, No. 11, 40: 'the publication of the image of a person, independent of his/her notoriety and independent of the professional activity concerning which the photograph was taken, is only allowed if expressly authorised by that person. A specific authorisation is needed for each envisaged use of the photograph'. - TGI Nanterre 28 Oct. 2002, *Légipresse* 2003, No. 199, I, 23: 'the sole fact that the photograph was taken in the context of the exercise of the plaintiff's professional activity does not suffice to dispense from obtaining the consent of the person concerned'.

⁴⁵ See, e.g., CA Paris 13 Mar. 1986, D. 1986, somm., 445: 'everybody can observe scenes which occur in a public place, exposed to everybody's eyes, and everybody in principle can record and reproduce those scenes without needing the agreement of each participant in those scenes'.

⁴⁶ TGI Paris 27 Feb. 1974, D. 1974, jur., 530.

⁴⁷ CA Paris 26 Mar. 1965, JCP 1965, II, 14305.

⁴⁸ CA Paris 11 Feb. 1987, D. 1987, somm., 385.

because the child ‘was isolated from the event in which the photograph had been taken’.⁴⁹ However, more recent case law admits that the person may be identifiable, provided the focus of the photograph is not on the person but on the actual event instead.⁵⁰

The second and, in practice, the most important basis for the justification of the legality of photographs taken without the consent of the person represented is the public’s right to information. In reality, this mainly concerns public figures. However, this justification can also apply where persons are involuntarily thrust into the public eye, as occurs in the case of criminals, victims of crimes, etc. In the instant case, if X is famous he will not be able to enjoin the publication of the photograph unless it invades his privacy (see Case 8). In the latter hypothesis, his cause of action will not be based on his right to his own image, but rather on his right to privacy.

If X is not famous, the right of the public to information cannot justify the taking and publishing of the photograph. It is the combination of several other criteria, such as the public place, the exercise of a professional activity and X’s incidental position in the photograph which could, in certain cases, relieve Sally from all liability.

Germany

I. Operative rules

If X is famous, he cannot prevent the taking or the publishing of the picture if the situation is deemed to be newsworthy. If he is not famous, an injunction may be granted against the taking and/or publication of the picture if it focuses on him and if he has not tacitly consented. If Sally knows X, his implicit consent to take the photograph may be presumed, but not to publish it.

II. Descriptive formants

The right to image is among the few personality rights which are codified in German law (§§ 22 and 23 of the Copyright Act, ‘*Kunsturhebergesetz*’, *KUG*).⁵¹ These provisions do not protect the photographer, but the person

⁴⁹ Cass. civ. 12 Dec. 2000, D. 2001, jur., 2064.

⁵⁰ Cass. civ. 25 Jan. 2000, JCP 2000, II, 10257: ‘the photograph was taken on the doorstep of a public building and it was not possible to isolate (the claimant) from the group of persons represented in the photograph, that was focused not on him but on a topical event in which he happened to be involved in by coincidence due to circumstances exclusively concerning his professional life’.

⁵¹ E. Schuster, *Das Recht am eigenen Bild* (Diss. Heidelberg: 1931) p. 14.

portrayed.⁵² § 22 *KUG* does not protect a person against the taking of his/her photograph, but merely against the dissemination thereof. Therefore, a supplementary protection has to be granted by the general personality right which is regarded as one of the rights protected under § 823(1) *BGB*.⁵³ The limitations in respect of the right to image are set out in § 23(1) *KUG*.⁵⁴

Usually in privacy cases, a balancing of the interests involved determines whether or not there was a violation of this right. In respect of the right to image, this methodology changes slightly as § 23(1) *KUG* provides some clear and special limitations to the right to image. If these limitations are met, a violation of the right may be assumed if interests are violated which are not directly protected by the *KUG* but by the general right to personality. This requires an additional balancing of interests under § 23(2) *KUG*.⁵⁵

§ 22 *KUG*, in combination with the general right of personality, sets out the principle that no person's image may be taken without her or his consent. § 23(1) *KUG* provides limitations to this right. The most important limitation relates to 'situations from contemporary history' (§ 23(1)1 *KUG*). The exact wording of the provision does not say that pictures of famous persons will always be pictures from contemporary history. Traditionally, courts and scholars in Germany speak of pictures of public figures, as public figures are regarded as being part of contemporary history.⁵⁶ A further distinction is made: not only do public figures in a narrow sense fall under this provision, but also private individuals who only become public figures for a limited time and in relation to a single historical fact, e.g. the relatives of public figures or criminals.⁵⁷ These persons are called '*relative Personen der Zeitgeschichte*' (relative persons of contemporary history), while public figures in general are called '*absolute Personen der Zeitgeschichte*' (absolute persons of contemporary history). If X is famous in either sense, under § 23(1)1 *KUG* a picture may be taken of him and distributed without his consent.⁵⁸

⁵² BVerfG NJW 2001, 1921, 1923 – Prinz Ernst August von Hannover.

⁵³ BGHZ 20, 345, 347; BGHZ 24, 200, 208; H. Hubmann, *Persönlichkeitsrecht* (2nd edn., Cologne/Graz: 1967) p. 297.

⁵⁴ See J. Helle, *Besondere Persönlichkeitsrechte* (Tübingen: 1991), pp. 171 *et seq.*

⁵⁵ BGHZ 131, 332, 337.

⁵⁶ *Personen der Zeitgeschichte*, see H. Neumann-Duesberg, 'Bildberichterstattung über absolute und relative Personen der Zeitgeschichte' (1960) *JZ* 114–18.

⁵⁷ J.R. von Strobl-Albeg, in K.-E. Wenzel, *Das Recht der Wort- und Bildberichterstattung* (5th edn. Cologne: 2003) pp. 468 *et seq.*

⁵⁸ Cf. KG Berlin ZUM-RD 2006, 552; LG Berlin ZUM-RD 2006, 571.

§ 23(2) *KUG* makes one further exception: if the picture violates the personality interests of the depicted (public) person, the taking and distribution falls under the general prohibition in § 22 *KUG*. Generally, § 23(2) *KUG* will not allow the distribution of photographs which have been taken as a result of an invasion of privacy (see Case 8). Furthermore, photographs depicting situations which put a person into a false light or embarrass or humiliate him/her, i.e. intimate situations or naked poses, are barred from publication.⁵⁹ However, there is no information in this particular case concerning these exceptions.

If X is a private person, in principle a picture may not be taken and/or published without his consent (§ 22 *KUG*, § 823 (1) *BGB*). However, if the picture is taken in a market place, another limitation is applicable under § 23(1) *KUG*. According to para. 2 of this provision, pictures of persons in public places may be taken if the picture is focused on the public place.

Situation (b) raises the question of whether another exception may be made for circumstances in which people are photographed in a professional activity or in an official function. In principle, § 23(1) *KUG* limits the right to image to situations in which the use of personality features is either necessary for media purposes or is unavoidable. Therefore, paras. 2 and 3 of § 23(1) *KUG* allow photographs of persons if the use is unavoidable because the photograph does not focus on the person but on the place or event depicted. As long as this limitation is met, it does not matter if this person is photographed in a private or a professional situation.

If limitations under § 23(1) *KUG* are not met, one might argue that a person who is photographed during her or his work has tacitly consented thereto. This might be the case if a person carries out an official function which is connected to the place where the photograph is taken. Therefore, the guards in front of the President's home at Bellevue Palace in Berlin will tacitly consent to a tourist taking a picture which is focused on them.⁶⁰ In the instant case, implied consent in the taking of the photograph can also be assumed if X regularly carries

⁵⁹ BGH GRUR 1975, 561, 562; NJW 1985, 1617; OLG Hamburg NJW 1996, 1151 = GRUR 1996, 123, 124; OLG Hamm NJW-RR 1997, 1044; but see OLG Frankfurt/Main NJW 2000, 594: Playboy photograph series of Katharina Witt; the distribution of a copy of one of the photographs – taken from Playboy's website – in a newspaper was allowed for its informative value because the paper distributed the copy in connection with a short satirical article about the fact that Witt had exposed herself in Playboy.

⁶⁰ See the dictum in a similar case by OLG München ZUM 1997, 388, 390. Public officials are usually not regarded as persons belonging to contemporary history,

out a professional activity on a public market place or if he knows Sally personally. However, this type of consent will not justify the commercial publication of the photograph.

III. Metalegal formants

The respective provisions in §§ 22, 23 *KUG* stem from 1907. Critics argue that in modern times the old *KUG* has become obsolete and should be replaced by new provisions which are more suitable for the modern media and information society.⁶¹

Greece

I. Operative rules

If X is not famous, he can sue Sally for taking the photograph without his consent. If X is famous and the picture is published, a balancing of interests has to take place.

In case of a photograph of X attending to his private affairs there is a claim for damages whether the person is famous or not. As to the publication of a famous person's picture taken in a public place, there is no claim for damages unless other circumstances occur which amount to an injury.

II. Descriptive formants

The personality of an individual includes all attributes which are firmly connected to that person. Among the attributes which form the content of the personality right is that of a person's image.⁶² Image refers to the external appearance of a person, which always accompanies him/her and, therefore, he/she should be able to choose when to expose it in public. Likewise, the image of a person does not belong to the public but only to the person it represents. In Greek law it is forbidden to take a photograph of a person in any form and to present or to expose this picture in public or through the press without the consent of the depicted individual.⁶³

OLG Karlsruhe NJW 1980, 1701; especially if the person is focused upon by the camera, OLG Koblenz NVwZ 1998, 237, 238.

⁶¹ B. Hahn, 'Das Recht am eigenen Bild - anders betrachtet' (1997) NJW 1348, 1350.

⁶² See Supreme Court (Areopag) Decision 411/2002. Supreme Court (Areopag) Decision 961/2003. Supreme Court (Areopag) Decision 782/2005.

⁶³ Plagiannakos, 'Personality Right' (1966) *Elliniki Dikaïosini* 101 ff. Paterakis, *Remuneration for non pecuniary damages* (2nd edn., Athens: 1995) p. 125 ff. Sourlas, in Georgiadis/Stathopoulos, *Civil Code: Article by Article Interpretation* (Athens: 1996) § 57.

Therefore, taking a picture of a person without his/her prior consent constitutes an unlawful injury to that individual's personality right, within the meaning of Art. 57 CC. It is even unlawful where the photograph is not presented to the public or is not reproduced or disseminated further.⁶⁴

Moreover, the subsequent publication of the photograph, combined with other circumstances that diminish a person's value and reputation, can amount to an injury to honour.⁶⁵

III. Metalegal formants

If the picture is published by the press and the individual depicted is of interest to the public, there is a conflict of interests, the balancing of which should take all the facts of the case into account.⁶⁶ Therefore, it is not possible to put forward a general rule where publication is justified.

Self-determination, based on the constitutional right to the free development of personality means that every human is free to decide which aspects of his/her personality he/she shall reveal to third persons, to choose the image he/she presents to society and to decide when his/her personality is injured. Self determination itself is not unlimited but subject to specific restrictions.⁶⁷ The individual has to endure intrusions into his/her personality which are connected to the way of life he/she has chosen. If one chooses to participate in a public event or to expose oneself publicly, this has the effect that one has accepted a degree of invasion of privacy.

Ireland

I. Operative rules

X would not have an action against Sally in any of the circumstances outlined above.

II. Descriptive formants

Privacy has been recognised as an unenumerated constitutional right under Art. 40.3. In *McGee v. AG*,⁶⁸ the Supreme Court recognised a

⁶⁴ Supreme Court (Areopag) Decision 411/2002. Supreme Court (Areopag) Decision 961/2003.

⁶⁵ Supreme Court (Areopag) Decision 782/2005. Supreme Court (Areopag) Decision 961/2003. See also Case 9.

⁶⁶ Supreme Court (Areopag) Decision 411/2002.

⁶⁷ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) p. 58.

⁶⁸ [1974] IR 284.

right to marital privacy and in *Kennedy and Arnold v. Ireland*,⁶⁹ the High Court upheld a right to privacy in relation to telephone conversations where the government had authorised the illegal tapping of journalists' telephones. The exact parameters of the constitutional right remain unclear. In *Kane v. Governor of Mountjoy Prison*,⁷⁰ the court indicated that the overt surveillance of an individual without specific justification could constitute an infringement of his/her constitutional right to privacy. However, it is unlikely that the taking of a snapshot by Sally could amount to 'surveillance' whether it was covertly or overtly taken. The courts have been reluctant to recognise privacy claims outside of these limited categories, particularly in light of the explicit protection afforded to the right to free expression under Art. 40.6.1 of the Constitution, preferring to leave such developments to the legislature.⁷¹

Notwithstanding this reluctance, the introduction of the European Convention on Human Rights Act 2003, which enacts the ECHR into Irish law, may provide renewed impetus to the Irish courts and the legislature to develop privacy protection in a manner similar to what the European Court of Human Rights has done.⁷²

An action for breach of confidence by X would also be difficult to maintain. No relationship of confidence has been reposed in Sally by X that would give rise to an obligation on Sally not to breach that confidence by publishing the information.⁷³

Under s. 21(h) of the Copyright and Related Rights Act 2000, Sally, as the photographer, would be considered an 'author' for the purposes of the Act. As an author, Sally would be the first owner of the copyright in the photograph and as a consequence X would have no remedy for breach of copyright where Sally published the photograph.

Italy

I. Operative rules

The traditional rule is that X cannot prevent Sally from *taking* the picture in a public place. X can, in principle, obtain an injunction against the *publication* of the photograph (Art. 10 CC, Arts. 96–97 Copyright Act) and recover damages (Arts. 2043, 2059 CC).

⁶⁹ [1987] IR 587. ⁷⁰ [1988] IR 757.

⁷¹ *Maguire v. Drury* [1995] 1 ILRM 108 at 116.

⁷² *Von Hannover v. Germany* (2005) 40 EHRR 1 and the Privacy Bill 2006.

⁷³ *House of Spring Gardens v. Point Blank Ltd* [1984] IR 611 (SC). See also Case 3.

II. Descriptive formants

The right to one's own likeness is codified in Art. 10 CC. According to this provision, every person can obtain an injunction and/or claim damages if his/her likeness is exhibited or published unlawfully. The lawfulness of the publication has to be judged according to the criteria set by Arts. 96–97 Copyright Act (CA).⁷⁴ Art. 96 CA sets out the general principle of *consent*: nobody can publicly exhibit, publish or sell the portrait or picture of another person without having first obtained the consent of the said person or (after his/her death) his/her next of kin. This is the general rule, however some exceptions are provided for. According to Art. 97, no authorisation is required if the publication is *justified*: (a) on the basis of the portrayed person's status (he/she is a public figure or a prominent person); (b) for police or judicial reasons; (c) in the interests of science or culture. By the same token, publication is lawful if the picture is related to a public event or to a fact of public interest. However, the picture cannot be exhibited or sold when the reproduction violates the honour or reputation of the person portrayed.

One should also consider the Data Protection Code as applicable, at least if the picture was taken with the aim of being published or systematically shown to third parties (Art. 5 (3) DPC). As a matter of fact, the image constitutes 'personal data' under Art. 4 (1)b DPC.⁷⁵ Taking a photograph, as well as the publication thereof, are activities amounting to a 'processing' of personal data (Art. 4(1)a DPC). This conclusion has important consequences in terms of the rights and remedies of the person portrayed.⁷⁶

(1) The first problem raised by this case relates to the *taking* of the picture. Is it lawful or not to take a picture of somebody without having previously obtained his/her authorisation? The wording of Art. 10 CC and of Art. 96 CA is clear: the exhibition and the publication of a portrait has to be authorised by the person portrayed, while the mere taking of the photograph does not require his/her previous consent.

⁷⁴ Legge 22 Apr. 1941 no. 633, *Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*.

⁷⁵ See, for instance, Trib. Roma 12 Mar. 2004, *Danno e resp.* 2005, 879; Trib. Napoli 26 Jun. 2001, *Dir. inf.* 2001, 888; and Garante protezione dati 9 Mar. 2006, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) 293; Garante protezione dati 8 May 2000, *ibid.*, 288.

⁷⁶ Namely that the person portrayed (data subject) has a right to be informed (Art. 10) and to authorise the fixation, reproduction or publication of his/her likeness (Arts. 11, 20); has access rights (Art. 13a) and specific remedies against unfair or unlawful

The same solution is adopted by scholars and judges who agree that simply taking a photograph of someone on a public street is not a tortious act provided that the portrait is kept private and not publicly exhibited.⁷⁷ In conclusion, under the Copyright Act, X has no remedy against Sally, irrespective of his status as a public or private figure.

If the Data Protection Code is applicable, the answer will be different.⁷⁸ As observed above, taking a picture amounts to a 'gathering' of personal data under Art. 4a DPC. As a consequence, consent is required (Art. 23). This is the general rule, however two important exceptions should be mentioned. Both exceptions focus on the aim of so-called 'gathering'. According to Art. 5(3), the DPC does not apply if the information is processed by a natural person in the course of non-professional activity and is not intended to be (systematically) communicated or disseminated.⁷⁹ Secondly, no permission is required if personal data is gathered by someone acting as a journalist (Art. 137(2) DPC).

(2) In order to judge the lawfulness of the *publication*, the following factors have to be considered: (a) the place where the photograph was taken; (b) the status of the person portrayed; (c) the context in which the portrait is placed; (d) the function and purpose of the publication.

The last factor is probably the most important. Publication is *always* unlawful if – in the absence of consent – it is carried out for commercial purposes (advertising, use as trademark, etc.), regardless of the status of the person portrayed, the activity performed, or the context in which the picture was taken.⁸⁰

treatment (Art. 13c, d, e); in addition he/she can recover damages for pecuniary (Art. 18) and non-pecuniary losses (Art. 29 n. 9).

⁷⁷ A. De Vita, 'Art. 10', in A. Pizzorusso, R. Romboli, U. Breccia and A. De Vita, 'Le persone fisiche', in F. Galgano (ed.), *Commentario del Codice Civile Scialoja-Branca* (Bologna/Rome: 1988) p. 546; P. Sirena, 'La tutela inibitoria e cautelare del diritto all'immagine' (1996) *Riv. crit. dir. priv.* 321 et seq., 340; A. Giuffrida, *Le persone. Diritti della personalità* (Turin: 2000) p. 206; G. Bavetta, 'Immagine (diritto alla)', in *Enciclopedia del Diritto*, XX (Milan: 1970) p. 145. See also the decisions cited by A. De Vita, 'Art. 10' above.

⁷⁸ Compare the decision of the Data Protection Authority: Garante protezione dati 8 May 2000, in M. Paissan (ed.), *Privacy e giornalismo* at 288.

⁷⁹ For instance, if I take a picture of my girlfriend with my mobile phone, this action is in principle not subjected to the DPC (nevertheless, the rules on security measures and liability for damage apply in any event: Art. 5(3) DPC); but if I intend to post this picture on the internet (see Cass. Pen., 26 Mar. 2004, *Foro it.* 2006, II, 46) or to show it systematically to third parties, then the DPC is applicable (see Garante protezione dati, 12 Mar. 2003, *Boll.* no. 37, March 2003).

⁸⁰ See, *inter alia*, Cass. 6 Feb. 1993 no. 1503, *Giust. civ.* 1994, I, 229 (a photograph of the two famous cyclists Gino Bartali and Fausto Coppi, taken during a race, was used

Assuming that there is no commercial appropriation, other factors then come into play. The first relevant aspect is the *context* in which the portrait is set. Even if the photograph was taken in a public place and/or with the consent of the person portrayed, the action remains unlawful when it puts the person in a false light, namely when it creates the false impression that the person portrayed has something to do with the subject matter of the publication.⁸¹

Provided that there is no alteration of the original context, the publication can be considered lawful if it is *justified* by the public interest. The privacy interests of the person portrayed have to be weighed against society's right to know. Some limitations are set out in Art. 97 CA, but a balance is inevitable. The simple fact that a person was in a public place is not always a justification for the reproduction of his/her likeness.

If he/she is a public figure (circumstance (a)), the public is more likely to have a legitimate interest in this information. For example, if a picture of a soccer player is taken in a disco,⁸² in a waiting area of an airport,⁸³ on a beach,⁸⁴ or in a restaurant,⁸⁵ then the publication is lawful. If he/she is not famous, the test is more stringent. In principle, the publication of the photograph should require previous authorisation if the focus is on the person and not on the place or the event depicted. It has been decided, for instance, that in a film it is unlawful to reproduce the picture of a married woman sitting next to a man other than

in an advertisement for the bicycles 'Legnano'; Cass. sez. un. 31 Jan. 1959, *Foro it.* 1959, I, 200 (the picture of a politician, taken during a public speech, was used to advertise a drink); Trib. Roma 12 Mar. 2004, *Danno e resp.* 2005, 879 (use of the photograph of a person taken during the 1994 World Cup in an advertisement); Trib. Roma 23 May 2001, *Dir. inf.* 2001, 881 (a photograph of a soccer player – Carolina Morace – reproduced on the front cover of a book about soccer); Trib. Roma 20 Nov. 1986, *Temi rom.* 1986, 696 (use of the photograph of a man who used to swim in the river Tevere (Rome) every New Year's Day).

⁸¹ It has been decided, for example, that the publication of a picture of two Italian tourists – photographed in a disco in Brazil – in a report about prostitution in Rio de Janeiro violates their personality rights (Trib. Roma 24 Jun. 1993, *Dir. inf.* 1993, 981). Similarly, it is unlawful to reproduce the likeness of a lawyer, filmed while arguing a case in court, in a programme about the problems of Italian criminal justice (App. Roma 30 Sep. 1974, *Foro it.* 1974, I, 2789; Cass., 5 Apr. 1978 no. 1557, *Giust. civ.* 1978, I, 1256).

⁸² See Garante protezione dati, *Newsletter*, 5–11 Feb. 2001.

⁸³ Trib. Napoli 19 May 1989, *Dir. inf.* 1990, 520 (the case refers to Diego Maradona).

⁸⁴ Garante protezione dati, 11 Dec. 2000, in M. Paissan (ed.), *Privacy e giornalismo*, 247.

⁸⁵ Garante protezione dati, 12 Mar. 1999, in M. Paissan (ed.), *Privacy e giornalismo*, 250.

her husband at a race course,⁸⁶ or the picture of a man attending a soccer match.⁸⁷ If the picture does not specifically focus on the person then publication is lawful even without consent; it is not unlawful to publish the likeness of a man or woman filmed among the public at a criminal trial.⁸⁸ In conclusion, a balancing of interests is required. It has to be judged, according to the principles of proportionality and essentiality, whether the informative value of the publication would justify an infringement of the person's privacy.

From this perspective, the activity undertaken by the person portrayed in circumstance (b) is an element to be taken into consideration, even though it is not decisive. It can be argued that the publication is lawful if the person is carrying out an official function which is connected to the place where the photograph is taken: a report on criminal trials justifies the reproduction of the likeness of a judge sitting in court.⁸⁹ Private activities, on the other hand, seem to be better protected; however, case law is not always consistent. It has been decided, for example, that it is unlawful to publish the likeness of a woman actually 'at work' on the streets of Rome in a television report on prostitution (although the principle of human dignity is involved here),⁹⁰ while it is not a tort to reproduce the picture of a person dancing in a club in an article about night life.⁹¹

This confirms that a balance is always needed and only an evaluation of the concrete circumstances of the case – taking the constitutional ranking of values into account – can lead to acceptable results.

The Netherlands

I. Operative rules

X does not have a claim against Sally if the picture is not published. Under certain circumstances, publication is unlawful. If this is the case, X can claim both an injunction and, if the publication has already taken place, damages for economic and non-economic loss.

⁸⁶ Pret. Roma 7 Feb. 1977, *Giust. civ.* 1977, I, 1061.

⁸⁷ Cass. 15 Mar. 1986 no. 1763, *Nuova giur. civ. comm.* 1986, I, 726.

⁸⁸ Trib. Roma, 6 Feb. 1993, *Dir. inf.* 1993, 961; but it is unlawful to retransmit the video.

⁸⁹ On this matter, see V. Zeno-Zencovich, 'Ripresa televisiva dell'udienza penale e tutela della personalità' *Dir. inf.* 1985, 983.

⁹⁰ App. Roma 29 Nov. 1993, *Dir. inf.* 1994, 299.

⁹¹ Trib. Napoli 26 Jun. 2001, *Dir. inf.* 2001, 888; Trib. Firenze 16 Mar. 1998, *AIDA* 2000, 1072.

II. Descriptive formants

Dutch law does not recognise a general right not to be photographed without consent. Whether or not it is unlawful to take a picture of someone depends on the circumstances involved. An important factor is whether the person pictured was in a public or a private situation. In principle, it is not unlawful to take a picture of someone in public.⁹²

Taking pictures is to be distinguished from publishing them. When a picture is published or will be published, the right to privacy of the person pictured (specified in Arts. 20 and 21 *Auteurswet*) has to be taken into account.

Arts. 20 and 21 *Auteurswet* (Copyright Act) specify the right to privacy of the person portrayed. A representation of a person (pictured, in clay, bronze, paint, pen, film, video) is a portrait if there is a resemblance between the representation and the facial features of this person. Art. 20 *Auteurswet* does not apply since X did not request to be photographed.

Art. 21 *Auteurswet* provides that the unconsented publication of a portrait of an individual is unlawful insofar as publication infringes a reasonable interest of the person portrayed. The reasonable interest can be related to one's right to privacy and/or to one's commercial interests.⁹³ If the publication of the picture infringes a reasonable interest of the person portrayed, it has to be held that the right to personality has been infringed. This right has to be balanced with other interests, such as the right to free speech.⁹⁴ The mere infringement of the right to one's personality is not as such decisive for the unlawfulness of the publication. Nevertheless, in general, the right to one's personality outweighs the right to free speech. If this occurs the publication is unlawful (Art. 6:162 *BW*) for being a breach of a duty imposed by an unwritten rule of law pertaining to proper social conduct.

The publication of nude pictures, pictures that have been taken in an intimate situation, pictures where publication causes danger to the person photographed, pictures taken in embarrassing situations or pictures which are embarrassing themselves are not only rendered to be an infringement of the reasonable interest of the person pictured but also a severe infringement of that person's right to personality.⁹⁵

⁹² G. A. I. Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 138.

⁹³ HR 19 Jan. 1979, NJ 1979, 383.

⁹⁴ HR 21 Jan. 1994, NJ 1994, 473.

⁹⁵ S. Lindenbergh, *Smartengeld* (Deventer: 1998) p. 169.

In this situation, the honour or reputation of the person portrayed is impugned or his person is otherwise injured by publication of the picture. The person pictured can obtain damages for non-economic loss under Art. 6:106 BW.

In relation to situation (a), in general, taking pictures in public is not unlawful. It does not make a difference to the outcome whether X is famous or is not.

In respect of situation (b), if X is in a public place it is not decisive whether he is at work or attending his private affairs. The general rule that it is not unlawful to take a picture continues to be applicable.

We have to take more considerations into account in respect of situation (c). If the picture is not published, under the given circumstances there is no ground for unlawfulness and thus X does not have a claim against Sally. If the picture has been/will be published, X's right to privacy, specified in Art. 21 *Auteurswet*, might apply if the picture is a portrait. As mentioned above, a representation of a person (pictured, in clay, bronze, paint, pen, film, video) is a portrait if there is a resemblance between the representation and the facial features of this person. According to Art. 21 *Auteurswet* the publication of a portrait without the consent of the person depicted is rendered to be an infringement of his/her right to privacy. There is a reasonable interest to prevent the picture from being published if the interest of the person portrayed outweighs general interests such as free speech. In this respect, we are concerned with the way in which the right to privacy and the right to free speech have to be balanced in general.

Among the interests that are to be taken into account in favour of the person portrayed are both morally based interests (such as when a nude picture, a defamatory picture etc. is involved) and financial interests.

Assuming that the snapshot is a portrait, unauthorised publication is an infringement of X's privacy. This interest has to be balanced with other interests, most importantly with the general interest to be informed about important facts. In this case, the picture has been taken in a public place and no facts have been given about the indecency of the picture. Even if X was attending his private affairs, he can be assumed to know that there is a possibility he will be photographed. If this is the case, the protection of his privacy is not a reasonable interest.

If X is famous, his interest could be of a financial nature. If Sally profits from the publication, a reasonable interest is indeed concerned

because X could have shared in the profit if he had been asked for his consent for the publication. In that case, the publication of the portrait is unlawful. X can ask for an injunction to prevent Sally from publishing the picture. If the picture has already been published, X can ask for damages for economic loss. Since X is famous, the damage suffered can consist of the profits that X himself would have derived from publication with his consent. If X's person has been inflicted due to the publication of his photograph he can ask for damages for non-economic harm (Art. 6:106 *BW*).

Whether the publication is indeed an injury to his person depends on the type of publication. Since famous persons have to accept that they are public figures, the mere publication of a photograph of a famous person is not necessarily an injury to his person. If, however, the context in which the picture has been published is negative, the publication can constitute an infringement of the personality of the person portrayed and for that reason can be an unlawful act. If this is the case, X can ask for both an injunction and, if the publication has already taken place, for damages for economic and non-economic loss.

Portugal

I. Operative rules

X might have a claim for an injunction (recovering the photograph) against Sally. The same applies to hypotheses (a) and (b). In situation (c), however, if the photograph is published, X would have a claim for damages and for an injunction (prohibiting the distribution of the publication) unless X is famous, has not expressed his opposition to the taking of the picture and the publication does not harm his honour, reputation or decorum in any way.

II. Descriptive formants

The right to image is expressly provided for in Art. 79 CC.⁹⁶ It states that the 'portrait' of a person shall not be displayed or made public without his or her consent (para. 1). Para. 2 states that consent is not necessary when the display is justified by a number of circumstances set out by law: the notoriety of the person, his/her role or position, a legal or police requirement, scientific, didactic or cultural aims, or when the display is made within the context of public places or in the public interest. Art. 79, para. 3 introduces an important limitation to

⁹⁶ On the Portuguese discussion relating to the right to image, see Case 3.

the dispensation of consent, stating that the image may not be displayed if it results in damage to the honour, reputation or decorum of the person displayed.

Notwithstanding the seemingly straightforward regulations there have been controversial issues. The most spectacular case arose when a tabloid published a photograph of a topless girl on a nudist beach close to Lisbon on its front page. The girl sued and the tabloid defended itself by invoking Art. 79(2) and stating that she had voluntarily 'given publicity' to her own body and that the photograph had been taken in a public place. The Court disagreed on the grounds of Art. 79(3), making clear that there is a difference between being naked on a nudist beach and being exhibited on the front page of a tabloid, and that although the display of nudity on the beach was voluntary, this was not the case in respect of the newspaper, and thus the honour and reputation and the private decorum of the claimant was injured.⁹⁷

While the Civil Code (Art. 79) prohibits the public display of an image, it does not prevent the mere act of taking a photograph of someone in a public place. In fact, Art. 79 CC only protects the right to image when it is exposed, reproduced or commercialised. However, we cannot deduce from this wording that taking photographs of third persons in public places is lawful. Firstly, this is because it creates a risk for the persons involved, mainly because nowadays it is so easy to manipulate photographs. Secondly, one does not lose all one's privacy just because one is in a public place. Being photographed in a public place may circumstantially invade the personal privacy of the person. From a civil law point of view, even though not expressly provided in a specific legal provision such as Art. 79, this is nonetheless covered by the general clause of Art. 70, which protects all individuals from actual injuries or threats to their physical or moral personality. Taking into account that:

- a market place is a public place;
- the image of a person in a market place cannot, in principle, in any way harm his or her honour, reputation or decency (Art. 79, no. 3, CC); and
- that the Case does not mention any exposure, reproduction or commercialisation

it would probably be difficult for X to succeed in any civil claim against Sally. Nevertheless, although there has not been any court

⁹⁷ STJ 24.05.1989; BMJ (Boletim do Ministério da Justiça), 387, 531.

decision enlarging the scope of the right to image based on Art. 70 CC alone, a court decision could move in this very direction. However, such a decision should be well justified by the judge. A way of justifying such a claim would be to resort to the aforementioned ‘crossed interpretation’, based on the principle of the unity of law (see Case 3). If Art. 199, no. 2, para. (a) CP states that photographing someone against his or her will, even in events where that person legitimately participated, is a crime (no matter whether the image is used or not), then it would be coherent to interpret Arts. 70 and 79 CC as also restricting the collection of persons’ images and allowing for a civil claim. As long as this possibility is not tested in court, we cannot tell if it reflects the Portuguese legal stance on this issue. In any case, we cannot forget that the only claim at stake here would be the recovery of the picture, not receiving compensation, since there is no foreseeable (at least relevant) loss in the mere snapshot (Art. 483 CC).

The fact that X is famous (hypothesis (a)) may, in accordance with Art. 79 (2), waive the need for the consent of the person photographed if the photograph is not displayed afterwards in a manner that damages his honour, reputation or decorum.

Specifically relating to hypothesis (b), being at work might reduce the scope of protection of the person’s right to image, since the work environment can be considered to belong, depending on the situation, to that person’s public sphere (or at least is more public than ‘attending to his private affairs’).

Whether or not the photograph is published (hypothesis (c)) is of central importance, as previously explained. If the image is published, the risk of harming that person’s honour or decency increases considerably.

Scotland

I. Operative rules

X does not have a claim against the public use of the photograph unless a separate cogent argument can be made as to why privacy should be conceded.

II. Descriptive formants

The classical approach to ‘privacy’ within the public sphere before the implementation of the HRA, at least in England, was explained in the

case of *Sports and General Press Agency v. Publishing Company*:⁹⁸ ‘no person possesses a right of preventing another person photographing him anymore than he has a right of preventing another person giving a description of him’.

Being present in a public place does not normally exclude a photographer from taking photographs: it merely limits what can be done with them thereafter. The immediate question of whether Scots law protects the privacy of those photographed while moving freely in public now requires examination in the light of both the HRA and the developing concept of privacy. Although privacy itself can be seen as relative to the concept of freedom of expression, case law is not particularly useful to the situation at hand.

‘There must be some interest of a private nature which the claimant wishes to protect, but usually the answer to the question whether there exists a private interest worthy of protection will be obvious.’⁹⁹

There is little helpful authority under the HRA on this particular question as the authority relates to well-known people¹⁰⁰ and not the ordinary citizen. Even in this authority, very particular circumstances involving the processing of personal data, which is a matter of importance to journalists and data controllers alike, have surrounded the cases.¹⁰¹ The public interest argument is also not likely to be useful in this instance. There is no Scots authority equivalent to the Canadian Supreme Court decision in which damages were awarded to a teenage girl, photographed while sitting in public.¹⁰² The Canadian provinces all have separate charters or acts on privacy, thus reducing the absolute character of freedom of expression and creating a statutory right to privacy.¹⁰³

‘It is also recognised that the photographer is exempt from liability as are those who publish the photograph, when an individual’s own action, albeit unwitting, accidentally places him or her in the

⁹⁸ [1916] 2 KB 880.

⁹⁹ *A v. B&C* [2002] EWCA Civ 337; [2002] 2 All ER 545 per Lord Woolf, CJ at para. 11(vii).

¹⁰⁰ See the recent privacy case of *Sara Cox v. People*, 7 Jun. 2003, High Court (unrep.); out of court settlement of £50,000 for the publication of an unauthorised naked photograph of the plaintiff (BBC Radio 1 DJ during honeymoon); see www.mediaguardian.co.uk.

¹⁰¹ *Campbell v. MGN* [2002] EWHC 499 (QB) (HL); *Theakston v. MGN Ltd.* [2002] EWHC 137; *A v. B&C*.

¹⁰² *Les Éditions Vice-Versa v. Aubry* [1998] 1 SCR 591.

¹⁰³ See Calcutt Report, Committee on Privacy and related matters, Cm 1102, Jun. 1990, Appendix D and E.

photograph in an accidental manner. In such a case ... the person “snapped up without warning” cannot complain.¹⁰⁴

The situation at hand does not fall within the category of private or even commissioned photographs. In the latter case, the photographer’s breach of copyright or possibly even breach of confidence¹⁰⁵ will be held in cases where the photograph suddenly lands in the hands of the press.¹⁰⁶ In such cases, the victim of a private or commissioned photograph may at least rely on his/her moral rights under s. 85 Copyright Act 1988 and sue for damages for breach of moral rights.

In assessing the rights and remedies under the HRA, a court is required to take the Press Code provisions on privacy into consideration.¹⁰⁷ The Code itself only addresses the matter of photographs in public where these are people who *have a reasonable expectation of privacy*.¹⁰⁸

The English Court of Appeal decisions were founded on their own very specific facts: one decision concerned Naomi Campbell, whose photograph was taken while emerging from a dependency therapy clinic;¹⁰⁹ another decision related to the private wedding of Michael Douglas and Catherine Zeta Jones,¹¹⁰ where unauthorised photographs were published even though the couple had exclusively licensed the wedding photographs to a particular photographer. In the *Campbell* decision, the privacy of information was recognised;¹¹¹ in the *Douglas* decision, a different type of privacy was involved. This related to publication of unauthorised photographs taken by an intruder (taking advantage of what was a private situation and selling these on to the magazine *Hello!*). Nevertheless, the Court of Appeal discharged a High Court interim injunction against publication *on the balance of interests*,

¹⁰⁴ Quoted in *A v. B&C*.

¹⁰⁵ The Copyright Act 1988 applies to both Scotland and England and has now preserved privacy in domestic photography to the extent that copyright belongs to the photographer.

¹⁰⁶ *Williams v. Settle* (1960) 1 WLR 1072.

¹⁰⁷ S. 12(4) (b) HRA 1998.

¹⁰⁸ See Press Code: *Privacy*: (ii) the use of long lens photography to take pictures of people in private places without their consent is unacceptable. In *Sara Cox v. People* the plaintiff complained to the Press Complaints Commission and the *People* were required to print an apology thereafter. The decision to sue was based on the plaintiff’s view that the 63 word apology was insufficient recompense for the hurt suffered.

¹⁰⁹ *Campbell v. MGN*.

¹¹⁰ *Douglas v. Hello!* [2001] QB 967, [2003] EWCA Civ 139; *ibid* [2005] EWCA Civ 595 (House of Lords).

¹¹¹ Morland J in *Campbell v. MGN* (High Court) at para. 166.

particularly on the basis of costs to *Hello!* in having to cancel one week's circulation. The Court referred to the couple's clear right to choose which photographs were to be made public (and hence privacy in their *selection* of the photographs to be published). Under considerations of proportionality, the remedy was deemed to be damages and not a continuing injunction.

'The more intimate the aspect of private life interfered with, the more serious must be the reasons for interference before the latter can be legitimate.'¹¹²

The approach of the UK courts is nevertheless based on the premise that there should be no interference with publication. Regardless of what material is to be published, the court should *prima facie* not interfere with its publication. S. 12(3) HRA requires the court to have regard to the *likelihood* (i.e. chance of success in trial) of publication being restrained before granting summary relief. S. 12(4) further requires the court to have regard to the importance of freedom of expression itself before making any injunctions or interdicts.

The question therefore turns to the nature of privacy under Art. 8 ECHR in relation to private figures. As long as privacy is not seen as an absolute right, the authorities have not supported an application by the person photographed to date. Any floodgate of applications to prevent publication of 'public' photographs of individuals can only be met by a decision made on the merits of each individual case. The current authorities do not conclusively support a remedy in this case.¹¹³

In relation to Scots law,¹¹⁴ whether or not the HRA, in conjunction with the Scots law of privacy based on *iniuria*, gives weight to the prevention of a member of the public photographing another member of the public can only be surmised. If the person is unknown and simply carrying on with normal life, there appears to be no claim, not even under the ECHR.

The only other possible head of claim would be for breach of statutory duty under the Data Protection Act 1998 for failure to process data information properly. This action would only lie against a journalist or publisher. In *Campbell v. MGN* at first instance, Justice Morland awarded Naomi Campbell £2,500 damages for breach of confidence and £1,000

¹¹² Keene L. J in *Douglas v. Hello!* [2001] QB 967 at 1011–12, para 168; *Sara Cox v. People*.

¹¹³ See *A v. B&C* at para. 11 (vii): '... the weaker the claim for privacy, the more likely that the claim for privacy will be outweighed by the claim based on freedom of expression', per Lord Woolf, C.J.

¹¹⁴ *McKie v. Orr* [2003] ScotsCS 40, 28 Feb. 2003, per Lord Emslie.

compensation under the Data Protection Act. Data subjects have a right under s. 7(1) of the Act to be informed about which data is being processed. Under s. 13(1) an individual can also be compensated for breach of statutory duty where a data controller fails to comply with the Act. S. 32 of the Act provides an exemption from the data protection rules but only for specific categories of journalism and library work. The purpose of these provisions is to limit the ability of data subjects to invoke statutory rights to impede publication.¹¹⁵

III. Metalegal formants

The House of Lords in *Naomi Campbell* has left the issue open regarding the legality of publishing a photograph of a well-known individual taken in public which, in the context of a press report relating to confidential information, might be seen to constitute an invasion of privacy. Given that the decision relates to a public figure and not a private figure, the decision is circumspect in relation to ordinary citizens.

Spain

I. Operative rules

If X is a private person he will have a claim against Sally whether or not the photograph is published. If X is a famous person he will only have a claim against Sally if he is attending to his private affairs when photographed.

II. Descriptive formants

The right to one's own image is a personality right recognised as an autonomous right with its own specific content, different to that of personal and familial privacy. The right to one's own image is protected by Art. 18.1 of the Constitution, and limited by Art. 20 of the Constitution, especially by the right to freely communicate information when a public interest exists in publishing the image. It is absolutely vital that these issues are decided on a case-by-case basis.

The constitutional regulation of the right to image is realised through Arts. 7.5¹¹⁶ and 8.2 *LO* 1/1982.¹¹⁷

¹¹⁵ See I.J. Lloyd, *Information Technology Law* (3rd edn., London: 2000) p. 172.

¹¹⁶ Art. 7.5 reads: 'The following will be considered an illegitimate interference with the right to honour, privacy and image: (...) the capturing, reproduction or publishing of pictures, films, or by any other means, the image of people in places, or moments, whether in their private or public life, except what is mentioned in Art. 8.2'.

¹¹⁷ Art. 8.2 reads: 'In particular, the right to one's own image will not impede: the capture, reproduction or publication by any media when the person is a public

Spanish case law has defined the right to image as a personality right, derived from human dignity, the function of which is to protect the moral dimension of persons, entitling the holder:

- (i) to decide which graphic information generated by his/her physical features can be publicly distributed; and
- (ii) to prevent the taking, reproduction or publishing of his/her image by an unauthorised party, whatever this third party's purpose is (be it informational, commercial, scientific, or cultural).¹¹⁸

Thus, there are two dimensions: a positive version which entitles the holder to expressly control the economic exploitation of his/her image; and a negative version, which entitles the holder to prevent the unauthorised use of his/her image.

Spanish case law has set out that consent to be photographed must not be confused with the consent to publish these pictures.¹¹⁹ In the same sense, some decisions have reasoned that publishing images of public persons when these images are totally unconnected to the position of the public person could be considered an illegitimate interference, but this is a doctrine which has not completely been standardised.

If X is a private person and did not give his consent to be photographed and the picture is published, X has an action against Sally and the media and can claim for an injunction and damages.¹²⁰ If the picture is not published, X has an action against Sally in order to recover the picture and can also claim for damages, although it is improbable that X will succeed. Whether X was at work or attending his private

officer practicing public work or a famous or public person and the image is captured during a public meeting or act or in a place open to the public, the use of caricature of these persons, according to the social customs, graphic information about a public event when the image of a certain person is merely incidental. The exceptions mentioned in paragraphs (a) and (b) do not apply to officials or people whose work is of a nature that requires anonymity for this person.'

¹¹⁸ STC, 26 Mar. 2001, 81/2001.

¹¹⁹ STS, 1st chamber, 3 Nov. 1988.

¹²⁰ See STS, 7 Oct. 1996 (RJ. 7058): a photographer took several pictures of a family on the street. The photographer provided the City Hall with those pictures to illustrate a public campaign for the 'respect of the elderly'. The family sued the photographer and the City Hall for illegitimate use of their image. The Supreme Court rejected the appeal filed by the defendants. The Supreme Court considered that the cultural and public interest that guided the public campaign could not prevail over the claimants' right to honour. The right to one's own image included the exclusive right to consent on its taking, manipulation and reproduction. This right did not dissipate because these were not public persons and the pictures were taken on the street.

affairs is irrelevant, unless X is a civil servant or has a position in public life.¹²¹

If X is a famous person and did not give his consent to be photographed but the picture was taken at work and was published, he has no action against Sally.¹²² On the contrary, if the picture was taken when the famous person was attending to his private affairs, X is allowed to file a civil action against Sally and the newspaper/magazine asking for an injunction and damages.¹²³ If the picture is not published, X does not have an action against Sally.

According to Spanish Law, the Copyright Act (*Ley 23/2006, de Propiedad Intelectual*) is not applicable in this case. Copyright only protects the work of an author or artist. The protection does not include photographs taken without the consent of the depicted person. The Copyright Act only protects the photographer and the professional, or at least the intended, model.

Switzerland

I. Operative rules

Whether or not taking someone's picture is unlawful depends on the circumstances to a large degree. In a public market place, without any

¹²¹ STS, 25 Oct. 2000 (RJ. 8486), several newspapers and tabloid magazines published pictures of a policewoman as a result of an incident involving two policemen with whom she had had a relationship. Along with pictures of the policewoman taken on the street while she was wearing the police uniform, other pictures were published where she participated in beauty contests. A public television network broadcasted the news (TVE). The policewoman sued the newspapers, tabloid magazines, their directors and editors, as well as TVE, seeking an award for damages of 565.000.000 pesetas (pts). The Court of First Instance and the Court of Appeal dismissed the claim. The Supreme Court rejected the appeal. The taking of the pictures was allowed in both cases; in the first case, the pictures relating to the beauty contests were allowed because they were taken at a public event, and in the second case, the pictures were of a civil servant or a public person engaged in a profession with a public projection.

¹²² See, however, STS, 19 Mar. 1996 (RJ. 2371), where a professional model sued a photographer to whom she had entrusted a portfolio for marketing purposes. The photographer sold one of the pictures to an editorial without the model's permission for 5.000 pts. The editorial used the picture on a book cover. The Court of First Instance ordered the photographer and another unidentified defendant (most probably the editorial company) to pay 350.000 pts. The Court of Appeal and the Supreme Court confirmed this ruling. The Supreme Court considered that intellectual property had a limit on the right to honour. Although it was admissible to take and reproduce pictures of a public person for informative purposes, benefit from this use without the express permission of the model was not allowed.

¹²³ STS, 22 Mar. 2001 (RJ. 4751), a tabloid magazine published pictures of a famous person without her permission. In those pictures she appeared trying on a bikini

refusal from the person captured on film, the picture taken does not automatically constitute an unlawful infringement of the person's rights.

II. Descriptive formants

The right to one's image constitutes an aspect of the personality rights protected under Art. 28, para. 1 CC. As such, an image cannot, in principle, be reproduced by drawing, painting, photography, or any comparable process without the consent of the individual; moreover, such reproduction may not be distributed without this person's consent.¹²⁴

With respect to the hypotheses discussed, it should be noted that the protection afforded to the individual depends on the sphere in which he or she finds him or herself. Three different spheres are usually distinguished. First, the secret or intimate sphere encompasses facts that are not accessible to others unless physical or psychological boundaries have been crossed; it also covers facts that the individual concerned wants to keep to him or herself or that he or she does not want to share outside a small circle of confidants. As a result, the secret sphere is made up of any facts that are strictly personal and that are generally kept from others. Secondly, the private sphere concerns all the facts and events that do not take place in public, but that may be known by people who are relatively close to the individual. Finally, the public sphere encompasses facts that are accessible to everyone. Art. 28 CC gives protection to information included in either the intimate or private spheres, but not to publicly known facts, at least in principle.

As for situation (a), X's consent is presumed and the picture is therefore not unlawful unless X expresses his refusal.¹²⁵

If X is a well-known figure (actor, politician, etc.), there will be a legal justification as long as the picture was taken in the context of X's public activity (Art. 13a, para. 2(f) *Legge federale sulla protezione dei dati - LPD*). In

in a shopping mall. She sued the editorial company, the photographer and 'Europa Press, S.A.' seeking damages and the publication of the final judgment in the magazine. The Court of First Instance and the Court of Appeal ruled in favour of the claimant. The Supreme Court rejected the appeal since it considered that the article infringed the right to the claimant's own image and her right to privacy. The taking of pictures of a public person without their permission for purely commercial purposes is not allowed if they have not given their permission.

¹²⁴ RVJ 2003, p. 252 c. 4a.

¹²⁵ P. Tercier, *Le nouveau droit de la personnalité* (Zurich: 1984) n. 472.

fact, a defence exists regarding the public's interest in being informed about public figures. There will be an unlawful infringement if X did not intend to attract attention and actually wanted to *avoid* media attention. Activities with this intention, even those exercised in public, belong to the private sphere.

In respect of situation (b), photographing a person at his or her workplace invades his or her private sphere.¹²⁶ Even though work generally takes place in an accessible area, access is only granted to a certain group of people. This is all the more so if the person is engaged in personal business. Such activities belong to the private or even intimate sphere of the person concerned. The Federal Court has held that photographing a person in front of the door of his or her house constitutes an unlawful infringement.¹²⁷ In both hypotheses, compensatory and injunctive relief will be available to the individual.

In relation to situation (c), agreeing to have one's picture taken does not mean agreeing to the publication of the picture. Unauthorised publication is unlawful within the meaning of Art. 28 CC.¹²⁸ The same idea also applies where the photograph is used for a different purpose or under different conditions than those understood and authorised by the individual at the outset. Thus, a person who consents to pose for a photograph to commemorate a family event does not thereby authorise the commercial use of his or her image.¹²⁹ Furthermore, a person who poses for an photograph to be used in a leaflet does not thereby authorise the use of the photograph on a billboard.¹³⁰

Where an unlawful infringement of the right to image is established, compensatory and injunctive relief will be available.

Comparative remarks

This case raises the question of whether and to what extent individuals have the right not to be photographed in public places, and to

¹²⁶ T. Legler, *Vie privée, image volée: la protection de la personnalité contre les prises de vues* (Berne: 1997) p. 115. According to this author, professional relationships belong to the private sphere.

¹²⁷ ATF/BGE 118 IV 41 c. 3.

¹²⁸ ATF/BGE 127 III 481 c. a/aa, JdT 2002 I 426 ('Minelli'); ATF/BGE 70 II 130; RSJ 1912/1913 241.

¹²⁹ B1ZR 43, p. 1944 n. 46.

¹³⁰ Judgment of the *Obergericht* of the area of Zurich, in: SJZ 71 (1975), p. 28.

take action against the use – in particular the publication – of those photographs. If a picture is published, the personality interests of the person portrayed come into conflict with the professional freedom of the photographer and (possibly) the freedom of the press. These interests are to be balanced against each other. The result of this balancing may lead to different results according to the notoriety of the person portrayed or the fact that he/she was photographed while attending a professional or a private activity.

I. Legal bases

Many private law systems conceive this case in terms of a ‘right to one’s image’. In the majority of the continental European legal systems considered, a right to one’s image is expressly or implicitly regulated by statute and finds considerable attention in both jurisprudence and academic literature.

In Italy and Portugal, a subjective right to one’s own image is expressly laid down in the Civil Code. In Austria, Belgium, Germany, Italy and the Netherlands, a statutory regulation of the use of one’s image is provided for in the Copyright Acts or other special legislation. Unlike the other countries, in the Netherlands, courts and scholars seem to avoid speaking of a ‘right to one’s image’: they simply refer to privacy and personality rights.

In many countries, the right to one’s image was born as a pre-constitutional subjective right, but then over the course of time it gained a constitutional dimension. In Spain, both the Constitution (Art. 18) and a special statute (*Ley Organica*) of 1982 expressly protect the ‘fundamental right to honour, privacy and image’. In Germany, Switzerland, Italy and Greece, the (statutory) right to one’s image is also embedded in the general constitutional guarantees of the personality.

A right to one’s image is neither acknowledged in England, Scotland and Ireland, nor in Finland. In the UK and Ireland, the present case is dealt with under the equitable doctrine of breach of confidence (privacy). In Finland, protection against the taking or use of an individual’s photograph is only granted within the narrow scope of the crimes of defamation and disclosure of private information under the Penal Code, or when a person’s image has been commercially exploited. In the latter situation, Finnish courts and scholars acknowledge the violation of a right existing without a special legal provision, which entitles its holder to sue the wrongdoer in tort.

In Italy, Switzerland, England and Scotland, a further legal basis referred to in this case is data protection law. A person's image can be seen as personal data and its photographic reproduction as a processing thereof. In Italy, England and Scotland, data protection law and copyright law appear to be conflicting legal formants which cause some uncertainty in the solution of this case, as will be explained below.

To assess the lawfulness of Sally's conduct in the legal systems considered, a first distinction is to be made between the mere taking of a photograph and the dissemination thereof.

II. Taking of photographs

In most legal systems considered there is no specific regulation concerning the mere taking of a photograph. The legal criteria governing this area are to be logically deduced from the rules governing the use (in particular, the publication) of a person's image, laid down for example in the Copyright Acts.

1. First model: No taking of photographs without consent

In France, Germany, Greece, Spain and Switzerland, the taking of an individual's photograph without his/her consent is considered a violation of his/her right to image or general personality right. This qualifies Sally's taking of a picture as unlawful, unless a specific justification applies. Such a justification may be based on the person's notoriety (see IV. below), the public or professional nature of the activity attended by the person photographed (see V. below) or the publicity of the premises where the photograph has been made (see 2. below). Where these circumstances allow the unauthorised publication of photographs (see III. below), they also allow the taking of photographs without the consent of the person portrayed.

2. Second model: Photographs can be taken in public places without consent

Under Austrian, Belgian, Dutch, Finnish, Italian, Portuguese, English, Scots and Irish law, a person can, in principle, be photographed in a public place without his/her consent. No distinction is made in this regard between famous and non-famous persons.

The principle of being photographed in a public place without consent may be subject to exceptions regarding the special circumstances under which the photograph has been taken. In Finland, Sally would only act wrongfully if the requirements of the crime of defamation are met. This would be the case, for example, if someone

is photographed under ‘humiliating or awkward circumstances’, for example being drunk and sleeping in the street. The results will be similar in the Netherlands and Portugal, although coming from a different legal standpoint. In these countries, the taking of a photograph could be considered a violation of personality rights under exceptional circumstances.

In England, Scotland and Ireland, established case law does not prevent the mere taking of a person’s photograph in a public place. Photographs seem to be treated differently to films. In an English case where a person had secretly filmed another person, the judge found a breach of confidence on the ground that it was not open to those who were subject of the filming to take any action to prevent it.¹³¹ However, it is difficult to understand why the same reasoning should not be extended to the taking of photographs. It is also arguable that the traditional English approach to photographs of persons taken in public places probably does not comply with the Human Rights Act. At least in cases of harassment by the photographer in the sense of the Code of Practice of the Press Complaints Commission (clause no. 4), the taking of the photograph could hardly be deemed lawful. Furthermore, according to the Data Protection Act 1998, the person photographed has a right to be informed about which pictures or data are being processed. Exemption from the data protection rules is only provided for specific categories of journalism and library work. On the facts of this case, none of these exceptions applies, thus Sally could be considered in breach of a statutory duty because she failed to process X’s data properly.

In addition, in Italy, the Data Protection Code seems to bar the taking of photographs without the authorisation of the person portrayed. The processing of personal data always requires a person’s consent. Exemptions are only provided for journalists, or for data gathered by a natural person in the course of a purely personal activity. The latter exemption may apply to Sally. However, traditionally, Italian courts have dealt with cases of this kind not in terms of data protection law but in terms of copyright law. The Italian Copyright Act 1941 only prohibits the dissemination of the photograph not the taking thereof as such.

3. *Interim account*

To summarise, the mere taking of a photograph of X in public would be allowed in Austria, Belgium, Finland, Italy, the Netherlands, Portugal

¹³¹ *R. v. William Loveridge and Others* [2001] 2 Cr App R 29, 591 at 599, per Lord Woolf.

and under English, Scots and Irish law. In this regard, it is irrelevant whether X is famous or not. On the contrary, in France, Germany, Greece, Spain, Switzerland (and possibly under the English Data Protection Act), the taking of X's photograph is in principle unlawful. Exceptions may be made if X is a celebrity or he is attending a professional activity.

III. Publication of photographs

With regard to the publication of photographs of an individual taken *with or without* his/her consent, a distinction can be made between three models: the European continental civil law, the common law and the Nordic law.

1. *The continental European model*

The continental European model focuses on the principle of consent. A person's image can only be published with his/her authorisation, unless a specific justification applies. A first question may be raised concerning what 'a person's image' is. A distinction is commonly made between pictures actually focusing on a person and topical portraits, i.e. pictures of places or events not focusing on the individual persons who happen to be there. In general, the principle of necessary consent only applies to pictures focusing on a specific person. French case law has sometimes followed a stricter rule: when persons occasionally photographed in topical portraits are identifiable, their consent will also be necessary. A similar rule seems to be followed in the Netherlands, where a person's photograph is considered a portrait in the sense of the Copyright Act if the facial features are recognisable.

In relation to the patterns of solution of the present case, the continental European private laws may be divided in two main groups:

- (a) In Belgium and France, neither personality rights nor specific statutory exemptions seem to govern this case. The Belgian Copyright Act of 1994 simply prohibits the reproduction and publication of a person's image without his/her express consent. The absoluteness of this rule is softened by case law regarding presumptions. In particular, the consent of persons photographed in public places will always be presumed. In French case law, the 'incidental position' of the portrayed person in the picture, his/her public function or notoriety, his/her being photographed in a public place, attending a professional activity, etc. are circumstances which may justify publication without the person's consent, but only if these occur cumulatively. None of these criteria alone will be sufficient.

- (b) In Austria, Germany, Greece, Italy, the Netherlands, Portugal, Spain and Switzerland, personality rights and/or special statutory provisions play a decisive role in the solution of this case. Within this group of countries, a distinction can be made between three models.

In Germany, Italy, Portugal, Spain and Switzerland, specific statutory exemptions to the principle of necessary consent are provided in the Civil Code (Portugal), in Copyright Acts (Germany and Italy), in Data Protection Acts or Codes (Italy and Switzerland) or in other special statutes (Spain). These provisions allow publication without the consent of the person portrayed in consideration of his/her notoriety and social position, his/her presence in a public place, his/her involvement in facts of public interest, or other reasons, for example of policing, administration of justice, science, culture and education. However, if one of these exemptions applies, this does not automatically make an unauthorised publication licit. Even if these requirements are met, a publication may be deemed unlawful on the grounds of violation of personality rights, in particular the right to privacy. Thus, a balancing between personality rights and the public interest will always be needed.

Furthermore, in Austria and in the Netherlands, this case will be solved by a personality rights-based balancing embedded in the interpretation of Copyrights Acts. However, the Austrian and Dutch Copyright Acts follow a significantly different pattern than those in Germany and Italy. They are based on general clauses declaring that the use of a person's portrait without his/her consent is unlawful when it infringes his/her 'reasonable' or 'legitimate interests'. In Austria, this requirement is met in cases of violation of privacy and other personality interests, unless the latter are outweighed by conflicting interests such as free speech or the right to be informed. In the Netherlands, the scope of personality protection is narrower: photographs taken in public places may always be published unless they are indecent or harmful to the honour or safety of the person portrayed.

In Greece there is no detailed statutory regulation of the use of one's image. However, the Greek solution to this case very much resembles the common pattern outlined above: The publication of a person's photograph without his/her consent constitutes a violation of his/her personality right, which has to be balanced against freedom of the press and the public interest, taking all the circumstances of the case into account.

2. *The common law model*

According to the traditional common law approach there is no right to prevent the reproduction and publication of photographs in which one does not own the copyright. However, the Human Rights Act requires the protection of privacy interests and case law in both England and Scotland pursues this protection through the equitable doctrine of breach of confidence. The principle has been established that even in public places there may be a reasonable expectation of privacy. A balance is to be struck between privacy and freedom of expression taking all the circumstances of the case into account, in particular the public interest in the photographic information. The more intimate the aspect of private life interfered with, the more serious the reason for interference must be before the personal information can be brought to the attention of the general public.

Despite the existence of a constitutional right to privacy in Ireland, traditionally the regulation of this area has mirrored developments in the UK. However, the introduction of the European Convention on Human Rights Act in 2003 might lead to an expansion of the scope of the right to privacy to encompass the reproduction and publication of photographs in circumstances similar to the case before us.

3. *The Nordic model*

The perspective of the Nordic countries such as Finland is strongly focused on criminal law. In this case, tort liability only arises when the publication of the photographs meets the requirements of the crime of defamation. Otherwise, pictures taken in public places can always be published without the consent of the persons portrayed.

IV. Notoriety of the photographed person

In all legal systems considered, celebrities or other public persons enjoy less protection than ordinary citizens. This is due to the greater public interest in information about protagonists of public life.

In Germany, Italy, Portugal, Spain and Switzerland, the position of the portrayed person in public life finds express consideration in the above-mentioned statutes regulating the use of one's image, as a reason for exemption from the consent requirement. In Germany, starting from an interpretation of the notion of '*situations of contemporary history*' (§ 23 Artists' Copyright Act 1907), scholars and courts have developed the concepts of '*absolute*' and '*relative persons of contemporary history*'.

All legal systems under scrutiny acknowledge that even a person who constantly puts themselves in the public spotlight should be entitled to legal remedies against the publication of photographs which violate his/her privacy (see II.1.) or seriously damage his/her honour and reputation. This is the absolute minimum of personality protection. In Finland, protection against the dissemination of photographs of celebrities taken in public ends here. Most countries go a step further and bar at least the publication of pictures which are embarrassing, indecent or concern a person's most intimate sphere (e.g. nude photographs). In Germany, the Netherlands and Portugal, the protection of notorious persons in public ends here. In the end, a common core may coincide with the recent outcomes of the English case law on privacy: even public figures shall be protected in situations where there is a reasonable expectation of privacy, no matter whether the photographs are taken in the private sphere or in public places.

The question most relevant in practice is to what extent the public interest in information on celebrities justifies the publication of photographs taken of their private and family life outside their home. In the light of the ECtHR judgment in the *von Hannover* case,¹³² it should be questioned how far the traditional approaches of the legal systems considered conform to Art. 8 ECHR. Both issues will be dealt with in Case 8.

V. Persons photographed at work or attending private affairs

In many countries, the outcome of this case may vary according to whether X is photographed at work or attending his private affairs. In general, less protection is accorded to the former situation. In most countries, the mere fact that X is photographed at work will not alone justify publication. It is just one of the elements relevant for the balancing of conflicting interests.

Under Spanish law, the taking and publishing of photographs from X's private life is normally unlawful. Photographs of X at work will always be allowed where X is a civil servant or public figure only. In Switzerland, photographing a person at his or her workplace will be considered an invasion in this person's private sphere, which is in principle unlawful.

In other countries, the solution is less clear-cut. In Germany and Italy, if X exercises an official function connected with the public place

¹³² *Von Hannover v. Germany* (2005) 40 EHRR 1.

where he is photographed (e.g. a palace guard), the taking and publication of photographs may be allowed even when the pictures specifically focus on X. In Germany, this result is based on the assumption of the tacit consent of the person photographed. This tacit consent however will not legitimate commercial publication of the photograph. (The problems of commercial exploitation of one's image will be dealt with in Case 10.)

Under current Irish law, it would not make much difference whether X is photographed at work or attending private affairs. In both situations, X will probably not have any claim, neither under the doctrine of breach of confidence nor under copyright law. Time will tell whether the European Convention on Human Rights Act 2003 will encourage Irish courts and legislature to develop privacy protection in a similar manner to that of the ECtHR in the *von Hannover* case.

VI. Remedies

If Sally's taking of the picture is deemed unlawful, in all legal systems considered X will be able to claim both damages and injunction.

Damages will be mostly for both pecuniary and non-pecuniary loss. In Greece, only non-pecuniary losses are recoverable. In the Netherlands, the amount of pecuniary damages coincides with the profits earned by Sally from the publication.

In England and Scotland, X can claim damages both under the law of confidence and under the Data Protection Act: the awards will be cumulated. An injunction against publication will not be readily granted.

In Finland, an unusual system of remedies is provided for in situations where X is photographed at work and the picture is used for commercial purposes. These cases are regulated by the Finnish Act on Unfair Business Practices. In such situations, X can claim for an injunction before the Finnish Market Court, but he can sue for damages before the ordinary civil courts. Pure economic loss is only recoverable if there are 'especially weighty reasons for compensation'.

11 Case 8: A paparazzo's telephoto lens

Case

With a strong telephoto lens, a paparazzo took a photograph of a famous princess, sitting in the garden of her private villa together with her new lover and her little son. The picture was published on the cover of a tabloid, under the heading: 'The Princess' New Family'.

- (a) Can the princess skim off the profits that the magazine earned due to the publication of her photograph? If yes, is the magazine under a duty to disclose the necessary information?
- (b) Would it make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant?

Discussions

Austria

I. Operative rules

Taking a photograph with a strong telephoto lens could qualify as an intrusion into the princess' right to privacy and intimacy, which may entitle the princess to sue the paparazzo for the forbearance of the further taking of photographs, destruction of the negatives and compensation of damage. She may also sue the owner/publisher of the magazine for damages, but this will not include skimming off the magazine's profit.

II. Descriptive formants

The OGH pointed out in the '*Vranitzky* case' that even public figures have a right to privacy and intimacy.¹ The princess sitting in the garden

¹ OGH MR 1997, 28; cf. also Cases 1 and 7.

of her private villa (situation (a)) or in the back garden of a countryside restaurant (situation (b)) with her new lover and her little son are both private acts. Consequently, the cover photograph is a sufficient intrusion *per se*. This follows from the ECtHR's ruling in the case of *von Hannover v. Germany*.²

Where there is fault, economic loss would be compensated under § 1295 ABGB or § 87, subs. 1 *UrhG*. A claim for compensation of non-economic loss against the owner/publisher could be (independent of any culpable behaviour) based on § 7 *MedienG* or (as a fault-based claim) on § 87, subs. 2 *UrhG*; according to the OGH, the latter provision applies in cases of severe intrusion only.³

The paparazzo's actions are also unlawful. Taking photographs with a special telephoto lens in intimate situations is an invasive act conflicting with the princess' right to privacy pursuant to § 1328a ABGB⁴ or pursuant to Art. 8 ECHR in connection with § 16 ABGB. In addition, one has to bear in mind that the paparazzi earn a lot of money for photographs of this kind. As Koziol recently argued, the defendant's profits are not only subject to skimming off ('*Gewinnabschöpfungen*'),⁵ but may also contribute to the determination of the scope of tortious liability and the recoverability of losses. The higher the defendant's profits, the more extensive his responsibility is.⁶

Both elements together, namely the offensive way in which the paparazzo took the photograph in question and his profits, may be sufficient grounds to constitute the tort of intrusion into the princess' right of privacy.

There is no court judgment in Austria establishing a claimant's right to skim off the profits of newspapers or magazines as, for example, under German or English law. Skimming off profits under Austrian law would presumably be a question of unjust enrichment and not one of torts.⁷

² ECtHR MR 2004, 246 *et seq.*; *cf.* also Case 7.

³ See Case 7.

⁴ This provision can only be applied to the taking of the picture, but not to the publication in the magazine (see § 1328a subs. 2 ABGB; *cf.* also Cases 5 and 7).

⁵ *Cf.* C. -W. Canaris, 'Gewinnabschöpfung bei Verlust des allgemeinen Persönlichkeitsrechts', in *Festschrift für E. Deutsch zum 70. Geburtstag* (Cologne/Berlin/Bonn/Munich: 1999) 85; G. Wagner, 'Geldersatz für Persönlichkeitsverletzungen' (2000) *ZEuP* 200.

⁶ H. Koziol, 'Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement', in *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydlinski* (Vienna: 2002) 192.

⁷ See Case 7. In the context of the unauthorised use of personality aspects of famous persons for advertising purposes the OGH granted a hypothetical licence fee under the law of unjust enrichment (*cf.* the remarks in Cases 10, 11).

The tort of invasion of privacy under Austrian law which was alleged above is based on the violation of protective rules. In this respect the compensation of economic loss is not a problem: Under § 1295, subs. 1 ABGB the princess may sue the paparazzo for damages for economic loss. Moreover, this claim could also be based on § 1328a ABGB.

In respect of non-economic loss, the princess has a claim for compensation against the paparazzo according to § 1328a ABGB. However, this loss is only eligible to be compensated in cases of serious infringement. This precondition is expressly stipulated in § 1328a ABGB.⁸

Belgium

I. Operative rules

In both cases, the paparazzo will need the consent of the princess to publish her photograph. She will be able to skim off the profits earned by the magazine.

II. Descriptive formants

The princess can skim off the profits earned by the magazine. Unauthorised commercial exploitation of a person's image deprives him/her of the possibility to exploit the image him/herself. The loss will be compensated as economic loss. In the absence of standard measures, the economic loss will sometimes be estimated *ex aequo et bono*.⁹ Mostly, it will be estimated *in concreto*. Damages will be awarded according to the going rate for publishing similar photographs.¹⁰

The outcome is the same if the princess was sitting in the back garden of a countryside restaurant. The paparazzo will not need the consent of the princess to take the photograph. However, he will need her express consent if he wants to publish her photograph in a magazine.¹¹

Freedom of the press has to be weighed against the right to privacy. The Belgian *Cour de Cassation* has decided that the press must try to seek the truth and at the same time must try to protect an individual's private life and cannot publish articles that are unnecessarily damaging.¹² Those considerations are also valid for public persons, who also enjoy the right to privacy. Members of the royal family, for example, can claim the right to privacy.¹³

⁸ Cf. Case 5.

⁹ CA Brussels 4 Oct. 1989, RW 1989-90, 651, note by D. Voorhoof.

¹⁰ Civil court Bruges 7 Nov. 1995, *Ing. Cons.* 1996, 23; Civil court Brussels 16 Nov. 1999, AM 2000, 117.

¹¹ See Case 7. ¹² Cass. 13 Sept. 1991, RW 1991-92, 464.

¹³ Brussels 25 Nov. 1981, JT 1982, 275.

Belgian case law has nevertheless laid down particular standards for public persons. It is accepted that persons can be categorised, so that, for example, politicians must take more criticism than magistrates because they are in a better position to defend themselves in the press.¹⁴ A further relevant factor is whether the criticism is connected to someone's public position.¹⁵ For example, the criticism of a politician who was a member of the committee of inquiry for the *Dutroux* case was allowed. The press reports written about this politician were correct and only concerned his activities in this committee.¹⁶

Notwithstanding the criminal prosecution of the photographer, the princess is entitled to damages for invasions of her right to image and to privacy. It is thus possible to sue for damages without having to prove the conditions under Art. 1382 of the Civil Code. Damages indemnify non-economic loss. The *Cour de Cassation* decided that emotional damages should compensate and repair pain, distress or other non-economic loss.¹⁷ Until recently, the amount of compensation was usually estimated *ex aequo et bono* to be a nominal amount (€1). Since then, larger amounts of compensation have been awarded on obscure grounds.¹⁸ At any rate, a certain nominal sum will be awarded for the mere invasion of the personality right. The amount varies and also depends on the fault of the paparazzo.

England

I. Operative rules

The claimant will probably have a claim for breach of confidence in both situations but that will depend on the exact facts of the case. In principle, restitutionary damages are available for breach of confidence.

II. Descriptive formants

1. Substantive law

(a) Trespass Generally speaking, the tort of trespass forbids intrusion onto private property. However, this only applies where the tortfeasor has entered the private property. If the paparazzo has taken the picture

¹⁴ Brussels 5 Feb. 1990, RW 1989–90, 1464.

¹⁵ D. Voorhoof, *Handboek mediarecht* (Brussels: 2007) 136 *et seq.*

¹⁶ Civil court Brussels 21 Sept. 1999, AM 2000, 334.

¹⁷ Cass. 3 Feb. 1987, Arr. Cass. 1986–87, 724.

¹⁸ E. Guldix and A. Wylleman, 'De positie en de handhaving van persoonlijkheidsrechten in het Belgisch privaatrecht' (1999) TPR 1625 at 1651.

from outside the limits of the princess' private grounds no action can be taken under trespass.¹⁹

(b) Breach of confidence The paparazzo's conduct would, however, constitute a clear breach of confidence under the reasonable expectations test.²⁰ The reasonable expectation of privacy will usually be present if the act complained of takes place within a secluded private property.

In principle, freedom of the press and Art. 8 ECHR would have to be weighed against each other in order to determine which right prevails in this instance. However, in the present case, freedom of expression cannot outweigh the breach of confidence. Particular attention should be paid to the Code of Practice of the Press Complaints Commission (PCC). According to s. 12 (4)(b) HRA 1998, any relevant privacy code has to be taken into account. The most prominent code in this particular field is the PCC Code.²¹ Under clause 3(2), it is unacceptable to photograph individuals in a private place without their consent.

2. Remedies

Breach of confidence is an equitable remedy. Thus, restitutionary damages are awarded by the courts.²² For example, in the *Spycatcher* case, the House of Lords held that the profit, in equity, belongs to the owner of the information.²³ However, this may be different when the defendant has not realised that he/she was breaching the claimant's confidence.²⁴ In *Peter Pan v. Corsets Silhouette*, Pennycuik J recognised that the claimant company whose brassieres were manufactured by the defendant company through a breach of confidence could claim

et seq. and A. van Oevelen, 'Schade en schadeloosstelling bij de schending van grondrechten door private personen', in K. Rimanque (ed.), *De toepasselijkheid van grondrechten in private verhoudingen* (Antwerp: 1982) pp. 438–39.

¹⁹ *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] QB 479.

²⁰ For the requirements of breach of confidence, see the answer to Case 2.

²¹ The current version dates from Sept. 2009 and is available at www.pcc.org.uk/assets/111/Code_A4_version_2009.pdf. See also *Mills v. News Group Newspapers Ltd* [2001] EMLR 41, 957, at 969.

²² For a detailed analysis of restitutionary damages for breach of confidence, see G. Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 *Law Quarterly Review*, 463 at 473 *et seq.*

²³ *Attorney-General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, at 262, per Lord Keith of Kinkel.

²⁴ See *Seager v. Copydex Ltd* [1967] 2 All ER 415, with an analysis in G. Jones, 'Restitution of Benefits' at 475 *et seq.*

an account of the profits made from the offending brassieres in question, not just from the use of the claimant's patterns and information.²⁵ Compensatory damages were awarded in *Douglas v. Hello!*²⁶ where the damage was the competitor magazine's loss of circulation. Damages would also be available for distress. These would usually be quite modest, although perhaps more than in *Douglas* as in that case the claimants had already agreed to make their wedding photographs public and it was only the medium that was the subject of the litigation.

3. Disclosure

The princess could seek an order for disclosure under r. 31 of the Civil Procedure Rules, under which disclosure can be withheld on grounds of privilege and public interest. The defendants would have to persuade the judge of any reasons why disclosure was not appropriate.

(b) Would it make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant? It would not necessarily make a difference, depending on the circumstances. If the princess was aware that she was courting publicity through her excursion to the countryside restaurant, there would be no right of privacy. If she was going to an entirely unknown and hidden place, the situation may be different. There is no restriction of confidentiality of private property.²⁷ English courts have recently frequently referred to the ECtHR case of *von Hannover*,²⁸ although the Court of Appeal indicated that it was 'far from clear that the House of Lords that decided *Campbell* would have handled *von Hannover* in the same way as did the ECtHR'.²⁹

This has also been recognised in Clause 3 of the Code of Practice of the Press Complaints Commission, which explains that 'private places' may include public property where there is a reasonable expectation of privacy.

²⁵ *Peter Pan Manufacturing Corp v. Corsets Silhouette Ltd* [1963] 3 All ER 402, with an analysis in G. Jones, 'Restitution of Benefits' at 486 *et seq.*

²⁶ *Douglas v. Hello!* [2004] EMLR 2.

²⁷ See also *Venables v. News Group Newspapers Ltd and Others; Thompson v. News Group Newspapers Ltd and Others* [2001] Fam 430, at 462.

²⁸ Court of Appeal in *Douglas and McKennitt*; High Court in *McKennitt and HRH Prince of Wales*.

²⁹ [2006] EWCA Civ 1714, at para. 39.

Finland

I. Operative rules

The princess cannot skim off the profit earned by the magazine. The situation is the same in both situation (a) and in situation (b).

II. Descriptive formants

According to Ch. 24, s. 6 of the Finnish Penal Code,³⁰ it is a crime to take pictures of a person, without that person's consent,³¹ in a place which is protected as that person's domicile, which also includes the garden.³² According to the same provision under Ch. 24, s. 6, the crime can also be committed in a semi-public place, e.g. a restaurant or the garden of a restaurant, if the observation of a person can be considered a violation of the privacy of that person. Whereas the client of a restaurant is normally allowed to take pictures in the restaurant in such a manner that other guests are also included in the picture, it is clearly unlawful for a paparazzo to take pictures of guests from outside the restaurant or the garden of a restaurant.³³ A public person, e.g. a princess, also has a private sphere, which can be violated, although this private sphere is narrower than the sphere of an ordinary person.

It is also possible that the publishing of the photographs constitutes a defamatory act according to Ch. 24, s. 9 or 10 of the Finnish Penal Code. If so, the case is judged as in Case 1.

Although it is a crime to take photographs of private persons in private surroundings, the victim, i.e. the princess, is only entitled to damages for the personal loss suffered, which is not related to the profit earned by the magazine. Instead, the profit of the magazine can

³⁰ S. 6 reads as follows: '*Illicit observation* (531/2000)(1) A person who unlawfully watches or monitors with a technical device (1) a person in domestic premises, a toilet, a dressing room or another comparable place, or (2) a person in a building, apartment or fenced yard that is closed to the public, as referred to in s. 3, where this violates the person's privacy, shall be sentenced for *illicit observation* to a fine or to imprisonment for at most one year. (2) An attempt is punishable.'

³¹ If the picture is taken and used, e.g. published, with the person's consent, the use of the picture for another purpose can constitute a crime according to the Finnish Penal Code Ch. 24, s. 8. This was the situation in Supreme Court case 1980 II 123, where a photograph of a shopkeeper was taken and published in connection with food prices. When the picture was used in a political advertisement by a student without the consent of the shopkeeper, the student was found guilty and was obliged together with five political associations to pay damages of 5.000 FIM (€841).

³² Government Bill 184/1999 p. 29. ³³ *Ibid.* at p. 31.

be forfeited,³⁴ i.e. according to Ch. 10, s. 2 of the Finnish Penal Code the state has the right to the profit.

France

I. Operative rules

The princess cannot obtain an order against the journal to skim off the profits attained from the publication of her photograph.

The solution would not be different if the princess was sitting in the garden of a countryside restaurant.

II. Descriptive formants

The publication of a photograph taken with a telephoto lens of a famous princess with her family in a private place is undeniably an infringement of her right to privacy. Such an infringement certainly cannot be justified by the public's right to information and the princess has an action for damages against the magazine. It is very likely that in the determination of legal consequences a French judge would take the particularly reprehensible way in which the photograph was taken into account.³⁵

Given the circumstances of the case, the damage which must be repaired is purely non-economic. Thus, although French law readily admits the allocation of damages in reparation of non-economic loss, the lower courts hold a discretionary power in determining the amount to be awarded. They do not need to let the criteria used to measure those amounts be known. Because tort liability in French law has a purely remedial function, the amount of damages cannot be adjusted according to the gravity of fault i.e. the behaviour of the defendant.³⁶ The amount of damages has certainly increased in recent years. However, this move

³⁴ This happened in Supreme Court case 1980 II 94.

³⁵ CA Versailles 23 Sept. 1999, CCE 2000, No. 25, 23: 'to assess the harm suffered, one has to take into account (...) the fact that the contested photographs were taken with a telephoto lens and without the knowledge of the persons concerned'. - Cass. civ. 18 Mar. 2004, *Légipresse* 2004, No. 211, I, 68: this Court approved the lower court decisions in that they stressed that the photographs illustrating the article, although taken at a public demonstration, were taken with the aid of a telephoto lens and without the knowledge of the persons concerned.

³⁶ CA Paris 26 Apr. 1983, D. 1983, jur., 376: 'the award of damages is intended to repair the harm suffered and does not have to vary with the gravity of the committed fault'; CA Versailles 16 Jan. 1998, D. 1999, somm., 168: 'the allocated sum was calculated by taking a recidivism into account otherwise qualified as

towards taking a severe stance against tabloids remains semi-official.³⁷ Some scholars proposed to revert to the concept of punitive damages or at least to take the profits made by the journal into account in order to calculate the amount of damages. However, these proposals have not been accepted by the courts. The *Cour de cassation* has thus approved the decision of an appellate court which 'held that the importance of the harm suffered by M. Delon was not a function of the profit realised by the Ici-Paris company'.³⁸ The princess thus cannot obtain an order for skimming off the profits of the magazine.

If the princess had been photographed in the same manner in the presence of the same persons, however, not at home but instead in the garden of a restaurant, it is not certain that the solution of the case would be any different. The fact that the photograph has been taken in a public place is not alone sufficient to justify the absence of consent (see Case 7). It has thus recently been determined that:

it is of little importance that the photographs taken of the claimants as they were walking in the Saint-Cloud park were taken in a public place because they were taken with the aid of a telephoto lens and have been published without the authorisation of the interested parties at a moment where they could legitimately believe themselves to be sheltered from indiscreet eyes as they could see no one in front of them. The publication of these photographs is an invasion of their privacy.³⁹

Germany

I. Operative rules

The princess may claim the profits earned by the magazine if the magazine editors knew or ought to have known that the publication

"refractoriness", and the disregarding of warnings previously addressed to the editor. All these elements can characterise the intensity of a fault but not the intensity of a harm, which is the only acceptable parameter before a civil court.'

³⁷ Carval, *La responsabilité civile dans sa fonction de peine privée* (Paris: 1995) p. 32;

Montero, 'La responsabilité civile des médias', in Strowel and Tulkens (eds.), *Prévention et réparation des préjudices causés par les médias* (Brussels: 1998) p. 131.

³⁸ Cass. civ. 17 Nov. 1987, Bull. civ. I, No. 301 p. 216. See, more recently, TGI Paris 5 May 1999, D. 2000, somm., 269: 'the profits gained by the journal are unrelated to the assessment of the harm'; TGI Nanterre 27 Feb. 2001, *Légipresse* 2001, No. 182, I, 78: 'there is no reason why one should take into account the publisher's profits from the sale of the issue where the contested photograph was inserted, because the harm suffered by the claimants does not depend on the profit gained by the publisher'; TGI réf. Nanterre 12 Nov. 2001, *Légipresse* 2002, No. 188, I, 4.

³⁹ TGI Nanterre 6 Mar. 2001, *Légipresse* 2001, No. 184, I, 103; CA Versailles 23 Oct. 2003, *Légipresse* 2003, No. 207, I, 178.

was unlawful. If this is the case, the magazine must also disclose any information which is necessary to calculate its extra profit. If the magazine editors were not negligent in thinking that the publication was lawful, the princess can still demand a hypothetical licence fee for the publication of the photograph.

II. Descriptive formants

The publication constitutes a violation of the princess' right to her own image (§§ 22, 23 *KUG*). Although a princess was considered by the older German case law as an 'absolute person of contemporary history', she still enjoys a certain private sphere. This is regarded as a legitimate interest which makes the publication of a picture unlawful according to § 23(2) *KUG*. Although the boundaries of this private sphere are sometimes hard to define, one's own home and garden certainly fall within the private sphere.⁴⁰ The claim for skimming off the extra profits may be based on § 687(2) *BGB*, on § 823(1) *BGB* or on § 812 *BGB*. According to § 687(2) and §§ 681, 667 *BGB*, someone who intentionally interferes in another's affairs and treats them as his/her own is liable for the resulting profits. Unlawful use of somebody's picture is regarded as such interference.⁴¹ Intentional interference means that the editors knew that the publication was unlawful. According to § 687(2) and §§ 681, 666 *BGB*, the defendant must also account for the profits gained from the publication. For a claim for compensation under § 823(1) *BGB* it is sufficient that the editors acted negligently regarding the unlawfulness of the publication. In cases such as this where the right to one's image is violated, the plaintiff may also demand the profits gained by such a violation, including account of the profits.⁴²

Negligence is not necessary for a claim for unjust enrichment (§ 812 *BGB*). The German courts have accepted such claims in cases where

⁴⁰ BGHZ 131, 332, 336.

⁴¹ Ehmann, in W. Erman, *Handkommentar zum Bürgerlichen Gesetzbuch* (12th edn., Münster/Cologne: 2008) § 687 no. 10.

⁴² BGHZ 143, 214, 232. Note that this is not necessarily the case for violations of other personality interests which are protected under the *general* personality right. In such cases, the fact that the defendant made a profit is only one of several factors to be considered in the determination of damages for non-economic loss (if any), see BGHZ 128, 1, 16 (invented interview). The difference is explained with the idea that the right to one's image is clearly of economic value, but other personality aspects are not (H. Sprau in O. Palandt, *Bürgerliches Gesetzbuch* (66th edn., Munich: 2007), § 823 *BGB* no. 125). This distinction is not very convincing since an exclusive interview with Princess Caroline about her love life which was at issue in BGHZ 128, 1, is certainly also of substantial economic value.

someone's photograph was used without permission for advertising purposes.⁴³ Under this theory, the defendant's profits cannot be skimmed off, however the defendant owes a hypothetical licence fee.⁴⁴ Only if the defendant knew that his/her enrichment was unlawful would he/she have to turn over all profits.⁴⁵

(b) Would it make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant? This would not make any difference if the restaurant garden can be qualified as a place where privacy can reasonably be expected. An older opinion suggested that public figures cannot prevent the publication of photographs taken outside of their own home.⁴⁶ Nevertheless, even before the famous Strasbourg decision in *von Hannover v. Germany*, the German Federal Court rejected such a limitation of the private sphere by declaring that it extends to all places where someone has 'retreated into a spatial isolation in which it is obvious that he wants to be by himself and in which he acts in a way in the specific situation that he would not do in public, relying on this isolation'.⁴⁷ In that particular case, such spatial isolation was assumed in a dimly lit restaurant. The Constitutional Court accepted this formula in general,⁴⁸ but it may be criticised for its vagueness since the legality of a publication may now depend on the brightness of the light bulbs in a specific restaurant.⁴⁹

III. Metalegal formants

The increased willingness of the Federal Court to attach monetary value to certain personality rights has been criticised by a few authors who warn of inappropriate commercialism regarding personality rights.⁵⁰ They stress that although society in fact attaches market value to many – if not

⁴³ See, e.g., BGH AfP 2006, 559; NJW 1992, 2084; LG Hamburg AfP 2006, 585.

⁴⁴ BGH NJW 2007, 689, 690; see also Case 3, n. 45.

⁴⁵ Canaris, 'Gewinnabschöpfung bei Verlust des allgemeinen Persönlichkeitsrechts', in *FS Deutsch* (Cologne: 1999) 85, 91 *et seq.*

⁴⁶ K.-E. Wenzel, *Das Recht der Wort- und Bildberichterstattung* (4th edn., Cologne: 1994) no. 5.46 and 5.60; OLG Hamburg NJW-RR 1995, 790 (overruled by BGHZ 131, 332).

⁴⁷ BGHZ 131, 332, 339.

⁴⁸ BVerfGE 101, 363, 393 *et seq.*

⁴⁹ But see the thoughtful defence of the formula by J. Soehring, 'Caroline und ein Ende?' (2000) *Zeitschrift für Medien und Kommunikationsrecht* 230, 233.

⁵⁰ H. Schack, 'Anmerkung zu BGH 1.12.1999 – I ZR 49/97 – Marlene Dietrich (vermögenswerte Bestandteile des postmortalen Persönlichkeitsrechts)' (2000) *JZ* 1060; K. N. Peifer, 'Eigenheit oder Eigentum – Was schützt das Persönlichkeitsrecht?' (2002) *GRUR* 495.

all – aspects of personality, the judiciary should not simply follow this trend but should make value judgments regarding its desirability.⁵¹

Greece

I. Operative rules

The princess has a claim for compensation of non-economic harm. It is unlikely that she can skim off the profits earned by the publication of her photographs.

II. Descriptive formants

There is no ground in either Greek scholarship or court decisions to accept the pecuniary exploitation of personality's aspects, such as name, image, voice, etc. As the Supreme Court has stated, 'the claim for non-pecuniary damages exists even when a person's image is exposed for promotional reasons'.⁵²

The Greek courts have accepted that taking a photograph of a person without consent does not amount to an offence when the person depicted is a person of public importance, such as a politician, a diplomat, an artist, an athlete, etc. Therefore taking a picture of the princess, especially in a public place (restaurant) does not objectively amount to an offence *per se*.

Taking pictures of a person and displaying them publicly, without this person's consent, is unlawful, unless the pictures represent a person of public interest, a person of contemporary history, or persons who are exposed publicly.⁵³ Any use of a picture for commercial purposes without the consent of the person depicted constitutes an unlawful injury to personality. Even in cases involving public persons, the picture and its publication must not intend to present aspects of private life, unless these have to do with moments connected to his/her social role or office.⁵⁴

Ireland

I. Operative rules

The princess would not succeed in bringing an action for breach of confidence. An action for breach of privacy could be raised by the princess

⁵¹ Schack, 'Anmerkung zu BGH 1.12.1999' at 1062.

⁵² Supreme Court (Areopag) Decision 1010/2002.

⁵³ Sourlas in Georgiadis-Stathopoulos, *Civil Code – Interpretation by Article* (Athens: 1996) Arts. 57–60, no. 83. Karakatsanis, in Georgiadis-Stathopoulos, Art. 57, no. 9.

⁵⁴ Karakostas, *Personality and Press* (3rd edn., Athens/Komotini: 2000) 81–2.

and the ECtHR has recognised the existence of such a right based on facts similar to those outlined above.⁵⁵ Whether the princess would be able to skim off the profits of the magazine would depend on whether the Irish courts would recognise her action for invasion of privacy.

II. Descriptive formants

An action for breach of confidence would not succeed due to the absence of a special relationship of trust and confidence between the parties.⁵⁶ While the Irish courts have yet to recognise a breach of privacy action based on these facts, the recent judgment of the ECtHR in *von Hannover v. Germany*⁵⁷ could have important implications for the development of the law in Ireland in this regard. The princess could plead that under the European Convention on Human Rights Act 2003 the Irish courts must follow the *von Hannover* decision – possibly through the expansion of the Constitutional right to privacy – and recognise that her privacy had been invaded, thereby leading to an award of damages.

Italy

I. Operative rules

The publication of the photograph is unlawful in this case. The princess cannot skim off the profits earned by the defendant. However, she can recover damages for economic and non-economic loss.

II. Descriptive formants

Two different questions are raised by this case. The first one is related to the unlawfulness of the publication (1); the second one to the actions available to the princess (2).

(1) The publication of a photograph taken in a private place requires the prior consent of the person portrayed, otherwise it amounts to a tort (and possibly to a crime: Art. 615 *bis CP*). Protection is afforded by the right to privacy (Arts. 1-2 DPC) and the right to one's own likeness (Art. 10 CC). As already mentioned in Cases 5 and 7, both rights have limitations. According to Art. 97 CA, no consent to publication is required if the photograph relates to a public figure. However, it is a well-established principle that the particular status of the claimant is not a justification of the defendant's action *per se*. In other words, the restriction of the privacy rights of a prominent person must be

⁵⁵ *Von Hannover v. Germany* (2005) 40 EHRR 1.

⁵⁶ *House of Spring Gardens v. Point Blank Ltd* [1984] IR 611 (SC). ⁵⁷ See n. 55.

justified on the basis of society's interest in information. No 'waiver of privacy' doctrine is accepted by Italian law. To be lawful, the disclosure of private facts should pursue serious and not frivolous interests. These principles were stated by the Supreme Court for the first time in 1975, in a case entirely similar to the one discussed.⁵⁸ Princess Soraya Esfandiari was sitting in the garden of her private villa next to her new lover, the movie director F.I. With a strong telephoto lens a paparazzo took many photographs of the two talking side-by-side and also kissing each other. The photographs were published in the tabloid 'Gente'. Soraya successfully sued the publisher. For the first time, the judges recognised a right of privacy and rejected the argument that the information concerning prominent persons is a 'public good' at any rate. If privacy infringement is not aimed at satisfying a relevant informative value, then it amounts to a tort.⁵⁹

It is not unlikely – but the issue is much debated – that the result would be similar under situation (b). Assuming that the princess was sitting in a famous restaurant in Piazza Campo de' Fiori in Rome, no violation of her right to privacy or right to image could probably be found. Anyone could see the two lovers sitting side-by-side and it would be unreasonable for the princess to expect the information to be kept secret.⁶⁰ The situation would be different if the two were eating in the back garden of a countryside restaurant. Here she would have a reasonable expectation of privacy, because it is arguable that nobody could *easily* observe the two lovers. This is a typical scenario in which a public place is legally interpreted as a private one. As is well-known, the distinction between public and private cannot be described in purely spatial terms, but involves a value judgement. The private sphere can extend far beyond the walls of one's house, as the Italian Supreme Court has stated;⁶¹ on the other hand, even private occurrences can sometimes be lacking in privacy protection. As always, a balance of interests is needed. The real question is whether

⁵⁸ Cass. 27 May 1975 no. 2129, *Foro it.* 1976, I, 2895; see also Trib. Milano 17 Jul. 1982 no. 1390, *Riv. pen.* 1982, 898 (publication of a photograph of the actress Sophia Loren depicted naked in a private house).

⁵⁹ Two similar cases should be mentioned: the first one concerns Marina Doria, the wife of Prince Vittorio Emanuele di Savoia (Trib. Milano 8 Apr. 1991, *Dir. inf.* 1991, 865); the second a popular journalist and now politician, Lilli Gruber (Trib. Milano 17 Nov. 1994, *Dir. inf.* 1995, 373).

⁶⁰ See Trib. Napoli 26 Jun. 2001, *Dir. inf.* 2001, 888; Garante protezione dati 12 Mar. 1999, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) 250.

⁶¹ See Cass. 8 Jun. 1998 no. 5658, *Dir. inf.* 1999, 39 (the case concerns the television broadcast of a divorce trial).

the information to be disclosed is deemed essential to society (Art. 137(3) DPC).

The case law gives some guidelines. It has been decided that the press cannot publish the picture of a famous journalist pictured semi-nude on a desert beach in the Seychelles Islands: in these circumstances he/she has a reasonable expectation of privacy.⁶² Similarly, it is unlawful to publish the photograph of a public figure standing in front of the window and on the balcony of a hotel room.⁶³ However, even a street can on some occasions become a 'private place': a recent judgment has considered it unlawful to secretly follow two relatively famous persons and to publicise their meeting, in the absence of any relevant public interest in this information. The judge noted that gossip is not a valid justification for privacy infringements.⁶⁴ On the contrary, the publication of the photographs of a *private* wedding – held in a small church closed to the public – is not prohibited if this information is *essential* to society.⁶⁵

Applying these principles to our case, one could assume that the publication is unlawful: the information is not essential to the public and the princess has a reasonable expectation of privacy in that particular location.

(2) The princess cannot skim off all of the profits earned due to the unlawful publication of her photograph.

In matters of interference with property rights, tort law takes precedence over the law on restitution. A general rule on unjust enrichment is provided for by Art. 2041 CC, but since Art. 2042 CC provides for a principle of subsidiarity, it is up to the law of torts to deal with these situations.⁶⁶ The princess can claim compensation for any *losses* actually suffered.

According to the Elizabeth Taylor doctrine,⁶⁷ the princess should be awarded the foregone royalties for the publication of the photograph as lost profits.

⁶² Pret. Roma 15 Apr. 1988, *Dir. inf.* 1988, 458; but for a different solution, see Cass. 29 Sep. 2006 no. 21172.

⁶³ Trib. Milano 18 Apr. 1999, *AIDA Rep.* 2000, 1072.

⁶⁴ Trib. Roma 24 Oct. 2001, *Dir. inf.* 2002, 797.

⁶⁵ Trib. Roma 24 Jan. 2002, *Dir. inf.* 2002, 505: in this case, the former Minister for the Interior and President of the Italian Republic Francesco Cossiga was one of the witnesses at the wedding of a former terrorist.

⁶⁶ See, exactly on this point, App. Roma 27 May 1955, *Foro it.* 1956, I, 793 (film on Enrico Caruso's life).

⁶⁷ App. Milano 16 May 1989, *Foro it.* 1991, I, 2861; Cass. 16 Apr. 1991 no. 4031, *Nuova giur. civ. comm.* 1992, I, 45; Cass. 6 Feb. 1993 no. 1503, *Giust. civ.* 1994, I, 229; Cass., 11

In addition, she could recover damages for non-economic loss. This action could be based either on Art. 15(2) DPC (unlawful processing of personal data)⁶⁸ or Art. 2059 CC.⁶⁹

Nevertheless, it should be noted that restitutionary elements could play a significant role in the determination of the *amount* of damages. According to Arts. 1226 and 2056 CC judges have discretionary power in the assessment of damages where the exact amount cannot be ascertained. Sometimes they make use of this power in order to strengthen the deterrence function of the remedy: it happens that both the value of the asset misappropriated *and* the infringer's gain are taken into account as a basis for the calculation of damages. As a consequence, part of the profits gained by the defendant may be reallocated to the claimant, understood as damages.⁷⁰

III. Metalegal formants

According to some scholars this approach is dogmatically and practically unsatisfactory.⁷¹ In a typical damage action the claimant seeks redress for the harm suffered, whereas in the interference situation there is no 'harm' other than a reduction of the claimant's right to the exclusive enjoyment of his/her property. In these cases, the tortious scheme cannot work properly and should be abandoned in favour of

Oct. 1997 no. 9880, *Foro it.* 1998, I, 499; see also recently Trib. Milano 17 Nov. 2005, AIDA 2006, 534; Trib. Torino 2 Mar. 2000, *Resp. civ. prev.* 2001, 174; Trib. Roma 23 May 2001, *Dir. inf.* 2001, 881.

⁶⁸ See e.g. Trib. Milano 13 Apr. 2000, *Dir. inf.* 2000, 371; Trib. Orvieto 23 Nov 2002, *Dir. inf.* 2003, 333; Trib. Roma 10 Jan. 2003, *Dir. inf.* 2003, 532; Trib. Roma 22 Nov. 2002, *Dir. inf.* 2003, 525; Trib. Roma 12 Mar. 2004, *Danno e resp.* 2005, 879.

⁶⁹ This according to the new construction of this provision adopted by the *Corte di cassazione* in 2003. See Cass. 29 May 1996 no. 4993, *Foro it.* 1996, I, 2368; Cass. 7 Nov. 2000 no. 14485, *Giur. it.* 2001, 136. For a recent confirmation of these principles see Cass. 11 Jul. 2005 no. 34100, *Guida al diritto* 2005, 42, 84.

⁷⁰ This becomes clear when one looks at the amounts recovered by Marina Doria (Trib. Milano 8 Apr. 1991, *Dir. inf.* 1991, 865) and Lilli Gruber (Trib. Milano 17 Nov. 1994, *Dir. inf.* 1995, 373) in the two cases discussed above (see n. 59 above): the princess Marina Doria was awarded about €100,000, the journalist Lilli Gruber about €50,000. One can conclude that no restitutionary claim is available to the claimant, but the action for damages works (sometimes) as a proxy. For an overview of the monetary rewards allocated by the courts in Italy, see E. Borrelli, 'La quantificazione del danno per violazione del *right of publicity*' (1996) *Danno e resp.* 166.

⁷¹ See P. Sirena, *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto* (Torino: 1999) 277 *et seq.*; cf. also the general remarks by C. Castronovo, 'La violazione della proprietà intellettuale come lesione del potere di disporre. Dal danno all'arricchimento' (2003) *Dir. ind.*, 7.

restitutionary actions. It is argued (applying the provisions on *negotiorum gestio*) that the defendant could be obliged to turn over all of the profits unjustly gained if he/she knew that the enrichment was unlawful.⁷² Useful indications could be now taken from the new Industrial Property Code, which expressly provides for restitutionary actions (see Art. 125).

The Netherlands

I. Operative rules

In situation (a), if the publication of the pictures is unlawful, the princess is entitled to damages, including the skimming off of profits earned due to the publication. In situation (b), the princess does not have a claim.

II. Descriptive formants

In this case a distinction has to be made between the (un)lawfulness of the way in which the paparazzo gathered the information, e.g. took the picture, and the (un)lawfulness of the publication of the picture.

The standards of Art. 6:162 *BW* apply with regard to the way the press gathers its information.⁷³ The method of gathering information can be a breach of a statutory duty. Relevant provisions are Arts. 138 and 139f *Sr* (Penal Code), regulating the protection of domestic peace and quiet against trespass/intrusion and, furthermore, the situation in which the act of trespassing is used to take a picture. If the method of gathering information is contrary to these provisions, the act is unlawful. If this is not the case, in line with the spirit of Arts. 138 and 139f *Sr*, in respect of the private law situation between the paparazzo and the princess, a duty of care can exist which results in the method of gathering the information being deemed unlawful. An important factor is whether the situation in which the person was photographed is private in the sense that he/she may assume that he/she is not being photographed. If, in contrast, the place is public or not private in a way in which one may assume that one is not being photographed, there is no duty to refrain from photographing that person. In the instant

⁷² P. Sirena, *La gestione di affari altrui* at 278; *id.*, 'Lo sfruttamento commerciale abusivo dell'immagine altrui', in *Annuario 2001 della L.U.M.S.A.* (Rome: 2001) 76; see also P. Trimarchi, 'L'arricchimento derivante da atto illecito', in *Scritti in onore di R. Sacco*, II (Milan: 1994) 1149 at 1157; P. Vercellone, 'Diritti della personalità e "rights of publicity"' (1995) *Riv. trim. dir. proc. civ.* 1163, 1173.

⁷³ Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 84.

case, the princess' assumption that she is in a purely private situation is only reasonable if the place in which she was pictured is very difficult to access and if it is clear that the paparazzo had to take complex actions to photograph her. Although the princess is a public figure and has to accept that her privacy is more limited than that of non-public figures,⁷⁴ she also has the right to protection of this relatively limited privacy. Outside this area, the princess has to be aware of the fact that she is a person in which the public is interested and for that reason people will do their best to take pictures of her.

Although the way in which the picture has been taken might be unlawful and therefore actionable as such (for instance through an injunction), the princess' interest in an action has to be regarded as pertinent if the picture is published. If her facial features are recognisable, the picture is a portrait. If this is the case, Art. 21 *Auteurswet* applies. As described in Case 7, in light of the 'reasonable interest' requirement, the interests of the princess and the interest of the photographer and the general interest in being informed have to be balanced. In this case, the princess' interest, in particular in the protection of her private life, is at stake. Whether this interest outweighs the other interests depends on the situation in which she was pictured (very private, semi-private or public) and on the question whether she herself already went public with her 'new family' or has had pictures of her 'new family' taken and published. If that is the case, the general interest in being informed about the life of the princess will outweigh the interest of the princess.

If the publication of the pictures is unlawful, the princess is entitled to damages, including the skimming off of profits earned due to the publication (Art. 6:104 *BW*) (see Case 1). Art. 6:104 *BW* only applies if the injured party actually suffered loss. If someone is infringed in his/her person, there is non-economic loss and so this person has the possibility of applying Art. 6:104 *BW*. However, if the financial interest was the reason for the unlawfulness of the publication, it has to be proved that this interest was indeed harmed.

Art. 6:104 *BW* does not provide the injured party with a right to have the wrongdoer turn over his/her entire profits. It provides that the judge can assess the damages on the basis of the net profits. The judge is not entitled to assess the damages in this (abstract) way unless he has

⁷⁴ HR 4 Mar. 1988, NJ 1989, 361 (De Bourbon Parma); Schuijt, *Losbladige Onrechtmatige Daad* no. 111.

been asked to do so by the injured party and the injured party based this request on facts. The victim does not have to prove the amount of profits. This implies that the judge needs information from the wrongdoer about the net profits. Although there is not a clear duty on the part of the wrongdoer to unveil information about profits, without this information the judge will assess the profits according to insights based on the information which is available.

(b) Would it make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant? From the above answer it can be derived that a claim only exists if the picture has been taken in a private situation. A restaurant is a public place in which the princess has to take into account that she may be photographed. A picture of her having a meal with her 'new family' does not infringe her right to privacy in a way which constitutes a reasonable interest in the sense of Art. 21 *Auteurswet*.

Portugal

I. Operative rules

The princess would most likely not be able to skim off the profits the magazine earned, regardless of whether she was at her home (hypothesis (a)) or in the back garden of a countryside restaurant (hypothesis (b)).

II. Descriptive formants

The taking of the photograph, followed by its publication, is unlawful and infringes the rights to image (Art. 79 CC) and to privacy (Art. 80 CC⁷⁵), as previously referred to in Cases 5 and 7. It is also considered a crime (Art. 199 CP). In addition, according to the *LI*, the freedom of the press has to respect the right to image and to privacy (Art. 3) and, as the *EJ* establishes, journalists should not gather images or declarations which may harm someone's dignity (Art. 14, para. f)). Finally, Art. 29(1) *LI* determines that cases of civil responsibility arising from wrongful acts committed through the press shall be solved according to the general civil responsibility rules.

Following the celebrated Princess Caroline cases, there has been a tendency to allow the possibility of 'skimming off' the profits earned

⁷⁵ Art. 80 (Right to privacy in respect of the intimacy of private life):

Everyone must respect the privacy of the intimacy of the private lives of others.

The extent of this privacy is defined in accordance with the nature of the case and the condition of the persons.

by the magazine through its unlawful actions. In general, it can be said that there is no autonomous reference to punitive damages in Portuguese law. However, some leading authors admit an exception to the traditional strictly compensatory nature of civil liability and make brief references to the punitive function of civil responsibility. The introduction of this concept in Portugal has had very few repercussions until now and there are no court rulings, to our knowledge, accepting a solution of this kind. Even if some authors recognise a punitive function to civil responsibility, punitive damages can only be awarded when and as far as there are actual material and/or moral damages.⁷⁶ If the court was to decide to award punitive damages and required information from the newspaper regarding the amount of the profits earned from publication, it could order the newspaper to provide the necessary information either of its own initiative or at the request of the victim. The newspaper cannot refuse to provide such information.

If the princess was sitting in the back garden of a restaurant, rather than at home, the difference would not be decisive. The injury to her personality would only be of a less serious degree, as the location where the photograph was taken would then be less private, although not completely public. Nonetheless, there would be a breach of her personal privacy and an unlawful use of her image. In any case, the princess would most likely not be able to skim off the profits the magazine earned, no matter where she was when the picture was taken (hypothesis (a) or (b)).

Scotland

I. Operative rules

The princess will be awarded an interdict against further intrusion and pursuit by the paparazzi in relation to taking photographs of her within her private sphere, together with damages for solatium on proof.

II. Descriptive formants

The scene described here reflects the Princess Caroline of Monaco litigation decided by the German Federal Supreme Court (BGH) in *Caroline von Monaco II/III*,⁷⁷ as expanded by the ECtHR.⁷⁸ Relying on the

⁷⁶ STJ 29.04.2002. ⁷⁷ BGH NJW1995, 861 Caroline; NJW 1996, 984.

⁷⁸ *Von Hannover v. Germany* (2005) 40 EHRR 1.

authority of the pre-HRA European decision *Earl and Countess of Spencer*, concerning a paparazzi long lens intrusion claim,⁷⁹ as followed by the long line of case law developing since *Douglas v. Hello!*,⁸⁰ claims for breach of confidence and breach of privacy are likely to be recognised in Scotland as they are in England. Although Sedley J at first instance in *Douglas* came down in favour of a fully fledged right to privacy,⁸¹ the House of Lords has not pronounced conclusively on the matter. Given the statutory basis to privacy, the Scottish courts will certainly take the English decisions into account. Generally, the sustainability of a claim of infringement of privacy will depend on the individual circumstances: whether intrusions are within the private home or garden, etc. will be of importance in the final assessment.⁸² Scots law, unlike England, has no tort of trespass.⁸³

Should the princess be sitting in a public place, then the general presumption against a private situation within the public sphere would apply, unless it is obvious from the circumstances that she was seeking privacy. The actual balance in the individual case can only be determined on the facts:

in the majority of cases the question of whether there is an interest capable of being the subject of a claim for privacy should not be allowed to be the subject of detailed argument. Certain facts relating to the private lives of public figures ... may be of interest to citizens and it may therefore be legitimate for readers to be informed ... The advantage of not having to distinguish between acts which are public and those which are private in a difficult case are made clear by what Gleeson CJ had to say on the subject in *Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd*.⁸⁴ 'There is no bright line that can be drawn

⁷⁹ *Earl and Countess of Spencer v. UK* [1998] 25 EHRR CD 105.

⁸⁰ The High Court proceedings in *Douglas v. Hello!* [2001] QB 967 are complicated in view of the search for the appropriate remedy in equity in the circumstances, see Court of Appeal, [2003] EWCA Civ 139, para. 67.

⁸¹ See *Douglas* High Court, *ibid.* per Sedley LJ para. 110: 'We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.'

⁸² The Court of Appeal in *Douglas* decided that the wedding couple had a clear commercial interest in the photographs, which the law could protect, n. 80 above, Lord Phillips MR at para. 107: 'It follows that we do not accept (the) submission that the effect of the OK! contract precluded the Douglases' right to contend that their wedding was a private occasion and as such, protected by the law of confidence'. See also *Sara Cox v. People*, 7 Jun. 2003 (High Court), unreported at www.guardianmedia.co.uk.

⁸³ The Criminal Justice and Public Order Act 1994 has now introduced a special trespass for new 'generation rave' forms of trespass in England. However, this does not make the law equal between both countries.

⁸⁴ [2001] HCA 63 at para. 42.

between what is private and what is not ... The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private'.⁸⁵

On the facts, Scottish courts would also classify the paparazzi intrusion into the home/garden as an invasion of the private sphere under both the HRA and Art. 8 ECHR, possibly even in conjunction with s. 8 Protection from Harassment Act.⁸⁶ The latter statute has introduced the civil remedies claim of interdict, damages and a non-harassment order in relation to disturbing conduct in Scotland.

The actions of the paparazzo in this case conflict with the Press' own Code of Conduct⁸⁷ that the judges are required to have regard to when determining the action. From the facts given, a court will be obliged to grant an interdict along with an award of damages.

The question of whether aggravated – in contrast to punitive – damages will be awarded depends on the degree of harmful intent and the paparazzo's personal intrusion.⁸⁸ If the intrusion is deliberate – as the facts here indicate – there is nothing to stop the court ordering an account of profits.⁸⁹ Information relating to profits from the distribution of the photographs can easily be acquired through pre-trial discovery.⁹⁰ This requires the defendants to present their financial information before the court. Whether or not the interdict will be awarded depends on the expediency of the matter in relation to s. 12(3) which allows the court alternatives to injunctions such as an order for damages. A continuation of the injunction against the publishers was refused in the *Douglas* case and an award of damages was found more appropriate than stopping one week's circulation of the magazine.⁹¹

Public figures do undergo greater press exposure than private citizens. The publication of a television reporter entering a brothel was accepted by the court as legitimate in *Theakston v. MGN Ltd*,⁹² despite his claim for privacy.

⁸⁵ *A v. B&C* [2002] EWCA Civ 337; [2002] 2 All ER 545 per Lord Woolf, CJ at para. 11 (vii).

⁸⁶ Protection against intrusions is also provided for under the new statute Protection from Harassment Act 1997.

⁸⁷ See Case 1 re Press Code.

⁸⁸ Damages in Scots law include compensation for defamation and verbal injury.

⁸⁹ An account of profits is the measure of extra profit gained through the publication. Scots Law does not tolerate punitive damages, in contrast to the English position, see *Cassell v. Broome* [1972] AC 1027. Accounting for profits is a discretionary remedy.

⁹⁰ This compels defendants to provide full information to the court relating to the plaintiff's case.

⁹¹ This decision is based on s. 12(3) and (4) HRA. ⁹² [2002] EWHC 137.

Spain

I. Operative rules

The princess can skim off the profits earned by the magazine and the magazine is under a duty to disclose any necessary information. It would make a difference if the princess was sitting in the back garden of a countryside restaurant as the princess would not have a claim in such a situation.

II. Descriptive formants

Art. 9.3 of Spanish Act 1/1982 provides that any benefit obtained by the party causing the loss shall be one of the criteria in quantifying the amount to be awarded to the injured party. In court proceedings, the magazine has a duty to disclose any necessary information. There are some Supreme Court decisions that used this criterion to quantify the amount to be awarded to the claimant.⁹³

It would make a difference if the princess was not sitting at home, but in the back garden of a countryside restaurant. As a princess is a public person and a restaurant is a public place, we can conclude that the princess would not succeed in bringing a claim in this

⁹³ See STS, 25 Nov. 2002 (RJ, 10274). In this case, a magazine published several pictures of a professional model (Judit Mascó) in two different issues. In the first one, no. 829, fourteen pictures of the model were published and titled 'Judit Mascó in her bathroom, her most erotic pictures'. In the second issue, no. 985, a picture of the model was displayed on the cover, and the table of contents directed the reader to pictures of another model along with an interview that did not belong to Judit M. The model sued 'Ediciones Zeta, SA', 'Distribuciones Periódicas, SA' and José C. for infringement of her right to honour, personal and family privacy and the right to her own image, seeking damages equalling the profits earned due to the publication of her pictures in issue no. 985, and compensation of €360,607 for moral damages, €120,202 for direct loss and €300,506 for loss of profit. The Court of First Instance ruled in favour of the claimant holding the defendants jointly responsible to pay compensation equalling the net benefit obtained due to the publication of the model's pictures, plus €60,101 for material loss and €240,404 for moral damages. The Court of Appeal rejected the claimant's appeal and partially upheld the defendants' appeal. 'Distribuciones Periódicas, SA' was acquitted and the award of damages relating to the net benefit obtained by the defendants was reduced. The Supreme Court ruled partially in favour of the defendants. The Supreme Court reversed the judgment rendered in the first instance, rejected the award of material damages and decreased the compensation for moral damages to €48,080. With regard to the pictures in issue no. 829, the Supreme Court considered that the pictures represented a minor fault, thus fixing moral damages at €12,020. With regard to issue no. 985, the Court ruled that the model's image was supplanted, which was considered to be a major infringement of her right to privacy and honour, thus quantifying moral damages of €36,060.

scenario and no damages would be awarded for the publication of the picture.

A decision of the Spanish Supreme Court⁹⁴ confirmed the principle that the right to image does not deserve protection when the affected is a public person and the image is taken in a public place. The case concerned pictures taken of a famous married Spanish banker and his lover in a federal reserve in Kenya. However, the Spanish Constitutional Court reversed this decision, and held that the publication of the picture was unauthorised as the picture belonged to the personal and privacy sphere, it was taken by a relative with his camera, and he was on a family holiday.

Switzerland

I. Operative rules

Whether the princess is in the garden of her private villa or in the garden of a restaurant she may bring a claim for the unlawful infringement of her private sphere as well as for an infringement of her rights to her image. She may be able to receive restitution of profits earned by the publication of the article, but she cannot force the magazine to disclose the information and documents necessary for the calculation and proof of such profits.

II. Descriptive formants

Before determining whether an individual's personality has been unlawfully invaded, two elements must be taken into account: on one hand, the status of the person concerned, and on the other hand, the three-sphere theory.

Whoever the individual concerned is, in a recent opinion the Federal Court has adopted the German distinction between individuals permanently belonging to contemporary history (*absolute Person der Zeitgeschichte*) and those who occupy a temporary place in history (*relative Person der Zeitgeschichte*).⁹⁵ The first category primarily includes politicians, monarchs, and extraordinary figures of world economics, science, entertainment, art, literature and sports. A public interest in being informed exists when such people are concerned. The second category includes people who find themselves momentarily in the spotlight; thus, reporting on them in relation to the event that made them temporarily famous is not unlawful. In the *Minelli* opinion, the

⁹⁴ STS, 21 Oct. 1997. ⁹⁵ ATF/BGE 127 III 481 c. 2c, JdT 2002 I 426 ('*Minelli*').

Federal Court also held that some intermediary categories exist. For those, the interests present on each side must be balanced.⁹⁶

As a general rule stemming from this decision, a princess belongs to the category of permanent celebrities. However, this statement needs to be nuanced in light of the recent ECtHR decision in *von Hannover v. Germany*.⁹⁷ For the ECtHR, the German approach (also adopted by Swiss law) of making the protection of the private sphere depend on the celebrity being in a secluded location and acting in a way that objectively demonstrates the celebrity's desire for privacy, lacks clarity and does not enable an individual to know when he or she must submit to others' intrusion, most notably that of the tabloid press. More concretely, the particular circumstances of a situation along with the official position of an individual must be considered in order to determine the appropriate degree of protection.

In Switzerland, the protection afforded by law depends on the sphere concerned. The protection of the private and intimate spheres is broad. However, the scope of the private sphere depends on a person's notoriety and can be diminished according to the degree of the latter.

Case law affords great importance to the individual's intent to keep certain facts or activities out of the public eye. Interference with an individual's private life is only justified to the extent that it is linked to the individual's public function and that it respects the principle of proportionality. In the *von Hannover* case, the Court considered as decisive the fact that the princess had gone to an isolated place and objectively demonstrated that she did not want to have photographs taken. The Court broadened the protection of the private sphere in that celebrities benefit more and more from a 'travelling private sphere', which also applies when they appear in public. The Court has also become less tolerant where the publicity's sole function is to satisfy public curiosity about the details of a celebrity's private life and does not relate to photography or articles concerning the public or official functions of the celebrity, which might contribute to public debate in the interest of society as a whole.

In the case at hand, whether the photograph was taken in the garden of the princess' private villa, part of her private domain, or in a restaurant does not make a difference. The fact that the paparazzo

⁹⁶ ATF/BGE 127 II 481 c. 2c/bb, JdT 2002 I 426 ('Minelli').

⁹⁷ Judgment of the ECHR of 24 Jun. 2002, *von Hannover v. Germany*, case no. 59320/00. On this case see Part 4 of G. Brüggenmeier, 'Protection of Personality Rights in the Law of Delict/Torts in Europe: Mapping out Paradigms', in this volume.

must have used a telephoto lens supports the idea that the princess had the precise intention of keeping the event out of public view. The fact that she was with her family must also be given considerable weight. The meal enjoyed in the garden forms part of her private sphere. Even though it was an event which took place in public, the choice of the location indicates that the princess had no intention of attracting attention.

In order to obtain restitution of the economic profit the tabloid made from the publication of the photograph, the princess must initiate a claim for the restitution of profits (Art. 28a, para. 3 CC). There are four conditions to this claim: (1) there must be an infringement of a personality right; (2) that infringement must be unlawful; (3) the infringing party must have made a profit, in other words a net augmentation of the income made after recovery of costs; and (4) a causal relationship must exist between the infringement and the profit. With respect to the third condition, the profit corresponds to the income received because of an increase in circulation, deducting the value of the photographer's intellectual property rights (including copyright), costs of paper, printing, and distribution. Taking into account the fact that the individual harmed has no judicial means of demanding any documents or information from the tabloid which would permit the calculation and proof of the net profits received, the judge will usually determine the amount of damages awarded, considering the ordinary course of events (Art. 42, para. 2 CO).

III. Metalegal formants

Some media outlets have been using the private life or images of celebrities more and more for commercial objectives. Technological progress facilitates this trend. However, the phenomenon of 'sensationalisation'⁹⁸ also serves the interests of the celebrities because it increases their notoriety. In addition, they use the exploitation of their images to demand considerable damages. It is worth noting in this controversial area that while Caroline of Monaco or other celebrities regularly obtain large sums as a result of unauthorised publicity, the same is not true for the average person.⁹⁹ Courts are much less generous when it

⁹⁸ Term borrowed from D. Barrelet, summarising the article of W. Larese, 'Die Genugtuung: ein verkanntes Instrument des Persönlichkeitsschutzes?' (1997) *Médialex* 139.

⁹⁹ See F. Werro, 'La tentation des dommages-intérêts punitifs en droit des médias' (2002) *Médialex* 82 *et seq.*

comes to an average person; it seems that infringements of the personality rights of the latter do not have the same value.

That being said, it is clear that the tabloid press and the paparazzi behave in a manner that renders life quite difficult for individuals who simply wish to have some sort of private life.¹⁰⁰ In this sense, the *von Hannover* decision, discussed above, sends out a positive message that may serve to calm the vehemence of certain factions of the press.

Comparative remarks

While Case 7 deals with all possible claims of persons – both celebrities and ordinary citizens – photographed in public places without their consent, Case 8 specifically focuses on the damages claims of celebrities photographed outside their homes, but in places which are clearly private or on the border between public and private. Cases like this are frequently brought before courts all over Europe. Two main questions arise. How is the conflict between the privacy of celebrities and the freedom of the (tabloid) press to be solved? If the personality interest prevails and the celebrity has a claim for damages, how are the latter to be assessed?

I. Privacy protection of celebrities inside their home

In all countries considered, it is unlawful to secretly photograph people inside their residential areas with the help of a strong telephoto lens, be it in flats, houses, gardens or on yachts. In these scenarios, continental European legal systems will acknowledge an unjustified violation of the photographed person's right to privacy and/or right to one's image. Under English and Scots law, the claim will fall under breach of confidence. In Ireland, a privacy action will probably be successful under the European Convention on Human Rights Act 2003.

In many countries, the paparazzo will also be in breach of statutory or professional duties. Some self-regulatory instruments such as the UK Code of Conduct of the Press Complaints Commission expressly disallow the use of a telephoto lens in private places. Finally, in some countries such as Finland and Belgium the paparazzo will also be criminally responsible.

¹⁰⁰ D. Barrelet, 'Un livre sur la santé d'un défunt chef d'Etat ne peut être interdit' (2004) *Médialex* 168.

Beyond this, the unlawfulness will not only affect the paparazzo's conduct but also the publication of the photographs by a magazine.

II. Privacy protection of celebrities in semi-public places

Restaurants are in principle public places, however, they can more or less offer privacy to their customers. People sitting in a terrace pizzeria in a crowded city square are of course more exposed to the public eye than people sitting in the back garden of a countryside restaurant at night. Most legal systems take such differences into account when balancing the privacy interests of celebrities against the freedom of the tabloid press. The English rule that regardless of the degree of publicity of the place, a legitimate interest in protection is given where there is a reasonable expectation of privacy is helpful. Whether or not a certain location meets this requirement can only be assessed on a case-by-case basis considering all of the circumstances. For example, in England whether or not the princess was aware she was courting publicity while going to the restaurant may play a role. If the answer to this is in the affirmative the information in question will not be confidential.

The Dutch Civil Code also makes use of the general notion of reasonableness to distinguish the privacy interests which are worthy of legal protection from those which are not. However, court practice in the Netherlands leads to different results than in England. In the Netherlands it seems that the publication of unauthorised photographs of celebrities in public places is always allowed, unless these are defamatory or indecent.

On the contrary, in most legal systems considered, the publication of a photograph of the princess sitting in the back garden of a country restaurant will be deemed unlawful. In Finland, the publication gives rise to criminal responsibility and accessory tort liability; in England and Scotland to liability for breach of confidence; in Ireland to liability for breach of privacy under the European Convention on Human Rights Act 2003; in Austria, Belgium, France, Germany, Greece, Italy, Portugal and Switzerland to civil liability for the violation of the right to one's image and/or privacy or the violation of an innominate personality right.

The method of solution of the present case is basically the same in Italy, Germany and Switzerland. However, even quite early on Italian scholars and courts have rejected a privacy definition formulated in spatial terms, preferring to draw the borderline between publicity and

privacy on the basis of value judgements only. On the contrary, German and Swiss courts used to follow a spatial criterion. Accordingly, it is unlawful to invade the privacy of celebrities in situations of 'seclusion' in which it is obvious that the persons in question want to be alone and act as they would not do in public. In a famous German case, Princess Caroline was photographed while having a meal with her then lover in a dimly lit restaurant. The particular lighting conditions were considered decisive by the *Bundesgerichtshof*, which allowed the princess to recover damages from the magazine.¹⁰¹ This has sparked some criticism among scholars, who speak of a '30 Watt case law' to point out the vagueness and arbitrariness of this kind of distinction between lawful and unlawful photograph publications.

To summarise, in most legal systems considered the princess would enjoy the same privacy protection in the back garden of a countryside restaurant as she would at home. The opposite is true for the Netherlands and Spain. These two countries form their results on the same ground: the princess is a public person, the restaurant is a public place, and the act of sitting at a table having a meal has nothing strange, defamatory or indecent about it.

III. Privacy and image rights of celebrities after the *von Hannover* judgment

The traditional national approaches outlined above and in Case 7 will have to be brought into conformity with the judgment of the ECtHR in the *von Hannover* case.¹⁰² From the viewpoint of outcomes, the ECtHR has followed the French and Belgian model: photographs concerning a person's private life can only be published with the person's consent, even in the case of celebrities portrayed in public places. From the viewpoint of legal terminology, the ECtHR has primarily focused on the right to privacy and less on the right to one's image because only the former is laid down in the ECHR.

The ECtHR has set clear rules on how to balance privacy against freedom of the press. The latter prevails if the publication is concerned with information about the exercise of official functions or is otherwise related to the public debate or when the press is fulfilling its watchdog function in political issues. To satisfy the mere curiosity of readers of

¹⁰¹ BGH, 19 Dec. 1995, BGHZ 131, 332; NJW 1996, 1128; see also BVerfG, 15 Dec. 1999, BVerfGE 101, 361; NJW 2000, 1021.

¹⁰² *Von Hannover v. Germany* (2005) 40 EHRR 1; see already Brüggemeier, 'Protection of Personality Rights' (in this volume) under 4.

tabloids is not a legitimate ground for exploiting and commercialising the private life of celebrities.

To comply with Art. 8 ECHR, as interpreted by the ECtHR, German and Swiss case law will have to restrict the traditional freedom of tabloid press to report about celebrities and possibly to abandon the notion of 'absolute persons of contemporary history'. Dutch law has to broaden the interpretation of the statutory notion of 'reasonable interests' so as to include privacy in situations where celebrities 'unofficially' appear in public. The same is true for Spanish law with regard to the notions of privacy and intimacy.

IV. Damages and account of profits

In nearly all countries considered, when the publication is deemed unlawful the princess has a claim for damages against the magazine (as to the addressees see Case 1 Comparative Remarks IV).

In France, Germany and Greece, compensation in the present case is limited to non-economic loss. In the other legal systems, both damages for economic and non-economic loss are recoverable. In most countries, the profits made by the magazine through the deliberate unauthorised use of the photograph will be taken into account in the assessment of damages.

A complete restitution of the profits seems possible in Belgium, Germany, Portugal, Spain, Switzerland and in the common law countries. In England, restitutionary damages were developed in equity on the basis of the principle that profits made by exploiting confidential information belong to the owner of the information who wants to keep that information confidential. A substantively similar rule applies in Belgium, where the princess can recover the profits she would have made as economic loss if she had commercially exploited her image herself.

In Germany, the princess can only claim skimming off the profits if the editors of the magazine knowingly violated her personality right (§ 687(2) BGB). In Spain, according to a specific statutory provision the gains obtained by the tortfeasor are one of the decisive factors in assessing damages for the violation of the claimant's right to honour, image or privacy. A similar rule is acknowledged in the Netherlands and in Italian case law. However, in both Italy and the Netherlands the application of this rule by the courts does not seem to grant complete restitution but only a partial re-allocation of the profits.

In Germany, Spain, England and Scotland, the magazine is under a duty to disclose information concerning the amount of profits earned through the unlawful publication. In the other legal systems no duty of this kind is acknowledged, although in some countries, such as Italy, procedural mechanisms exist which could be applied in order to reach this result.

In Finland, the princess cannot skim off the profits gained by the magazine. However, these profits can be forfeited by the state as benefits of a crime.

12 Case 9: Naked.Little.Girl.Com

Case

Susan and Robert sold a photograph of their four-year-old daughter Lily, running naked on the beach, to a sun cream manufacturer. The photograph appeared in several magazines as part of an advertisement for the products of that firm. Kevin scanned the photograph and put it on the internet, on a site called 'naked.little.girl.com'. Can Lily claim damages from Kevin? Is the internet provider liable?

Discussions

Austria

I. Operative rules

Lily has a claim against Kevin for the forbearance of future publication of her picture on the internet, abatement, publication of the courts findings and for compensation, as well as for a preliminary injunction. In respect of the access and host provider, Lily cannot sue for damages but has a claim for injunction.

II. Descriptive formants

The right to image (§ 78 *UrhG*; see Case 7) is not just restricted to adults but also applies to children.

The consent of both Susan and Robert as Lily's parents refers only to the publication of the naked photograph in magazines as an advertisement for certain suncare products. There seems to be nothing sinister about this type of publication. However, advertising a naked four-year-old girl on a website called 'naked.little.girl.com' appears to have a more sinister connotation. As far as the parents' consent (on

Lily's behalf) is concerned, they have only given their consent for the publication of the photograph in a certain medium (magazines). Lily's appearance on the internet, however, concerns both a 'different medium'¹ and a 'different public'² (i.e. a different group of addressees). Therefore, there is no valid consent.

Weighing the interest of Kevin to upload the picture onto the internet against Lily's right to image, it is without doubt that Kevin, as a content provider, infringed the legitimate interests of the four-year-old. Kevin probably committed a crime (pornographic presentation of minors) under § 207a StGB (*Strafgesetzbuch*, Penal Code). Thus, he can be sued for forbearance (§ 81 *UrhG*), abatement (§ 82 *UrhG*), damages for economic and non-economic loss (§ 87, subs. 1 and 2 *UrhG*) and publication of the court's findings (§ 85 *UrhG*), and furthermore for a preliminary injunction under § 381 *EO*.

This holds true even if Lily becomes a 'public figure' after being published in several magazines. Her interests in relation to her future life prevail over those of Kevin.

Since the publication on the internet has to be regarded as a 'severe infringement', Kevin even has to compensate Lily for non-economic harm (§ 87, subs. 2 *UrhG*).³

According to the Electronic Commerce Act 2001 (*ECG*),⁴ access and host providers – who are, in most cases, just one person – are generally not responsible for internet content.⁵ Zankl compares the access provider with the builder of a bridge who cannot be held liable for a murderer driving his/her car over the bridge to the place of the crime.⁶

¹ See OGH MR 1997, 150; E. Swoboda, *Das Recht der Presse* (2nd edn., Vienna: 1999) 207 n. 433.

² 'Andere Öffentlichkeit' – see OGH MR 1996, 67: consenting to a television interview does not mean consent to the publication of the picture in an article dealing with neo-Nazism among civil servants.

³ See Case 7.

⁴ BGBl (Bundesgesetzblatt, Federal Law Gazette) I Nr 152/2001; on this, see W. Zankl, *E-Commerce Gesetz, Kommentar und Handbuch* (Vienna: 2002). This statute implements the Electronic Commerce Directive of the European Community 2000/31/EC.

⁵ Cf. § 13 (access-provider) and § 16 (host-provider) ECG. This was not the opinion of the courts before the enforcement of the EC Act. Therefore, the Higher Regional Court of Vienna for instance held that providers of online chat rooms have the duty to remove insulting statements at least within a few days from their homepages (OLG Wien MR 2002, 73).

⁶ W. Zankl, *E-Commerce* § 13 no. 186.

Both providers can only be held liable for damages if they definitely knew of the unlawful content on their systems. However, they have no duty to guard and examine their systems.

§ 19 ECG expressly states that claims for injunction against access and host providers are always admissible. § 381 EO,⁷ on which individual claims for a preliminary injunction are based, only demands objective endangerment (*objektive Gefährdung*), which is not dependent on the conduct of the defendant.⁸ Accordingly, the provider is bound to block the illegal material on its system.

Belgium

I. Operative rules

Susan and Robert can claim damages from Kevin on Lily's behalf. Whether or not the internet provider is liable will depend on the particular circumstances.

II. Descriptive formants

Susan and Robert lawfully sold their daughter's photograph. Parents exercise the personality rights of their minor children who lack the power of discernment. For minors with the power of discernment, parents exercise the property rights of the personality rights (right to publicity). These minors exercise their personality rights themselves.⁹

As Lily's legal representatives, Susan and Robert can sue Kevin. Art. 10 of the Copyright Act prohibits the publication of a photograph without the express consent of the person photographed or his/her legal representative. Once consent is given, it is interpreted restrictively.¹⁰ Firstly, Susan and Robert can obtain an injunction (*action en cessation*).¹¹ Secondly, they can sue for damages, albeit only compensatory damages; the mere invasion of the personality right grants a right to damages for non-economic loss. As far as economic loss is concerned, Kevin will be

⁷ See Case 1.

⁸ W. Zankl, *E-Commerce* § 13 no. 200; R. Holzhammer, *Österreichisches Zivilprozessrecht* (2nd edn., Vienna: 1980) 295.

⁹ Regarding the incompetence of minors, see generally: P. Senaev, *Compendium van het Personen- en Familierecht, Deel 2 Familierecht* (Louvain: 2003) 217 *et seq.*

¹⁰ See Case 7.

¹¹ Comp. CA Liège (President) 28 Nov. 2001, *JT* 2002, 308, note by A. Cruquenaire and J. Herveg, 'La responsabilité des intermédiaires de l'internet et les procédures en référé ou comme en référé'.

able to assert successfully that Susan and Robert did not lose the possibility to exploit the image themselves. However, a similar exploitation would be contrary to the public order and parental duties.

Susan and Robert are entitled to claim against the internet service provider. Under Art. 383*bis* of the Criminal Code, ‘the crime of (...) exhibiting or distributing, (...), pornographic material involving minors is punishable with a sentence of imprisonment of between 5 and 10 years and a fine of €500 – €1000 (x 5)’. Legal bodies are criminally responsible in Belgian law (Art. 5 of the Criminal Code). Susan and Robert can bring a civil claim for damages, parallel to a criminal prosecution. However, the judiciary holds that internet service providers are not bound to systematically track down any illegal use of the internet. Whether or not the internet service provider can be held to account will depend on the particular circumstances, e.g. collaboration with the prosecutor, preventive steps taken and immediate blocking of the internet page after notification.¹²

England

I. Operative rules

The claimant may have a claim in copyright and defamation. The internet provider might be liable in defamation and under Electronic Commerce law.

II. Descriptive Formants

1. *Claim for damages*

(a) Breach of confidence In principle, remedies for breach of confidence are available in cases where photographs have been taken in a private situation and the negatives are used for further copies thereafter.¹³ The same should apply if reproduction does not take place through copies made from negatives but through scanning. However, in relation to the tort of breach of confidence a remedy would only be available if the information imparted was confidential. Therefore,

¹² Civil court Hasselt 17 Nov. 2000, AM 2001, 161. In general (on European initiatives): K. Bodard, ‘Aansprakelijkheid van Internet Service Providers in Europees perspectief’ in K. Byttebier, R. Feltkamp and E. Janssens (eds.), *Internet en recht* (Antwerp: 2001) 285; A. Lucas, ‘La responsabilité civile des acteurs de l’Internet’ (2001) AM 42; T. Verbiest and E. Wery, ‘La responsabilité des fournisseurs de services Internet: derniers développements jurisprudentiels’ (2001) JT 165.

¹³ See *Pollard v. Photographic Company* (1889) LR 40 Ch D 345.

it must not be something which is public property and public knowledge.¹⁴ Since the photograph had already appeared in several magazines it was clearly public knowledge.

(b) Copyright The original photograph taken was protected by copyright, and it is, generally speaking, an infringement to reproduce this image by whatever type of process.¹⁵

(c) Defamation If the publication of Lily's photograph on Kevin's website constitutes a defamatory statement, Lily can sue for damages.

If naked.little.girl.com was a pornographic website, the uploading of Lily's photograph on that website would imply that her parents have consented to its publication, which is clearly defamatory. If it is just another commercial website, the information would merely be that Lily's parents have sold Lily's picture for commercial purposes, which can, in principle, be a defamatory statement,¹⁶ but which is perfectly true in this case.

The first problem is that Lily has probably not been named on the website and therefore her parents will not be identifiable to the public. They may, however, be identifiable to their friends and acquaintances (who should not visit the website anyway if it shows child pornography).

(d) Passing-off The tort of passing-off protects a person's property through his/her goodwill and therefore requires that a person whose picture is used for advertising purposes without his or her consent has marketable goodwill.¹⁷ Lily or her parents are not famous persons and therefore cannot claim damages under the tort of passing-off.

2. Liability of the internet provider

The internet provider might be liable if the material on naked.little.girl.com was defamatory. The issue of the liability of an internet provider for defamation was considered for the first time in *Godfrey*

¹⁴ *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 RPC 203, at 215, per Lord Greene MR; *Mills v. News Group Newspapers Ltd* [2001] EMLR 41, 957, at 968.

¹⁵ *Creation Records Ltd v. News Group Newspapers Ltd* [1997] EMLR 444, at 450. Notably, English law recognises copyright in any photograph, regardless of its artistic value, see, for example, A. Ohly, 'Der Schutz der Persönlichkeit im englischen Zivilrecht' (2001) 65 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 39, at 51.

¹⁶ See *Tolley v. J. S. Fry and Sons Limited* [1931] AC 333.

¹⁷ For details, see the answer to Case 10.

v. *Demon Internet*, dealing with the so-called Usenet.¹⁸ Morland J held that internet providers are not only owners of an electronic device through which postings were transmitted but that they are distributors in the sense of the law of defamation.¹⁹ In *Godfrey*, the defence of innocent dissemination was not available since although the claimant had complained to the internet provider by fax, the defendant only took down the defamatory material after a fortnight.²⁰

On 21 August 2002, the Electronic Commerce (EC Directive) Regulations 2002²¹ came into force, implementing the Electronic Commerce Directive 2000/31/EC. Liability for hosting is regulated under Reg. 19, according to which the service provider shall not be liable for damages or for any other pecuniary remedy, or for any criminal sanction as a result of that storage where:

- (i) the service provider does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent that the activity or information was unlawful; or upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; and
- (ii) the recipient of the service was not acting under the authority or the control of the service provider.

The solution under Reg. 19 of the present case would be identical to the solution under the common law of defamation.

Finland

I. Operative rules

Lily probably cannot claim damages from Kevin or from the internet provider.

II. Descriptive formants

As was described in Case 7, in principle a person does not have a right to his or her own picture *per se*. Only if the publishing occurs in a defamatory

¹⁸ *Godfrey v. Demon Internet Ltd* [2001] QB 201.

¹⁹ *Ibid.* at 209. On the notion of distributors, see the answer to Case 1. It should be noted that each visit to the respective webpage constitutes an actionable publication. This is particularly important for the limitation period of one year for claims under the law of defamation, see s. 4A of the Limitation Act 1980: it is not only the first visit of any person to the webpage that determines the limitation period applicable (so-called single publication rule), but the limitation period starts anew with each visit. See *Louchansky v. Times Newspapers Ltd (No. 2)* [2001] EMLR 36, 876, per Gray J.

²⁰ *Godfrey v. Demon Internet Ltd* at 212. ²¹ SI 2002/2013.

way or for marketing purposes does the person photographed have a right to damages. It has to be considered that the picture of Lily had previously been part of an advertisement and can hardly be viewed as pornographic material. According to Ch. 17, s. 18 of the Finnish Penal Code, the dissemination of pornographic pictures of children is prohibited. However, the fact that a child is nude in a picture does not make it pornographic as such. Only if the picture is contrary to sexual decency can the dissemination of that picture be a crime.²² The fact that Lily has appeared in an advertisement seems to imply that the picture is not pornographic.

If Kevin has put the picture on the site 'naked.little.girl.com' as a private person and the site is not a commercial one, then the possibilities for Lily to claim damages are non-existent, regardless of the fact that Kevin or the internet provider can be found guilty of a crime because of any other pictures on the website that can be considered pornographic. Lily's right to compensation is to be judged only on the basis of the picture which has appeared on the *suncare* advertisements and not on the basis of Kevin's or the internet provider's execution of other crimes in connection with the site called 'naked.little.girl.com'.

If the internet site is lawful, regardless of its provocative name, and it is of a commercial nature, Lily may have a possibility to claim compensation for the use of her picture. The right to damages is judged as in Case 7.

As Lily apparently is not the holder of any copyright to the picture, Lily is not entitled to damages on this ground either.

France

I. Operative rules

Lily has a claim for an injunction against Kevin and the internet provider, but can only claim damages from Kevin.

II. Descriptive formants

The enforcement of the personality rights of minors, notably the right to their own image, presupposes the action of their legal representatives, in practice their parents.²³ Thus, Lily cannot bring a cause of action alone, but only assisted by her parents Susan and Robert.

²² Government Bill 6/1997 p. 147.

²³ TGI Nanterre 23 Jan. 2002, *Légipresse* 2002, No. 190, I, 46: 'an action brought in the name of minor children, which is of non-economic nature as it concerns

The authorisation for the use of the photograph in question was only given to the sun cream manufacturer for the advertisement of its products and does not apply to third parties. It is a firmly established principle of French law that the consent given for the use of an image is unique and only benefits the person to whom consent has been granted and only for those uses which have been agreed upon by the parties.²⁴ The French courts have thus frequently held that 'all persons have a right to their image and the use thereof permitting them to oppose its unauthorised reproduction or dissemination. The burden of proof of authorisation, of its limits and its conditions is on the person who reproduces the image'.²⁵ Lily and her parents' claim against Kevin will thus be allowed by the French courts, which will order the removal of the controversial photograph from the site in question and will grant damages for non-economic loss, as is usual in such cases. In relation to the amount to be granted, it may well be substantial: Kevin's site is clearly all too immoral. The title of his site leaves no doubt as to the sexual, if not paedophilic connotation of its content.

Concerning the liability of the internet provider, the Act of 1 August 2000 (which amended the Freedom of Communication Act 1986),²⁶ drawing on the principles established in the Electronic Commerce Directive of 8 June 2000, establishes the rule that access providers shall not be responsible for the content on their network and that host providers are only liable in tort in situations in which, 'having been asked by a court, (they) have not acted promptly to block access' to the content which they store. Accordingly, in current French law, host providers are exempt from all obligations of surveillance and rejoinder, except where a judge, having observed the illegal nature of certain content, has ordered an injunction blocking access to that content. Therefore, they are not required to react when sued by the victim. The illegal content can thus remain accessible online for a certain period of time after the victim has had knowledge thereof

personality rights, must be brought jointly by both parents'; TGI réf. Toulouse 8 Mar. 2002, *Légipresse* 2002, No. 191, I, 53.

²⁴ Lucas-Schloetter, *Droit moral et droits de la personnalité. Etude de droit comparé français et allemand* (Aix-en-Provence: 2002) No. 479-480. See, e.g., Cass. civ. 30 May 2000, JCP 2001, II, 10524, sanctioning 'the publication of photographs (which) do not respect the purpose envisaged in the authorisation given by the person concerned'.

²⁵ CA Versailles 19 Sept. 2002, *Légipresse* 2002, No. 198, I, 6.

²⁶ Loi n° 2000-719 du 1er août 2000 (D. 2000, leg., 357) modifiant la loi du 30 sept. 1986 relative à la liberté de communication.

and has initiated legal action before a court.²⁷ The Act of 1 August 2000 was modified by the Act of 21 June 2004 on confidence in the digital economy (*la loi pour la confiance dans l'économie numérique*, so-called *LCNE*). The latter Act is the transposition, with an eighteen-month delay, of the EC Directive on e-commerce of 8 June 2000.²⁸ Art. 6-I 7° *LCNE*, drawing on Art. 15 of the Directive, sets out the principle of absence of a general obligation of surveillance on the part of internet service providers.²⁹ Furthermore, the Act distinguishes between access providers (Art. 9 *LCNE*) and host providers (Art. 6-I *LCNE*). The criminal responsibility of host providers is treated distinctly from civil liability: on this point the formulation of the *LCNE* is very close to that of the Directive. Both criminal and civil liability are only engaged when the host provider had 'effective knowledge' of the unlawfulness of the stored information, or when the host provider, after gaining knowledge of it, did not 'act promptly in order to withdraw this information or in order to make the access thereto impossible'.³⁰ The absence of responsibility of host providers is thus counterbalanced by an obligation to react promptly, to which a presumption of knowledge of the contested facts is added, once a certain amount of information has been communicated to the host provider and notably the reasons why that specific content must be withdrawn (Art. 6-I 5° *LCNE*).

Having recognised the injury to the right to one's own image and Lily's right to privacy, the judge can order Kevin to withdraw the photographs in question from his site and require the host provider to ensure that the obligation is fulfilled. However, only Kevin would be ordered to pay damages, since French law refuses to place the burden of a general duty of surveillance on web hosts.

²⁷ Passa, 'Internet et droit d'auteur' (2001) 1970 *Juris-Classeur Propriété Littéraire et Artistique*, n°191. Derieux, 'Internet et droit de la communication' (2002) 1300 *Juris-Classeur Communication* n°62.

²⁸ The Act of 1 Aug. 2000 was inspired by the Directive but did not transpose it into French law.

²⁹ Art. 6-I 7° *LCNE*: 'The persons mentioned under 1 and 2 (access providers and host providers) are neither under a general obligation of surveillance concerning the information transmitted or stored, nor under a general obligation to research facts or circumstances revealing illegal activities.'

³⁰ For an example, see TGI Paris 19 Oct. 2006, *Légipresse* 2006, No. 237, I, 174: the host provider 'is not responsible for the content of the hosted site', and 'must withdraw the stored data or make access thereto impossible from the moment when the host provider receives knowledge of the manifest unlawfulness of the data, or when a judicial decision has ordered that this be done'.

Germany

I. Operative rules

Lily has a claim for an injunction against Kevin and the internet provider but can only claim damages from Kevin.

II. Descriptive formants

The claim for an injunction against Kevin is based on Lily's right to control the publication of her image according to §§ 22, 23 *KUG*. The right to one's image, as well as the general personality right, not only belongs to adults, but also to children, regardless of whether they consciously experience an infringement of these rights.³¹ The publication on the internet has not been consented to by Lily's parents and Lily's appearance in certain advertisements does not make her a public figure.³² This could be different if Lily were the object of public interest for other reasons; for example, a German court decided that it was not unlawful for a newspaper to publish and comment on a nude photograph of the famous ice skater Katharina Witt after she had authorised the publication of this photograph in *Playboy* magazine.³³

As stated above, damages for non-economic loss can only be awarded for serious infringements of personality rights. However, the publication of a naked photograph is generally seen as such a serious infringement.³⁴ One could still argue that in this case the infringement is less serious since Lily (acting through her parents) has already consented to appear naked in public. This argument may become relevant in cases such as the Katharina Witt case described above where someone has consented to the publication of certain pictures in one magazine and then claims damages for non-economic loss from a second magazine which publishes these pictures.

In the present case, this 'prior publication' argument does not apply since the circumstances of publication are very different. The prior publication was obviously of a rather innocent character, while Kevin's publication seems less innocent and must therefore be regarded as causing serious non-economic harm. Thus, an award for non-economic

³¹ BGHZ 120, 29, 35 (in a somewhat different context, but with a general scope); LG Berlin, GRUR 1974, 415 (specifically regarding pictures).

³² Compare BGH, NJW 1985, 1617, 1618 (prior publication of nude photograph in school book does not make later publications lawful).

³³ OLG Frankfurt/M., NJW 2000, 594, 595.

³⁴ BGH, NJW 1985, 1617, 1619; OLG Hamm NJW-RR 1997, 1044; LG Berlin, GRUR 1974, 415; J. Soehring, *Presserecht* (3rd edn., Stuttgart: 2000) 667.

loss will be given, although it may be less than what would be given to an adult. One court decision suggests that for a small child there is less harm since its facial features will change over time so that after a while it will hardly be identifiable.³⁵

The liability of the internet provider is regulated by the German Parliament according to the Electronic Commerce Directive of the European Community.³⁶ The provisions distinguish between the 'content provider', the 'host provider', and the 'access provider'. In this case, Kevin is the content provider and is therefore liable according to general principles as stated above. The access provider only provides technical access to the internet for the customer and is free from all liability.³⁷ The host provider 'hosts' other people's content on data storage systems, but is not obliged to search this content for unlawful material. He/she is only liable for damages if he/she intentionally hosts unlawful material on his/her systems, that is if he/she definitely knows that such material exists on his/her systems and still does not act to remove it; Art. 14(1) E-Commerce-Directive, § 10 German *Telemediengesetz*.³⁸ However, these rules still allow an injunction against the host provider which does not require any fault on the part of the host provider. This follows from § 7(2) *Telemediengesetz*,³⁹ which implements Art. 14(3) E-Commerce Directive.⁴⁰ However, the wording of the injunction should consider that the provider must delete or block the illegal material when it is found, but cannot be forced to control whether the same material is placed on the provider's storage systems again.⁴¹

III. Metalegal formants

There seems to be a tendency in the European Commission to economically support electronic commerce suppliers by freeing them from as much liability as possible.⁴² In this light, one might even read

³⁵ LG Berlin, GRUR 1974, 415.

³⁶ Electronic Commerce Act of 14 Dec. 2001; for an overview see G. Spindler, 'Das Gesetz zum elektronischen Geschäftsverkehr - Verantwortlichkeit der Diensteanbieter und Herkunftslandprinzip' (2002) *Neue Juristische Wochenschrift* 921.

³⁷ Regarding criminal law, see LG München I, NJW 2000, 1051 (Compuserve).

³⁸ Formerly § 11 Teledienstegesetz. ³⁹ Formerly § 8(2) Teledienstegesetz.

⁴⁰ OLG München 17.5.2002, NJW 2002, 2398, 2399; G. Gounalakis and L. Rhode, *Persönlichkeitsschutz im Internet* (Munich: 2002) 192. See also recital 45 in the Preamble to the E-Commerce-Directive; E. Crabit, 'La directive sur le commerce électronique. Le projet "Méditerranée"' (2000) *Revue du Droit de l'Union Européenne* 749, 814.

⁴¹ Spindler, 'Das Gesetz zum elektronischen Geschäftsverkehr' at 921, 925.

⁴² Typical of this idea is recital 5 in the Preamble to the E-Commerce-Directive which bemoans legal obstacles to the development of electronic commerce, although, in

Art. 14 E-Commerce Directive in a way that would prohibit an injunction against the host provider. However, such an interpretation would mean that the traditional media and the new electronic media would be treated differently: with respect to print media, for example, the rule is clear. An injunction can even be brought against a distributor who unwittingly distributes unlawful material, since the interest in stopping the distribution should prevail.⁴³ There is no normative reason why the outcome should be different with respect to the electronic media.⁴⁴

Greece

I. Operative rules

The child can claim damages from the photographer, however not personally but through her parents acting as her legal representatives before the courts.

II. Descriptive formants

As already stated in Case 7, taking a picture of a person without his/her prior consent constitutes an unlawful offence against his/her personality right within the meaning of Art. 57 CC. According to the Supreme Court (Areopag) 'un unlawful injury to personality ... includes the use of a person's image for commercial exploitation without his consent. ... the injury is more severe when, in the picture used, the person is presented naked or partially-naked, even though this photograph was produced in the past, for other reasons and with the person's consent'.⁴⁵

According to Art. 1510 CC 'care for a minor child is a duty and a right of the parents (parental care) and is exercised jointly. Parental care includes care of the child's person, the management of its property and the representation of the child in any matter, legal transaction or court action relating to its person or to its property.'

According to s. 45 of the E-Commerce Directive the internet service provider, as the technical support intermediary in uploading

fact, it seems that most problems of electronic commerce are simply due to bad management and a lack of utility for consumers.

⁴³ See, e.g., E.H. Burkhardt, in K.-E. Wenzel, *Das Recht der Wort- und Bildberichterstattung* (5th edn., Colonge: 2003) 845.

⁴⁴ A. Halfmeier, 'Vom Cassislikör zur E-Commerce-Richtlinie: Auf dem Weg zu einem europäischen Mediendelikttsrecht' (2001) *ZEuP* 837, 867; LG Köln, MMR 2002, 254.

⁴⁵ Supreme Court (Areopag) Decision 782/2005.

webpages onto the internet, has to immediately block pages with illegal content.⁴⁶

Ireland

I. Operative rules

Lily would not be able to claim damages from Kevin. It is likely that the internet provider would be criminally liable.

II. Descriptive formants

Lily could not succeed in an action for infringement of copyright as she did not take the photograph. If Susan or Robert took the photograph of Lily then they would be considered the first owners of the copyright.⁴⁷ It would appear from the above scenario that the sun cream manufacturer purchased the photograph of Lily for specific use in its promotional material and therefore it would seem that the manufacturer was assigned the copyright. In order for any such assignment to be effective it must be in writing and must be signed by the assignor.⁴⁸ However, even if Susan and Robert had assigned the copyright to the sun cream manufacturer it would seem reasonable that they would have done this subject to certain restrictions such as what the photograph could be used for.⁴⁹ If that were the case, Susan and Robert could bring an action against Kevin for an infringement of copyright. If no such express limitation was in place, Susan and Robert could rely on a right to integrity which arises automatically under s. 109(1) of the Copyright and Related Rights Act 2000. This section provides the author with ‘the right to object to any distortion, mutilation or other modifications of or other derogatory acting in relation to the work which would prejudice his or her reputation ...’ It could certainly be argued that Kevin’s posting of the photograph on a website called ‘naked.little.girl.com’ would be in breach of this right to integrity, particularly if the website is pornographic.

The right to privacy has been recognised as an unenumerated constitutional right under Art. 40.3 in limited circumstances.⁵⁰ It is not

⁴⁶ See Court of Athens Decision 1639/2001.

⁴⁷ S. 21(h) of the Copyright and Related Rights Act 2000.

⁴⁸ S. 47(3) of the Copyright Act 1963 and s. 120(3) of the Copyright and Related Rights Act 2000.

⁴⁹ S. 47(2) of the Copyright Act 1963 and s. 120(2) of the Copyright and Related Rights Act 2000.

⁵⁰ *McGee v. AG* [1974] IR 284 (SC); *Kennedy and Arnold v. Ireland* [1987] IR 587; and *Norris v. AG* [1984] IR 36.

certain whether a private citizen could instigate proceedings for breach of privacy in Lily's situation. To date, the courts have indicated that an expansion of the right to privacy should be left to the legislature.⁵¹ However, since the enactment of the European Convention on Human Rights Act 2003, it could be argued that Lily's right to privacy under Art. 8 was breached by the publication of the photograph in this manner by Kevin. Such an argument could be developed in conjunction with the Irish constitutional case law already in existence on the matter. However, because Susan and Robert have already agreed to sell the photograph, such an action might be difficult to sustain.

To succeed in an action for breach of confidence, Lily would need to establish that the information was communicated in circumstances which gave rise to a confidential relationship and this is not the case here.⁵² Furthermore, the information would not appear to have the 'necessary quality of confidence about it' and as it had already appeared in the public domain any such action would consequently fail.⁵³

Under the Child Trafficking and Pornography Act 1998, trafficking and the use of children for purposes of sexual exploitation are prohibited. It is an offence to produce, disseminate, handle or possess child pornography which includes both visual and aural representations of children.⁵⁴ For the purposes of the Act, a child is any person under the age of 17.⁵⁵ Penalties include imprisonment and a fine.⁵⁶ Thus, if the images were deemed to be pornographic the internet provider could be found liable if they knowingly allowed the publication of the images.

Italy

I. Operative rules

Lily can recover damages from Kevin. The internet provider is not liable.

II. Descriptive formants

The reproduction of the photograph on the website is unlawful. According to Art. 96 CA, publication requires the permission of the person portrayed. Lily does not have the competence to decide. Therefore, the declaration must come from her parents.⁵⁷ They agreed to the

⁵¹ Per O'Hanlon J. in *Maguire v. Drury* [1995] 1 ILRM 108 at 116.

⁵² *House of Spring Gardens v. Point Blank Ltd* [1984] IR 611 (SC).

⁵³ *Ibid.*, Costello J at 660. ⁵⁴ SS. 5(1) and 2(1). ⁵⁵ S. 2(1). ⁵⁶ S. 5(1).

⁵⁷ See Trib. Catania 16 Dec. 1982, *Giur. merito* 1984, I, 855; Trib. Torino 15 Jan. 1994, *Dir. ind.* 1994, 723.

commercial exploitation of the picture. However, one cannot assume that the photograph, once published, becomes a public good. Consent to interference with personality rights is both subjectively and objectively restricted and is subject to a narrow interpretation.⁵⁸ In these matters, no doctrine of 'exhaustion' is accepted. Therefore, the permission given by Lily's parents does not include any derivative use of the photograph: Lily's picture cannot be used by persons other than the licensee for other purposes or in other contexts.

In this case, the context is not only different, but also humiliating. It is true that Lily was initially depicted naked. However, the portrait's reproduction in an advert for sun cream is not comparable to publication on a website with erotic or pornographic features.⁵⁹ Therefore, Lily's rights to likeness, honour and personal identity were infringed. Lily's parents, acting on her behalf, can recover damages for non-economic loss from Kevin (Art. 2059 CC; Art. 15 (2) DPC).

The liability of the internet provider is regulated by *decreto legislativo* 9-4-2003, n. 70, implementing the E-Commerce Directive 2000/31/EC. This Act follows the same principles set out in the Directive. As a result, the host provider is only liable for damages if he/she has actual knowledge of illegal material stored on his/her system and still does not act to remove it (Art. 16).⁶⁰ In any event, there is no general obligation to monitor transmitted or stored information, nor a duty to actively seek facts or circumstances indicating illegal activity (Art. 17). Therefore, if the internet provider has no actual knowledge of the unlawful publication of Lily's picture and no authority has given notice of the illegal material stored on the website, it is not answerable for any loss suffered by Lily. Only Kevin is liable as the content provider.

The Netherlands

I. Operative rules

Lily can claim both damages for economic and non-economic loss from Kevin. The internet provider is liable if it posts the photograph on the

⁵⁸ Cass. 17 Feb. 2004 no. 3014, *La resp. civ.* 2004, 112; Cass. 10 Jun. 1997 no. 5175, *Foro it.* 1997, I, 2920; A. De Vita, 'Art. 10', in A. Pizzorusso, R. Romboli, U. Breccia and A. De Vita, 'Le persone fisiche', in F. Galgano (ed.), *Commentario del Codice Civile Scialoja-Branca* (Bologna/Rome: 1988) at 564 *et seq.*

⁵⁹ For a similar case, see Trib. Bologna 27 Nov. 1997, *Dir. aut.* 1998, 521; see also Trib. Bari 13 Jun. 2006, *Dir. Internet* 2006, 563 with commentary by L. Trucco, 'Pubblicazione d'immagini personali in Rete e responsabilità del provider'.

⁶⁰ On this matter, see Trib. Bari 13 Jun. 2006, *Dir. Internet* 2006, 563.

site or if he/she does not remove the photograph after having been informed that it is unlawful.

II. Descriptive formants

Kevin published the picture without the consent of Lily's parents and/or Lily. In relation to the context in which the picture has been published (Case 1, circumstance (d)), the internet site 'naked.little.girl.com' which has sexual, pornographic and erotic connotations, this constitutes an unlawful act towards Lily.⁶¹

The fact that Lily's parents sold the picture to a sun cream manufacturer and knew that the picture would appear in an advertisement in several magazines implies that they gave consent for publication in that context.⁶² It does not imply that they consented to the publication of the picture on an internet site aimed at pornography and/or sexual expressions.⁶³

Lily can claim damages from Kevin. Her claim for economic loss suffered is based on Art. 6:96 BW. She can receive damages for non-economic loss if she proves that her person was infringed (Art. 6:106 BW).⁶⁴

With regard to the internet provider, the same standards apply as for publishers and other intermediaries in the process of communication.⁶⁵ If the internet provider posted the publication on the site he/she is jointly and severally liable (Art. 6:6, s. 2 *jo.* Art. 6:102 BW).

If the internet provider was not involved in posting the picture on the site, whether he/she has a duty to take measures depends on the circumstances involved. If he/she has been informed of the fact that one of the users of his system acts unlawfully by infringing someone's personality, he has to take measures. If this is the case, Lily can claim an injunction to have her picture removed from the site. If the provider does not remove the picture he is jointly and severally liable for the loss Lily suffers as a consequence of her picture being posted on the internet site.

⁶¹ HR 30 Oct. 1987, NJ 1988, 277 (Naturist Guide); Court of Appeal Amsterdam, 10 Sept. 1998, Mediaforum 1998-11/12, no. 52; G.A.I Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 128.

⁶² Court of first instance Utrecht, 18 Mar. 1999, Informatierecht/AMI 1999-6, pp. 94-6.

⁶³ HR 30 Oct. 1987, NJ 1988, 277 (Naturist Guide). ⁶⁴ *Ibid.*

⁶⁵ Schuijt, *Losbladige Onrechtmatige Daad* no. 171.

Portugal

I. Operative rules

Lily is entitled to compensation from Kevin for non-economic loss. The internet provider is only liable if it refuses to remove the photograph after being asked to do so by Lily, represented by her parents, and either following a decision by a supervisory authority or a court injunction.

II. Descriptive formants

Art. 81 *CC* prohibits, in principle, ‘any voluntary limitation of personality rights, if contrary to the principles of “public order”’ (para. 1). However, para. 2 states that, when admissible, voluntary limitations of personality rights are freely revocable, even though compensation may have to be paid to the other party for the loss caused to his/her legitimate expectations.

Selling the photograph of a naked four-year-old girl to a sun cream manufacturer to be used as a commercial advertisement is not unlawful in itself. However, the use of the image of minors in advertisements is limited by Art. 14 of the Code of Publicity⁶⁶ (*Código da Publicidade, CPub*) to cases where there is a direct relationship between the minor and the product or service to which the advertisement relates. This has to do with protection of minors and restricting (ab)use of their images in advertising. The wording of this case does not exclude the lawful use of the photograph in the advertisement of sun cream if it is specially designed for babies or young children and if the parents consent.

Moreover, it is seriously immoral and unlawful to publish the said photograph on an internet site called ‘naked.little.girl.com’. This practice has nothing to do with the aim for which the consent for publication was given and constitutes clear abuse. The general rule, as stated above, is that someone’s picture may not be displayed, reproduced or commercialised without his/her consent (Art. 79 *CC*), unless a lack of consent may be justified by one of the reasons mentioned in para. 2 of Art. 79 *CC*. One of those justifications is the reproduction of the image framed within a public place or facts of public interest or which have taken place in public. Kevin can therefore allege that the picture depicts facts (running on the beach) which have taken place publicly (a public beach, we presume). Still, Lily can counter-allege that framing the image within a public place does not, by itself, justify the

⁶⁶ Decree-Law no. 330/90, 23 Oct.

freedom to publish the picture (STJ 8.11.2001). In addition, her image in an advertisement campaign was not harmful to her reputation or honour, but having it on an internet website called 'naked.little.girl.com' is, on the contrary, very offensive to her honour and reputation. According to Art. 79(3) CC, posting the image on that website can be considered a wrongful act. Therefore, on the grounds of Arts. 70 and 79 CC, Lily, represented by either of her parents, may file for an injunction to remove the photograph from the internet, which would most likely be granted. She is also entitled to compensation for non-economic loss on the grounds of Arts. 483 and 496 CC.

In relation to consent, Art. 340 CC determines that the infringement of a right is lawful as long as the person entitled to this right has consented to that infringement (i.e. to the individual harmful conduct). Furthermore, in respect of the right to image, consent is only valid if it refers to a specific picture, not any picture of that person (STJ 8.11.2001). Lily, through her parents, only gave consent to the sun cream manufacturer, not to Kevin. In addition, even if consent had been given to Kevin, posting that picture on a website with such a name could easily be connected to paedophilia activities. Since paedophilia is a crime (Art. 172 CP) and completely against public order and morals, at any rate any consent would be considered void and Kevin's conduct would be wrongful (Arts. 81(1), 280(2) and 340(2) CC).

In respect of the internet services provider (ISP), Portugal has transposed Directive 2000/31/EC, regarding e-commerce, through Decree-Law no. 7/2004, 7 January. The ISP is not obliged to monitor the legality of the contents of the sites hosted (Art. 12). The ISP can only be liable if it refuses to remove the photograph, after being asked to do so by Lily, represented by her parents. After the request to remove unlawful contents (image, text or other), the ISP either acts accordingly or bears the responsibility for failure to act and for maintaining the status quo (Arts. 13 and 16). In the latter scenario, a claim for damages can be lodged based on the provisions mentioned, in connection with Arts. 483 and 496 CC. If the wrongfulness of the contents in question is not obvious, the ISP is not obliged to remove them or block access to them (Art. 18). Whoever believes that certain internet content is somehow wrongful can complain to the Portuguese Communications Supervisory Authority,⁶⁷ which has to provide a temporary solution (Art. 18(2)). On the other hand, if someone is interested in keeping such

⁶⁷ ICP-ANACOM, www.icp.pt/.

content available on the internet he/she can appeal to the Authority against any decision made by it to remove such content (Art. 18(3)). Besides these administrative instruments, one can simultaneously resort to a court action (Art. 18(8)).

Scotland

I. Operative rules

Lily's civil law claim is restricted to an action against Kevin for damages for breach of statutory duty under the Data Protection Act 1998 rules. The internet services provider (ISP) will only incur liability if it ignores prior notification to remove the data. A criminal prosecution under the relevant provisions of the Scottish equivalent of the English Protection of Children Act 1978 as amended, i.e. the Civic Government (Scotland) Act 1982, is possible.

II. Descriptive formants

A website showing a photograph of a naked child under a domain name which has child abuse/paedophilic overtones raises various civil and criminal law issues. In relation to the photograph itself, copyright law remains narrow in its scope of protection and therefore difficult to invoke here. This is all the more so where the photograph has previously been licensed or sold to an advertising agency. There is no recourse here to s. 85 of the Copyright, Design and Patents Act 1988 (owners' right to restrict use), as the parents cannot claim that the photograph was either commissioned for private purposes or subject to their control. Lily's parents have consented to the photograph being used for specific commercial purposes in the first place. Only Lily's moral right to her picture remains unaffected.⁶⁸

Nevertheless, the parental consent/licence cannot be deemed to automatically extend to all subsequent (ab)use. In view of its previous use in advertising, a claim for defamation may well fail on the grounds that the photograph has already appeared in the public sphere as an advertisement.⁶⁹ Although the photograph is in the public domain, the law of privacy and confidentiality may offer some protection, particularly as Lily is a minor. In the *Douglas* case, both

⁶⁸ S. 85 Copyright, Patents and Design Act 1988. The moral rights still attach to Lily and can be claimed through her parents on her behalf.

⁶⁹ See *Charleston v. NGN* [1995] 2 WLR 450 – not libellous to use the photograph of a well-known actress on a pornographic computer game.

the court of first instance and the Court of Appeal conceded that there had been a breach of confidence through the unlawful commercialisation of personal information in photographs by a magazine competing against the magazine to which the exclusive rights in the wedding photographs had been contracted. It is not declared in this case whether Kevin is working for profit or not. It is possible to claim breach of confidence along with invasion of the right to privacy against Kevin (following the judicial statements in the cases reported previously it appears obvious that privacy covers situations where children are exposed distastefully), but criminal law appears to offer a stronger line of action.

Some assistance can be found in the particular statutory provisions prohibiting the publication of photographs of children, particularly where these are lacking innocence or are obscene. Photographs of children, whether decent or not, are subject to special statutory restrictions and it is an indecent offence to possess an obscene photograph of a child.⁷⁰

The case raises strong data protection aspects. Kevin is required by the Data Protection Act 1998 (DPA) to provide the source of the data and accompanying information on communication, and is liable under those provisions where there is no authorisation by the data subject.⁷¹ Kevin is a data controller for the purposes of the Act and must comply with the data processing principles under s. 4(3) DPA. Data subjects have a right to access the information processed under s. 7, including the right to prevent processing likely to cause distress under s. 10. Failure to comply with the data protection rules leads to liability for breach of statutory duty and prosecution under s. 60 DPA. This ground of action has been reinforced by the Directive on Privacy and Electronic Communication 2002/58/EC,⁷² which has since been transposed in the UK.⁷³ These rules are limited in scope to providers of public communication services so that Kevin is excluded from their ambit. The provisions of the Data Protection Act remain unaffected.

⁷⁰ In both Scotland and England it is an offence to have or take obscene photographs of children. Protection of Children Act 1978, as amended in 1994 applies in England; *R v. Fellows* [1997] 2 All ER 548. It is regulated by the Civic Government (Scotland) Act 1982, Ch. 45, s. 52.

⁷¹ See s. 10 Data Protection Act 1998; s. 13 (compensation). See generally, I. Lloyd, *Legal Aspects of the Information Society* (London: 2002) para 3:60 ff.

⁷² OJ L201/37 of 31.07.2002.

⁷³ The Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426.

1. *Liability of provider*

The public policy element of publishing an online photograph of a minor requires the regulators of internet services to act against publication in the circumstances outlined in the instant case. The E-commerce Directive 2000/31/EC was transposed into UK law by the Electronic Commerce Regulations 2002.⁷⁴ The Regulations contain a two-fold approach to regulatory matters, including provider liability. Monitoring and shut down control by the regulatory authority occurs in cases where matters of public policy are endangered (this would extend to a case where minors are involved). Nevertheless, the liability of the ISP under the regulations is limited where the content is displayed unknowingly. An ISP can escape content liability under these circumstances. Prior notice to remove must be served on the ISP.⁷⁵ The ISP is only liable under these provisions once it has been notified and only fails thereafter to take reasonable steps to remove the publication.

Spain

I. Operative rules

Lily's representatives can claim damages and an injunction from Kevin as the authorisation to publish the picture was only given to the sun cream manufacturer. If the internet service provider has no actual knowledge of the illegal content it will not be held liable.

II. Descriptive formants

Kevin should have asked Lily's parents for permission to publish the photograph.⁷⁶ Otherwise, he is liable for harm and has to remove the photograph from the internet. Therefore, the parents can claim for an injunction against Kevin, according to *LO 1/1982*.

In addition to injunctive relief, the amount of damages to be awarded could be interesting because Kevin could argue that

⁷⁴ SI 2002/2013. ⁷⁵ Reg. 19, SI 2002/2013.

⁷⁶ STS, 24 Apr. 2000 (RJ 2673), dealt with this topic. This case concerned the wedding of the sister of a famous Spanish television actress (Lydia Bosch). The company who took the wedding photographs sold some pictures to a famous magazine, who published them. The Spanish Supreme Court condemned the agency and ordered the magazine to pay €3,000 for illegitimate interference, given that, although express permission was given for taking the photographs, there was no consent for publication, which must be expressly given. Moreover, Lydia's sister is not a public person and her domicile is not a public place.

hundreds of people had already seen the picture of Lily naked in the sun cream advertisement so no damage was caused. We consider that the relevance of this fact would be minimal as permission was only given to the sun cream manufacturer and Kevin used the picture for commercial purposes. At any rate, the action against Kevin will include a claim for non-pecuniary damages. Criminal law would also be applicable here as the picture could be considered as child pornography.

With regard to the internet provider, we must consider the Spanish Act 34/2002 of 11 July concerning information society services and e-commerce,⁷⁷ which adopts Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market. In our case, if we consider that 'put it on internet' and 'internet provider' refer to hosting services, then Art. 16 of the Act is applicable. This establishes the liability of the service provider for hosting where the provider has actual knowledge of illegal activity or upon becoming aware of the illegal activity does not take necessary steps to remove the information or disable access to the information. Thus, if the internet service provider has no actual knowledge of the illegal content, it will not be liable.

Switzerland

I. Operative rules

Robert and Susan may bring proceedings on behalf of their daughter and demand economic and non-economic damages from Kevin. If the photograph of Lily is distinguished by its individuality, it must be considered a 'work of art' under the applicable statute on copyright, hereinafter referred to as the *LDA*,⁷⁸ which applies to the exclusion of Art. 28 CC. The *LDA*, nevertheless, refers to the same judicial remedies as general law. Specific injunctive relief may be requested against 'any individual who participates in the infringement' (Art. 28, para. 1 CC). An action for specific relief can, therefore, also be brought against the internet provider.

⁷⁷ Ley 34/2004, de 11 de Julio, de servicios de la sociedad de la información y de comercio electrónico.

⁷⁸ Loi fédérale du 9 octobre 1992 sur le droit d'auteur et les droits voisins (*LDA*) (RS 231.1).

II. Descriptive formants

As Lily is a minor without capacity to understand, her parents must act on her behalf. The right to one's own image is part of the personality rights protected by Art. 28, para. 1 CC. As we have seen already, an individual's image cannot, in principle, be reproduced by drawing, painting, photography or any comparable process without the prior or subsequent consent of the individual; neither can such a reproduction be distributed without consent.⁷⁹ By scanning the photograph of Lily without the consent of her parents, Kevin unlawfully infringed her image rights.

In addition, the name of the website, which has a sexual connotation, and its association with the name of the little girl, infringes on Lily's right to her reputation. Therefore, Lily's parents may demand a declaratory judgment that an unlawful infringement occurred and ask for an injunction to prevent the photograph being posted on the website (Art. 28, para. 1(2) and (3) CC). They may also claim economic and non-economic damages (Art. 28a, para. 3 CC).

Moreover, if the photograph of Lily was considered a 'work of art' within the meaning of Art. 2 LDA, in other words a 'creation of the mind, literary or artistic which has an individual character, and whose value or purpose lies therein', it might also benefit from protection under this Act. Art. 2 provides a list of examples of works it protects, and specifically mentions photographic, cinematographic, and other visual or audiovisual works (Art. 2, para. 2(g) LDA).

To be elevated to the status of 'work of art', the work must be an original creation, a work with a novel idea; it must incorporate a creative idea or contain a personal expression of thought.⁸⁰ The determinative criterion is the individuality of the creation.⁸¹ According to the Federal Court, it is possible to give a photograph an individual character by virtue of its composition, for example, by the choice of objects shown, the frame, the method of processing, or even by the use of a determined objective, of particular filters or film, in adjusting the focus of the photograph, in altering the clarity of the photograph, and by work done on the negative.⁸² That

⁷⁹ RVJ 2003, p. 252 c. 4a.

⁸⁰ ATF/BGE 130 III 168 c. 4 *et seq.*, JdT 2004 I 258; Judgment of the regional Court of Saint-Gallen, in SIC 2000, p. 188 c. 1c/aa.

⁸¹ ATF/BGE 130 III 168 c. 4.5, JdT 2004 I 258.

⁸² ATF/BGE 130 III 714 c. 2.1, JdT 2004 I 281.

the result attains the expression of a thought is thereby determinative as an expression possessing an individual character. A photograph that does not distinguish itself from an ordinary snapshot does not correspond to the idea of a work of art protected by the LDA.⁸³

If the photograph of Lily is distinguishable by its individuality, the LDA applies. Art. 10 LDA gives the creator of a work of art, here Lily's parents, the exclusive right to decide its use. By reproducing and distributing the photograph without permission, Kevin violated this right. Lily's parents may invoke Arts. 61 and 62 LDA in order to demand a declaratory judgment stating that the infringement was unlawful and an injunction to put a stop to it. Economic damages are provided for by Art. 62, para. 3 LDA which refers back to the Code of Obligations' provisions. Damages for pain and suffering will not be granted except in an especially serious infringement case.⁸⁴

Finally, Art. 67 LDA provides for criminal sanctions when a creator's rights are violated. By virtue of Art. 28, para. 1 CC, specific injunctive relief may be requested against 'any individual who participates in the infringement'. This expression has a broad sense and it targets any individual whose participation causes, permits, or facilitates an unlawful infringement of the personality rights of others.⁸⁵ An action for specific relief can, therefore, be brought against the internet provider.⁸⁶

Claims for compensatory relief (Art. 41 *et seq.* CO) and pain and suffering (Art. 49 CO) may also be directed at the internet provider if the provider violates its duty of care.⁸⁷ Such a violation exists where the provider was aware or should have been aware of the infringing character of the content of the website.⁸⁸

⁸³ Judgment of the Federal Court, 4C.111/2002 c. 2.3.

⁸⁴ A court in Zurich held that where a photograph of a young woman selling condoms in front of a nightclub is published in a magazine with classified ads for prostitutes, general life experience strongly suggests that pain and suffering results therefrom. Judgment of the *Obergericht* of the area of Zurich, in SIC 2002, p. 34 c. 3.4.

⁸⁵ H. Deschenaux and P. -H. Steinauer, *Personnes physiques et tutelle* (4th edn., Berne: 2001) p. 188, n. 575.

⁸⁶ P. Rohn, *Zivilrechtliche Verantwortlichkeit der Internet Provider nach schweizerischem Recht* (Zurich: 2004) p. 218.

⁸⁷ *Ibid.* at p. 219. ⁸⁸ *Ibid.*

III. Metalegal formants

The internet permits those who have technological equipment at their disposal and the knowledge necessary to traverse the whole world as well as its ideas and creations while incurring only minimal costs. In addition, a preventative examination of what is placed at the public's disposition is difficult to conduct. To overcome the difficulties that result from such an undertaking, Switzerland adopted a Federal Statute on the Surveillance of Correspondence by Mail and Telecommunication in 2002.⁸⁹ The ordinance⁹⁰ that accompanies this statute defines the types of surveillance that can be ordered, the means of execution, and the obligations of service providers. Currently, surveillance of internet access is limited to email functions (Art. 24 Ordonnance du 31 octobre 2001 sur la surveillance de la correspondance par poste et télécommunication, *OSCPT*). However, Switzerland signed the European Council's Convention on Cybercrime on 23 November 2001, which should instigate a significant modification of Swiss law. Most notably, it will allow cross-border judicial cooperation and it will provide for more intensive investigations.⁹¹

Comparative remarks

This case revolves around the unauthorised use of a minor's photograph on an internet website. However, prior to this, the photograph in question was published legally in several magazines as an advertisement for a sun cream manufacturer. Therefore, the case concerns the right to one's image in the context of a photograph which has already been published. In particular, does prior lawful publication mean that a third party can subsequently make use of the photograph for his/her own purposes without seeking consent? In this framework we consider two questions. Firstly, can Lily sue Kevin for damages for the unauthorised use of her photograph? Secondly, is there liability on the part of the internet provider?

⁸⁹ Loi fédérale du 6 octobre 2000 sur la surveillance de la correspondance par poste et télécommunication (LSCPT) (RS 780.1).

⁹⁰ Ordonnance du 31 octobre 2001 sur la surveillance de la correspondance par poste et télécommunication (OSCPT) (RS 780.11).

⁹¹ For a detailed analysis, see L. Moreillon and S. Blank, 'La surveillance policière et judiciaire des communications par Internet' (2004) *Médialex* 81 *et seq.*

Lily enjoys the protection of her right to image in most of the legal systems considered. The fact that she is a minor is irrelevant. However, from a procedural point of view, it is her parents who will take an action on her behalf. Almost all national reporters consider that the publication of Lily's photograph, without consent, is an unlawful act by Kevin and constitutes a civil wrong and/or a criminal offence. In this respect, in most legal systems, it does not appear to make a difference that the photograph had already been published prior to Kevin's use of it. One exception is possibly the UK where it appears that Lily would be in a more favourable position to claim breach of confidence if the photograph had not already been in the public domain. For the legal bases of right to image claims, see Cases 7 and 8. In this respect, depending on the legal system, Lily can successfully sue Kevin on the basis of general personality rights provisions (as set out in civil codes and/or case law), copyright law and/or common law torts and equitable doctrines.

In most countries, the damages awarded will be in the form of compensation for non-economic loss. In order to claim damages for economic loss it would have to be shown that Lily and her parents lost the opportunity to exploit the image themselves – which would seemingly not be possible under the facts of this case.

In Germany, it is necessary to show a 'serious infringement' of personality rights in order to claim compensation for non-economic loss. In this case, it appears that Kevin's publication would be regarded as a 'serious infringement' because it involves a naked photograph and a 'less than innocent' context. Therefore, Lily can claim for non-economic loss. Nevertheless, interestingly, she may receive less than an adult in the same situation because the facial features of a child will change over time and become less identifiable.

The only legal systems in which Lily can probably not claim damages are Finland and Ireland. In Finland, Lily could only sue Kevin if the publication was defamatory or was used for commercial purposes. Since the photograph in question is not a pornographic picture and since Kevin's website does not appear to have a commercial purpose, Lily does not have a claim. Interestingly, even if there was other pornographic material on the website which made Kevin criminally accountable, this would not be grounds for civil liability. In Ireland, it is likely that the internet provider would be criminally liable, but Kevin's civil liability would most probably be denied.

The question of the liability of the internet provider is a separate and distinct issue to that of Kevin's liability. The answer is similar across most legal systems due to the implementation of the E-Commerce directive. If the photograph in question is deemed to be unlawful and the provider has actual knowledge of its existence, then he/she can be sued for an injunction.

13 Case 10: The late famous tennis player

Case

For advertising purposes, an electronics company used a photograph of a famous tennis player, depicted in action during a tournament match. This photograph was well-known, as it had appeared in the press some years earlier. In the advert, just three words ('Energy', 'Power', 'Speed') and the name of the company were written underneath the photograph.

- (a) Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?
- (b) Do the damages include skimming off the profits earned by the company through their use of the photograph?
- (c) What would be the result if the famous tennis player had died prior to the publication but he has a surviving spouse and child?

Discussions

Austria

I. Operative rules

The tennis player can bring an action for forbearance, abatement and for publication of the judgment. However, he is not entitled to claim compensation for his economic and non-economic loss. He can also obtain a hypothetical licence fee under the law of unjust enrichment.

If the close relatives are the trustees of the deceased tennis player they can bring an action in his name under the law of unjust enrichment.

II. Descriptive formants

(a) *Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?*

Even if the illustrated person is well-known, his right to image (§ 78 *UrhG*) can be injured.¹ Using a picture for advertising purposes without obtaining the consent of the (famous) person concerned is a prime example of a violation of § 78 *UrhG*.² In the view of the *OGH*, this creates the false impression that the picture was made available to the advertising company by the tennis player for consideration.³ It does not make any difference whether or not the name of the person is mentioned.⁴

The tennis player can raise the following claims: forbearance (§ 81 *UrhG*), abatement (§ 82 *UrhG*), publication of the judgment (§ 85 *UrhG*).⁵

According to § 87, subs. 1 *UrhG*, the tennis player is also entitled to ask for compensation of the economic loss he suffered. Analysing the facts, the only feasible damage to property seems to be the equivalent of a hypothetical adequate money consideration for the use of the photograph in an advertisement,⁶ i.e. a hypothetical licence fee. Indeed, in one case concerning the unauthorised use of an image for an advertisement, the *OGH* did not accept such a claim.⁷

Furthermore, under § 87, subs. 2 *UrhG* compensation for non-economic harm could be awarded if the infringement was particularly serious;⁸ however, this is not the case here.

(b) *Do the damages include skimming off the profits earned by the company through their use of the photograph?*

In the present case, an action for restitution of the unjust enrichment under § 1041 *ABGB*⁹ could be brought. When used for an unauthorised advertisement, the fame of a celebrated person such as a famous

¹ *OGH MR* 1996, 30; cf. Cases 1, 7, 8.

² *OGH SZ* 44/104; *ÖBl* 1973, 139; *ÖBl* 1977, 22; *ÖBl* 1982, 85; *MR* 1997, 26.

³ *OGH MR* 1999, 278 (commentary by G. Korn). ⁴ *OGH SZ* 55/12.

⁵ E. Rehm, 'Das Recht am eigenen Bild' (1962) *JBl* 1 *et seq.*

⁶ There is no indication that the athlete suffered loss because he promised someone to exclusively promote certain products.

⁷ *OGH EvBl* 1983/66 = *ÖBl* 1983, 119 = *SZ* 55/12. ⁸ See Case 7.

⁹ § 1041 *ABGB* ('Use of property for the gain of another') reads: 'Where property has been used for the benefit of another, not in the management of a business, the owner can demand the return thereof in kind or, if such return can no longer be made, the value thereof at time of its use, even though no advantage was received therefrom.'

sportsperson can be subsumed under the term ‘property’ in the sense of this particular provision.¹⁰

According to § 1041 ABGB, the level of the remuneration, which in our case is a hypothetical licence fee,¹¹ depends on the integrity of the party who has been unjustly enriched.¹² If this party was honest, the fair market value would have to be reimbursed; if not, the highest price achievable on the market would have to be paid (see § 417 ABGB). As the electronics company was probably dishonest,¹³ it has to pay the highest market price.

Skimming off the (net) profits earned by the company (through their use of the picture) instead of a hypothetical licence fee is a rather difficult question.¹⁴ Up until now, the OGH has not dealt with this problem.¹⁵

(c) What would be the result if the famous tennis player had died prior to the publication but he has a surviving spouse and child?

The spouse and the child are close relatives according to § 78, subs. 1 *UrhG*; § 78, subs. 2 *UrhG* refers explicitly to § 77, subs. 2 *UrhG*, which defines the term ‘close relatives’ as ascendants, descendants and the surviving spouse.¹⁶ These persons can prevent the dissemination of a picture of their deceased relative if their legitimate interests are affected. However, in the present case these interests are presumably

¹⁰ OGH EvBl 1983/66 = ÖBl 1983, 118 = SZ 55/12; JBl 1989, 786 = MR 1989, 132.

¹¹ As a result, regarding our case the OGH does not award this fee under tort law but under the law of unjust enrichment.

¹² OGH JBl 1992, 388; JBl 1996, 653; JBl 1998, 250; P. Apathy, ‘Redlicher oder unredlicher Besitzer’ (1989) NZ 142; F. Bydliński, ‘Zum Bereicherungsanspruch gegen den Unredlichen’ (1969) JBl 252 *et seq.*

¹³ The defendant has to be regarded as dishonest if he/she must reasonably suppose that the used property does not belong to him/her *cf.* § 326 ABGB.

¹⁴ Of course, this is only relevant if the profits earned are greater than the licence fee.

¹⁵ § 87 subs. 4 *UrhG*, which provides for such a claim regarding classical copyright infringements, is not applicable. Indeed, § 1041 ABGB in connection with § 330 ABGB could be an appropriate basis. If the company acted in bad faith, it not only has to substitute the common value of the used ‘property’ but the additional advantages which occurred through the use. If this is the case, the contribution of the company to these advantages (e.g. the money spent to manufacture the products and on the advertising campaign) should be taken into consideration; *cf.* H. Koziol and A. Warzilek, ‘Austrian Country Report’ no. 200 with further ref., in H. Koziol and A. Warzilek, *The Protection of Personality Rights against Invasions by Mass Media* (Vienna/New York: 2005).

¹⁶ Children, parents and the surviving spouse are entitled to this protection for their whole life, but other close relatives are only entitled to it for ten years from the end of the year of the death of the person portrayed.

not encroached. It would be straying too far from the issue if direct protection were to be granted to the close relatives.

It has to be examined whether the personality right of the tennis player in itself could be still a basis for a claim. Here we are concerned with whether or not there are post-mortem personality rights in Austria. Both the *OGH*¹⁷ and scholars¹⁸ recognise these types of rights. The relatives in the sense of § 77, subs. 2 *UrHG* could be regarded as trustees of the deceased person.¹⁹ Consequently, they can obtain remuneration under the law of unjust enrichment (§ 1041 *ABGB*). Moreover, there could be a post-mortem claim for forbearance, abatement and for publication of the judgment.

There is no compensation for non-economic harm (the deceased could not sustain any pain and suffering).²⁰

III. Metalegal formants

The courts often regard the unauthorised use of an image for an advertisement as an offending act, since this suggests that the injured person has sold a particular feature of his/her personality for remuneration.²¹ Korn is rightly critical of this approach, since nowadays such a suggestion is neither offensive nor scandalous. Nevertheless he argues that utilising someone's picture for advertising purposes without his/her agreement should not be permitted. The decision to become part of an advertising campaign should be

¹⁷ SZ 57/98; MR 2002, 291.

¹⁸ J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 16 no. 28; H. Koziol, *Österreichisches Haftpflichtrecht II* (2nd edn., Vienna: 1984) 17; K. Prietl, 'Die ärztliche Schweigepflicht nach dem Tod des Patienten', (1995) *RdM* 6 *et seq.*; B. Raschauer, *Namensrecht* (Vienna: 1978) 272; cf. also M. Binder, 'Das rechtliche Fortleben des menschlichen Körpers nach dem Tode' (1998/99) *JAP* 228 *et seq.*; K. Weber, 'Ist der "Ötzi" ein Denkmal?' (1992) *ÖJZ* 673 *et seq.*

¹⁹ H. Koziol, *Österreichisches Haftpflichtrecht II* at 17. In respect of the commercial use of a deceased person's name, see also P. Zöchbauer, 'Zur Gestattung der Namensverwendung' (2001) *MR* 353 *et seq.* In life, the deceased is entitled to nominate a trustee of his/her choice.

²⁰ H. Koziol, *Österreichisches Haftpflichtrecht II* at 18. In a decision concerning the postmortal application of § 1330 subs. 1 *ABGB* (Recht auf Ehre; right to honour) the *OGH* was not obliged to take a firm stand in respect of this problem, because according to this provision there is never compensation for non-economic harm; *OGH MR* 2002, 288 *et seq.*

²¹ *OGH MR* 1990, 141 (commentary by M. Polak); *MR* 1995, 109 (commentary by M. Walter); *MR* 1999, 278 (commentary by G. Korn); *OLG Wien MR* 1986/4, 19.

regarded as a product of one's right to freely express an opinion (cf. Art. 10 ECHR).²²

In respect of this particular case, it is questionable whether one could request an adequate hypothetical licence fee under § 87, subs. 1 *UrhG*. However, this tort law approach entails specific problems. Firstly, following the widely recognised balance theory, which says that one has to calculate the hypothetical current financial status with total disregard for the damage which has occurred minus the real current financial status,²³ no pecuniary loss arises if the tennis player categorically refuses to conclude contracts on the utilisation of his personality features. In this case the difference between his two compared financial situations is zero.²⁴ Secondly, from a dogmatic point of view it is not necessary to invoke tort law to recover the profits gained by the company. In Austria, the remedy of unjust enrichment exists which aims exactly at this goal.²⁵

In particular, the creation of a fictitious licence contract between the electronics company and the athlete, which is the precondition for a measurable loss, can be deemed as improper and unnecessary given that the claimant is usually entitled to receive the corresponding remuneration under the law of unjust enrichment.²⁶ Despite these misgivings, the legislator has agreed that the concept of economic loss in terms of § 87, subs. 1 *UrhG* also encompasses remuneration representing an adequate, hypothetical licence fee.²⁷ Although this opinion refers to infringements of copyright, the same should apply where

²² G. Korn, commentary on OGH MR 1999, 279. In Austria, the text of the ECtHR is constitutional law; see Cases 5 and 11.

²³ OGH SZ 50/50; EvBl 1983/66 = ÖBl 1983, 119 = SZ 55/12; H. Koziol, *Österreichisches Haftpflichtrecht I* (3rd edn., Vienna: 1997) no. 2/19; H. Koziol and R. Welsner, *Bürgerliches Recht II* (13th edn., Vienna: 2007) 324.

²⁴ Cf. BGH NJW 1958, 827; NJW 1961, 2059; NJW 1979, 2205; cf. further E. Ullmann, 'Persönlichkeitsrechte in Lizenz?' (1999) *AfP* 212; A. Warzilek, commentary on LG Hamburg MR 2004, 194.

²⁵ Cf. H. Koziol, 'Summary and Outlook' no. 42, in H. Koziol and A. Warzilek, *The Protection of Personality Rights*.

²⁶ A. Warzilek, commentary on LG Hamburg MR 2004, 194.

²⁷ 'Erläuternde Bemerkungen zum UrhG 1936', in W. Dillenz, *Materialien zum österreichischen Urheberrecht* (Vienna: 1986) 177; see also H. Torggler, 'Probleme des Schadenersatzes im Immaterialgüter- und Wettbewerbsrecht' (1976) *ÖBl* 59; dissenting F. Mahr, 'Die "rätselhafte Schadenspauschalierung" nach § 87 Abs. 3 UrhG' (1994) *MR* 187 *et seq.*; *ibid.*, 'Bereicherung, Schadenersatz und Herausgabe des Verletzergerwinnes', in R. Dittrich, *Beiträge zum Urheberrecht IV* (Vienna: 1996) 40.

there are infringements of the right to image (§ 78 *UrhG*). However, in one case concerning the unauthorised use of an image for an advertisement the *OGH* inconsistently did *not* award a hypothetical licence fee under tort law.²⁸

In the author's opinion, the property value embodied by the picture of the deceased should not be capable of being accessed by any third person. The German Supreme Court (*BGH*) adopted this remarkable position in the '*Marlene Dietrich* case'.²⁹ In this context, under Austrian law the most suitable remedy would be a claim under the law of unjust enrichment.³⁰

Finally, one has to state that personality rights cannot be inherited; however, this does not constitute an obstacle for post-mortem personality rights.³¹ Up until now the *OGH* did not consciously decide whether the protection of post-mortem personality rights should be limited by an absolute period of time³² or whether a balancing of the time which has passed and the seriousness of the infringement should take place in every individual case.³³ In respect of legal certainty, the first solution is preferable.

Irrespective of the fact that the nucleus of personality rights is idealistic, nowadays economic aspects stand in the foreground for both courts and scholars.³⁴ It is submitted that this trend will intensify in the future.

Belgium

I. Operative rules

The sportsman can sue the company for damages and an injunction. He will receive compensation for his lost earning capacity.

²⁸ OGH EvBl 1983/66 = ÖBl 1983, 119 = SZ 55/12.

²⁹ BGH MR 1999, 338.

³⁰ The German BGH granted a claim for damages. Bearing in mind the existence of § 77 subs. 2 *UrhG*, instead of the heirs, like in Germany, the close relatives should be entitled to lodge this claim as trustees. This solution would also be more coherent with another approach: At the time of the transfer of the hereditary rights this reward did not exist. Then again, the heirs could also be seen as the appropriate claimants, since they have to be regarded as the economic successors of the deceased.

³¹ OGH MR 2002, 291.

³² Cf. § 77 subs. 2 and § 78 subs. 2 *UrhG*; cf. also the fixed period of seventy years after the death of the author for the protection of copyrights (§ 60 *UrhG*).

³³ OGH MR 2002, 292.

³⁴ Cf. A. Warzilek, 'Comparative Report' no. 21, in H. Koziol and A. Warzilek, *The Protection of Personality Rights*; differentiating OGH MR 1995, 110 = ÖBl 1995, 287 = SZ

If the tennis player has died before the publication of the photograph, his widow and child can sue the company for the protection of his reputation.

II. Descriptive formants

The sportsman will be able to successfully sue the company for injunction and compensation.

A sportsperson cannot oppose the publication of a (one-off) topical photograph in a journalistic context which informs the public, e.g. the publication of a photograph in a newspaper article on sports.

However, his/her right to image is considered to have been infringed if the photograph is used for other purposes, e.g. commercial purposes. In such cases, he/she can seek an injunction and sue for damages for economic and non-economic loss. Compensation for non-economic loss arises from the mere invasion of the right to image. Damages for economic loss stem from the lost possibility for the sportsperson to exploit his/her own image commercially.³⁵

Kim Clijsters, a Belgian tennis player, reached the finals of the Roland Garros tennis tournament in 2001. At that time, a company used her photograph for advertisement purposes in a newspaper. Clijsters received €2,000 for moral harm.³⁶ In another case, Clijsters received €1 in damages for moral harm from a company that also used her photograph for advertisement purposes.³⁷

Personality rights are personal. Whether or not this means that there is no post-mortem protection is uncertain under Belgian law since the courts accept that they can protect the memories of the deceased relatives.³⁸ A Belgian newspaper *La Dernière Heure* used a photograph of the Belgian politician André Cools which was taken at the time he was dying after having been shot by some gangsters. The paper used the photograph in a promotional campaign in the printed press and on the television and the photograph was accompanied by music from the movie *The Godfather*, suggesting some rather dishonest dealings in Belgian politics. His relatives sued the newspaper. The civil court of

67/224; cf. also W. Dillenz and D. Gutmann, *Kommentar zum Urheberrechtsgesetz und Verwertungsgesellschaftengesetz* (2nd edn., Vienna: 2004) § 78 no. 12.

³⁵ CA Brussels 4 Oct. 1989, RW 1989–90, 651.

³⁶ Civil Court Hasselt 19 Dec. 2003, AM 2004, 388.

³⁷ Civil Court Ghent 19 Nov. 2003, AM 2004, 384.

³⁸ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995–2000' (2001) TPR 1639.

Brussels decided that the newspaper committed a fault by tarnishing the reputation of André Cools.³⁹

England

I. Operative rules

The claimant might have a claim in passing off although this is unlikely due to the specific requirements of the tort. Damages under passing off cannot consist of skimming off the profits earned by the defendant. The electronics company could not be held liable if the defendant has died prior to publication.

II. Descriptive formants

(a) *Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?*

1. Defamation In England, the case of *Tolley v. Fry* was decided in 1931. Mr Tolley was a famous amateur golfer whose reputation as an amateur was harmed when he appeared in an advertisement for the defendant's brand of chocolate without his permission.⁴⁰ Even though he won his case at the time, it would appear somewhat unlikely that today's society would find it harmful to a famous tennis player's reputation to be shown in an advertisement along with the words 'Energy', 'Power' and 'Speed'.⁴¹ It would depend on the reputation of the tennis player and the company respectively whether the photograph was defamatory or not. The court would only decide whether or not the advertisement may be regarded to be libellous, and if so, leave it to the jury to make the final decision.

An injunction would probably not be available, whereas the tennis player could sue for damages after publication.

³⁹ Civil court Brussels 12 Mar. 1996, *JLMB* 1996, 1015.

⁴⁰ *Tolley v. J. S. Fry and Sons, Limited* [1931] AC 333.

⁴¹ See also *Elvis Presley Trade Marks* [1999] RPC 567, at 583, per Walker LJ. In continental literature, *Tolley v. Fry* is still, and perhaps wrongly, seen as a case that demonstrates that even in England one is protected from having one's photograph used in an advertisement through the tort of defamation. See, for example, T. Hoppe, 'Gewinnorientierte Persönlichkeitsverletzung in der europäischen Regenbogenpresse' (2000) *Zeitschrift für Europäisches Privatrecht* 29, at 35. In fact, no such case appears to have been brought after *Tolley v. Fry*.

2. Copyright Copyright cannot play a role here since it is not the tennis player but the photographer who owns the copyright in the photograph.⁴²

3. Passing-off Passing-off is an old tort whose origins lie in the nineteenth century when it was anchored to the name or trademark of a product or business. However, in response to modern business practices it has expanded in its application.⁴³ The use of the tort of passing-off in cases such as the present one was also discussed in *Tolley v. Fry* but was decided to be inapplicable. This has certainly discouraged legal practitioners from recommending legal action for the appropriation of personality until recently.⁴⁴

Nevertheless, the tort of passing-off appears to have been extended recently in order to include cases such as the present one. Passing-off has been described, in *Warnink v. Townend*, as requiring the following elements: '(1) A misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his [or her] or ultimate consumers of goods or services supplied by him [or her], (4) which is calculated to injure the business or goodwill of another trader and (5) which causes actual damage to a business or goodwill of the claimant or will probably do so.'⁴⁵ This description might have at least corresponded to celebrities whose personalities are used for advertising and other business purposes and who could therefore be regarded as 'traders'.⁴⁶

However, the problem for cases such as the present one was that in *McCulloch v. May*, Wynn-Parry J had introduced the further requirement that the claimant and the defendant had to have a common field of activity.⁴⁷ Therefore, only a tennis player who was in the electronics business at the same time would have a claim under this restriction. The rule established in *McCulloch v. May* has been heavily

⁴² S. 4(1)(a) of the Copyright, Designs and Patent Act 1988. See also T. Frazer, 'Appropriation of Personality – A New Tort?' (1983) 99 *Law Quarterly Review* 281, at 290.

⁴³ See *Parker-Knoll Ltd v. Knoll International Ltd* [1962] RPC 265, at 278, per Lord Morris; *Cadbury Schweppes Pty Ltd v. Pub Squash Co Pty Ltd* [1981] RPC 429, per Lord Scarman. See also T. Frazer, 'Appropriation of Personality' at 286.

⁴⁴ See T. Frazer, 'Appropriation of Personality' at 283 *et seq.*

⁴⁵ *Erven Warnink Besloten Vennootschap and Another v. J. Townend & Sons (Hull) Ltd* [1979] AC 731, at 742, per Lord Diplock.

⁴⁶ See T. Frazer, 'Appropriation of Personality' at 287.

⁴⁷ *McCulloch v. Lewis A. May (Produce Distributors Ltd)* [1947] 2 All ER 845.

criticised in academic writing,⁴⁸ and courts in other common law jurisdictions, in particular in Australia, have expressly rejected the approach taken in this case.⁴⁹ It has also been rejected by courts in England.⁵⁰

This issue of advertisements using the image of a celebrity has recently come before the English courts in *Irvine v. Talksport*.⁵¹ In this case, the radio broadcaster Talksport, a broadcaster of high-profile sporting events, had used a picture of the Formula One racer Eddie Irvine for promoting their services. Talksport had manipulated the picture in such a way that Eddie Irvine was holding a radio, instead of a mobile, as on the original picture. In his judgment of 13 March 2002, Laddie J argued that the tort of passing-off does not create a monopoly right in the use of a word or a name but that it protects goodwill against damage, and that goodwill is property. Damage can arise from the selling of inferior goods or services under the guise that they are from the claimant, however the action is not merely restricted to this type of damage. For example, it is common for celebrities to exploit their names and images through endorsement,⁵² i.e. by telling the relevant public that they approve of a product or service or that they are happy to be associated with it, thereby encouraging members of the public to buy or use the product or service.⁵³ The commercial value of such endorsements is recognised by manufacturers and retailers when they pay famous persons to endorse their goods or services. Laddie J concluded that the modern law of passing-off should apply to cases of false endorsement. The claimant has to prove two facts: firstly, he/she has to prove that he/she had a significant reputation or goodwill at the time of the acts complained of; secondly, he/she has to show that the actions of the defendant resulted in a false message which would be understood by a sizeable section of his/her market that his/her goods have been endorsed, recommended or are approved of by the claimant.⁵⁴ This part of the judgment was not

⁴⁸ See, in particular, T. Frazer, 'Appropriation of Personality' at 290.

⁴⁹ See the decision by the High Court of New South Wales in *Henderson v. Radio Corporation Pty Ltd* [1969] RPC 218, which was recently approved by the High Court of Australia in *Campomar Sociedad, Limitada v. Nike International Ltd* (2000) 46 IPR 481.

⁵⁰ See, for example, *Harrods Ltd v. Harrodian School Ltd* [1996] RPC 697, at 714, per Millett LJ.

⁵¹ *Irvine v. Talksport Ltd* [2002] FSR 60 943.

⁵² For details, see *Irvine v. Talksport Ltd* at 957 *et seq.*

⁵³ For this description of endorsement, see *Irvine v. Talksport Ltd* at 948.

⁵⁴ *Irvine v. Talksport Ltd* at 959.

appealed by the defendant.⁵⁵ In contrast, pure character merchandising, where an advertisement uses the name of a celebrity without creating the wrong impression that the person mentioned was the creator of the goods or guaranteed their quality, is not actionable under the tort of passing-off.⁵⁶

4. Self-regulation Portraying people without their consent in advertising is dealt with in a number of self-regulatory instruments.⁵⁷ For example, the British Code of Advertising Practice, administered by the Advertising Standards Authority,⁵⁸ provides in Rule 13.1 that marketers are urged to obtain written permission before:

- referring to or portraying members of the public or their identifiable possessions (the use of crowd scenes or general public locations may be acceptable without permission);
- referring to people who have a public profile (references that accurately reflect the contents of books, articles or films may be acceptable without permission);
- implying any personal approval of the advertised product (marketers should recognise that those who do not wish to be associated with the product may have a legal claim).

Furthermore, Rule 14.5 provides that unless they are genuine statements taken from a published source, references to tests, trials, professional endorsements, research facilities and professional journals should only be used with the permission of those concerned.

(b) Do the damages include skimming off the profits earned by the company through their use of the photograph?

1. Defamation If the photograph was defamatory, restitutionary damages would not, in principle, be available. However, exemplary or punitive damages can, in individual cases, serve a similar purpose since they aim to discourage the defamer by taking what he/she earned from the defamation from him/her. However, this does not infer that the defamer's earnings are calculated precisely.⁵⁹ In fact, this is one

⁵⁵ Nevertheless, Parker LJ *obiter* expressed his approval in his judgment on the appeal on the representation issue and on damages of 1 April 2003, *Irvine v. Talksport Ltd* (No. 2) [2003] EWCA Civ 423; [2003] 2 All ER 881; [2003] EMLR 538 at para. 32.

⁵⁶ See, for example, *Elvis Presley Trade Marks* at 597–8, per Brown LJ.

⁵⁷ For details, see T. Frazer, 'Appropriation of Personality' at 282–3.

⁵⁸ Available at www.asa.org.uk.

⁵⁹ *Broome v. Cassell & Co* [1972] AC 1027, at 1094, per Lord Morris.

advantage of exemplary damages over restitutionary damages as evidence must be produced relating to the gains made by the defendant from the tort.

2. Passing off The issue of damages for passing off was subject to the decision in *Irvine v. Talksport (No. 2)*. According to Laddie J, since the claimant has property rights in his goodwill, protected by an action in passing off, the court is entitled to approach the issue of damages in the same way as it would do in the case of an infringement of similar property rights. The claimant can recover direct loss if he suffered any, for example, by losing another contract due to the false endorsement. Where the claimant has a habit in entering into advertising contracts, his standard fee would be the correct measure of the loss. Otherwise, damages are assessed on a reasonable endorsement fee basis, which is the equivalent of a reasonable royalty, i.e. the court works out a fee which would have been reached between a willing endorser and a willing endorsee.⁶⁰ In contrast, the profits that the defendant made cannot be claimed.⁶¹

(c) What would be the result if the famous tennis player had died prior to the publication but has a surviving spouse and child?

1. Defamation A person's reputation is only protected by the tort of defamation during his/her lifetime. According to s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, causes of action for defamation do not survive after the death of the person defamed.

Equally, the protection granted by self-regulatory instruments only relates to living persons. The only applicable rule in the ASA Code of Advertising Practice is Rule 13.3, according to which references to anyone who is deceased should be handled with particular care to avoid causing offence or distress.

⁶⁰ *Irvine v. Talksport Ltd (No. 2)*, with critical commentary by A. Learmonth, 'Eddie, Are You Okay? Product Endorsement and Passing Off' (2002) *Intellectual Property Quarterly* 306 *et seq.*, and A. Michaels, 'Passing Off by False Endorsement - But What's the Damage?' (2000) *European Intellectual Property Review* 448 *et seq.* In this case, Laddie J merely awarded £2,000 since the promotion was only sent to just under 1,000 people. This was varied by the Court of Appeal by substituting a figure of £25,000 for Laddie J's figure of £2,000; see *Irvine v. Talksport Ltd (No. 2)*.

⁶¹ The same applies, for example, to patent infringements, see *General Tire and Rubber Company v. Firestone Tyre and Rubber Company Ltd* [1976] RPC 197, at 212 *et seq.*, per Lord Wilberforce.

2. Passing off If the famous tennis player was already dead, the public could not possibly believe that he endorses the advertised product. Thus, the electronics company could not be liable for passing off.

Finland

I. Operative rules

The tennis player can sue for both an injunction at the Market Court and for damages at a local court. The damages will include the economic loss suffered by the tennis player, not skimming off the profits earned by the company. It is uncertain whether the spouse and child of the deceased will have a claim.

II. Descriptive formants

The right of a person to decide whether his or her picture is used for commercial purposes is not based on any legal provision, but on a few court cases and legal doctrine. In 1940, the Finnish Supreme Court decided that a person whose picture was used for commercial purposes was entitled to claim an injunction and damages from the company that had used the picture in an advertisement.⁶² This case was followed in 1982 by a case where a picture taken of a person was used for commercial purposes without his consent. The person was entitled to damages for this use.⁶³ The right to compensation is acknowledged by several authors.⁶⁴

According to the Finnish Act on Unfair Business Practices, when a picture used in an advertisement is taken of a person acting for business purposes, this person can bring a case before the Finnish Market Court if the picture is used without his/her consent. However, the Market Court cannot decide on the question of damages. This is done in the general courts.

The level of damages is based on the loss suffered by the tennis player and is compared to the economic loss suffered by the player. In practice, the amounts have been fairly low, e.g. €1,000–€2,000 in the older cases.

⁶² Supreme Court 1940 I 10. ⁶³ Supreme Court 1982 II 36.

⁶⁴ Nuutila, 'Kunnian ja yksityiselämän loukkaaminen', in Heinonen, Koskinen, Lappi-Seppälä, Majanen, Nuotio, Nuutila and Rautio, *Rikosoikeus* (Helsinki: 1999) 595, Muhonen, 'Henkilön persoonan kaupallinen hyödyntäminen Yhdysvalloissa ja Suomessa' (1996) *Defensor Legis* 777 and Tiili, 'Marknadsföring och rätt till egen bild' (1988) *Nordiskt Immateriellt Rättsskydd* 28.

III. Metalegal formants

Whether or not the spouse and the child of the deceased tennis player in situation (c) have any claim is unclear. There are no court cases in Finland and legal doctrine does not give a clear answer. In the Finnish Tort Liability Act there is a provision in Ch. 7, s. 3 that excludes the possibility of a relative claiming damages for non-economic injury. *E contrario*, claiming damages for the use of a picture for commercial purposes would be possible.

It is also legally possible that the relatives could have the right to claim an injunction if the picture is used for marketing purposes.⁶⁵

France

I. Operative rules

The tennis player can sue the company for an injunction and compensation. The damages do not include skimming off the profits earned by the company through their use of the photograph. The surviving spouse and child may also sue the company for an injunction and compensation, but French law is not clear on this point.

II. Descriptive formants

(a) Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?

The tennis player can sue the company which used his photograph for advertising purposes without his consent in order to obtain an injunction to prevent the violation of his right to image and reparation for the damage suffered. Being a famous athlete, he is one of the so-called public persons, the violation of whose personality right may be justified by the public's right to be informed. In French law, however, it is unanimously accepted that the legitimate exercise of the right to information excludes all commercial or advertising purposes. Case law has repeatedly condemned the commercial use of photographs of famous sportspersons even when those have been taken during the course of their professional activity.⁶⁶ Therefore, the injury to personality rights will not be justified by the right to information when the publication serves purely commercial purposes. Public figures, just

⁶⁵ See Tiili, 'Marknadsföring och rätt till egen bild', at 34–5.

⁶⁶ TGI Paris 21 Dec. 1983, Gaz. Pal. 1984, 2, somm., 360; TGI Paris 4 Jul. 1984, D. 1985, somm., 14; TGI Paris 30 Apr. 1986, D. 1987, somm., 137; CA Paris 3 Apr. 1987, D. 1987, somm., 384; TGI Nanterre 6 Apr. 1995, Gaz. Pal. 1995, 1, 285.

like private citizens, have a cause of action when their image is used for advertising purposes.

(b) Do the damages include skimming off the profits earned by the company through their use of the photograph?

The use of the tennis player's image in an advertisement has no pejorative connotation and in no way damages his private life. Thus, the damage which must be repaired here is of a purely economic nature. In France, the reparation of economic loss suffered where personality attributes are exploited without consent is unfortunately not very clearly distinguished from non-economic loss.⁶⁷ Nevertheless, for a long time now the courts have awarded damages, but often only implicitly,⁶⁸ which are intended to compensate the lost earning capacity of the injured party. More recent case law does not hesitate to consider economic loss which results from an unauthorised exploitation,⁶⁹ and seems to calculate the damages by reference to the sum which would have in fact been received had the consent of the owner been obtained. On the other hand, courts are very reluctant to take profits earned through the use of one's image into account when calculating damages,⁷⁰ the determination of which ultimately appears rather arbitrary.

(c) What would be the result if the famous tennis player had died prior to the publication but has a surviving spouse and child?

If the tennis player had died prior to the use of his image in the advertisement by the company it is not certain that his widow and child could bring a cause of action for compensation for economic loss.

⁶⁷ See, however, TGI Paris 28 Sept. 2006, *Légipresse* 2007, No. 239, III, 55, clearly distinguishing between the two types of loss: 'the claim (...) thus has the compensation not of non-economic, but of economic loss as its actual object which stems from the exploitation of the (claimant's) image, name and voice without any remuneration, loss which is recoverable on the basis of Art 1382 Code civil'.

⁶⁸ See, e.g., CA Paris 1er Dec. 1965 (Pétula Clark), JCP 1966, II, 14711; CA Paris 13 Feb. 1971 (Belmondo), JCP 1971, II, 16771.

⁶⁹ TGI Lyon 17 Dec. 1980, D. 1981, jur., 202; CA Paris 9 Nov. 1982, D. 1984, jur., 30; CA Paris 14 Jun. 1983, D. 1984, jur., 75; TGI Paris 21 Dec. 1983, D. 1984, IR, 331; TGI Paris 30 Apr. 1986, D. 1987, somm., 137; CA Paris 3 Apr. 1987, D. 1988, somm., 390; CA Nîmes 7 Jan. 1988, JCP 1988, II, 21059 [...]; CA Versailles 2 May 2002, *Légipresse* 2002, No. 192, I, 69: 'the claimant, a former actress and model (...) suffered harm, due to the unauthorised reproduction of several photographs of her, because of the sole fact that she was deprived of the remuneration which she could have legitimately received if she had sold her rights on the photographs in question'.

⁷⁰ See, e.g., TGI Paris 5 May 1999, D. 2000, jur., 269 – see Case 7.

French law is essentially undecided on the issue of the protection of the economic value of personality rights post-mortem. French case law has sought to distinguish between the non-pecuniary aspects of personality rights, which would not be descendible on the one hand, and the economic aspects which would descend to heirs through ordinary rules of inheritance on the other. French courts have thus stated that 'the right to one's image has both a moral and an economic nature (and) that the economic right, which enables expressing the commercial exploitation of the image in monetary terms, is not purely personal and passes on to the heirs'.⁷¹ However, the case law of the lower courts is not unanimous⁷² and the *Cour de cassation* has not yet ruled on this point.⁷³ Consequently, it is difficult to state the exact position of French law on this question. This is all the more true because the opinions of legal scholars are just as divided. Even among scholars who favour the recognition of an economic right to the use of all attributes of the personality, which at any rate is not yet part of French positive law, opinion is divided as to whether such a right should or should not be descendible.⁷⁴

Thus it seems that the widow and the child of the deceased tennis player do not have any cause of action for compensation. It would only

⁷¹ TGI Aix-en-Provence 24 Nov. 1988 (Raimu), JCP 1989, II, 21329. See also: TGI réf. Paris 4 Aug. 1995 (Jean Monnet), 167 RIDA 1996, 291: 'whereas the right to image, from its moral aspect, maintains a strictly personal character and extinguishes when its holder dies, (...) the exploitation made of the image for commercial purposes gives a patrimonial character to this right which descends to heirs'; CA Paris 10 Sept. 1996 (Coluche), 171 RIDA 1997, 345; CA Grenoble 24 Jun. 2002, *Légipresse* 2002, No. 195, I, 118: 'the economic right which allows placing a monetary value on the commercial exploitation of the image is not personal and descends to heirs'.

⁷² See, e.g., CA Paris 7 Jun. 1983 (Claude François), *Gaz. Pal.* 1984, 2, 528: 'the right of a person to his/her own image is an attribute of his/her personality and not an economic right. Thus, after the person's death, his/her heirs cannot sell the right to reproduce his/her image to a third person.'

⁷³ See, however, Cass. civ. 15 Feb. 2005, D. 2005, IR, 597, concerning the use of the photograph of a deceased man on a CD cover. The court rejected the claim of his children who demanded compensation for the commercial use of the photograph because 'the right to claim in respect of the right to privacy or the right to image extinguishes with the death of the person concerned'. The *Cour de cassation* also refused to distinguish between a non-economic, non-descendible right and an economic right in respect of the image which descends to heirs.

⁷⁴ See, e.g., Gaillard, 'La double nature du droit à l'image et ses conséquences en droit positif français' (1984) *Dalloz Chronique (D. chr.)* 163: 'the monopoly acknowledged to each individual on the commercial exploitation of his/her image extinguishes with the death of the concerned person'. On the contrary, see Caron, 'Les contrats d'exploitation de l'image de la personne', in Ass. Capitant (ed.), *L'image* (Paris: 2005),

be different in a case where the deceased brought such a claim before he/she died, his/her heirs then being entitled to pursue that claim.

Germany

I. Operative rules

The tennis player may claim an injunction as well as compensation with regard to the licence fee saved by the company and with regard to the profit earned by the company.

II. Descriptive formants

The dissemination of a photograph taken from a live sports activity such as a tournament match falls directly under § 22 *KUG*. This provision prohibits the dissemination of a person's image without this person's consent.

With respect to a person's public appearances, one can argue that the distribution of a photograph taken at a public sports event is undertaken with the knowledge and consent of the person depicted. As an athlete is aware of the presence of journalists, he/she will at least tacitly consent to his/her actions being filmed and this film being distributed. The athlete may have even expressly consented to this in his/her contract with the event organiser. However, consent to an interference with personal attributes does not extend to any derivative use which is later made of this photograph.⁷⁵ As the consent to a personal picture will always stem from a special situation and the circumstances under which the consent is given,⁷⁶ it has to be narrowly construed.⁷⁷ Therefore, implied consent will legitimise reports about the event as well as reports about the athlete, but not the use of his/her picture in an advertisement.

A justification can only be assumed if one of the limitations set out in § 23(1) *KUG* is met. Here, the limitation for pictures of contemporary events (§ 23(1) 1 *KUG*) comes into play. This limitation has been introduced with special reference to the needs of the press to report on

103: 'it would not be incoherent to foresee a *post mortem* devolution of the right to exploit one's own image'. See A. Lucas-Schloetter, *Droit d'auteur et droits de la personnalité*, *Juris-Classeur Propriété Littéraire et Artistique*, Fasc. 1118, 2009, No. 52 s.

⁷⁵ BGH NJW 2005, 56, 57.

⁷⁶ BGHZ 20, 345, 348; BGH NJW 1996, 593, 549 (memorial coin with the portrait of Willy Brandt); N. Dasch, *Die Einwilligung zum Eingriff in das Recht am eigenen Bild* (Munich: 1990), 14.

⁷⁷ H. Forkel, 'Lizenzen an Persönlichkeitsrechten durch gebundene Rechtsübertragung' (1988) *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 491, 500.

current events, which includes not only political events, but also sports and entertainment events.⁷⁸ Therefore, the photograph falls under § 23(1) 1 KUG. However, distribution without the consent of the depicted person is only justified for the purposes set out in § 23(1) 1, e.g. for press purposes. Public figures still have a claim if their photograph is used for commercial purposes.⁷⁹ Even if a product related to the sports event is marketed, § 23(1) 1 KUG does not allow the use of any photograph of the person but only those photographs which are clearly related to the marketed product or event.⁸⁰ As a result, the photograph, together with the commercial use made of it, has to encompass a news value. With regard to this limitation, the marketing of a sports book with an unauthorised photograph of a tennis star⁸¹ would be allowed just like the distribution of a CD together with an unauthorised portrait of the star.⁸² In this particular case, neither of these situations is met. Therefore, the publication of the photograph constitutes a pure commercial use of the photograph and has no news value. Consequently, the tennis player has a claim against its use for an injunction as well as damages.

The tennis star could also ask for the profits earned by the company provided that he does not generally oppose the commercial use of his attributes. Then, only non-monetary relief could be granted, which, however, requires that the commercialisation of the photograph is, as such, a grave and reckless injury to personality interests.⁸³ This would in fact be denied by the German courts (see also Case 11).

If the famous tennis player dies before publication, his surviving spouse and child could claim compensation. Case law up to now has acknowledged that the pecuniary personal attributes (e.g. the right to one's image) are hereditary.⁸⁴

⁷⁸ OLG Frankfurt NJW 2000, 594 (*Katharina Witt*).

⁷⁹ BGHZ 20, 345 - *Paul Dahlke*; BGH GRUR 1972, 97; BGHZ 49, 289; BGH NJW 1979, 2205, 2206; BGH NJW 1992, 2084; BGH NJW-RR 1995, 789; BGH NJW 1996, 593, 594 (memorial coin of Willy Brandt); accepted by BVerfG NJW 2001, 594, 595; LG München I ZUM-RD 2006, 465, 466 f.

⁸⁰ BGH NJW 2009, 3032; BGHZ 151, 26 = GRUR 2002, 690.

⁸¹ OLG Frankfurt NJW 1989, 402: tennis book with a front cover photograph of Boris Becker.

⁸² BGH NJW 1997, 1152 (*Bob Dylan*): but not if these CDs are unauthorised bootleg copies.

⁸³ BGHZ 128, 1, 15.

⁸⁴ BGH NJW 2000, 2195, 2197; consenting BVerfG WRP 2006, 1361, 1364.

III. Metalegal formants

The discussion whether fully attenuated property rights with respect to personality interests should be granted by law is a question of legal policy. The traditional task of personality rights is to protect moral but not pecuniary interests. This is due to the historical development of the German Civil Code which was originally formed to protect merely commercial interests, while the protection of moral interests was left to social norms.⁸⁵ This was rectified by the courts after World War II arguing that social norms do not offer sufficient protection of personality interests. In recent times there is a strong tendency to protect personal interests by the same sanctions that are used for the protection of commercial interests. However, the transformation of a moral right into a commercial right tends to weaken the moral value of personality interests.

Greece

I. Operative rules

The tennis player has a claim against the company for an injunction and compensation. The compensation does not include the skimming off of profits earned by the company through the use of his photograph.

II. Descriptive formants

(a) Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?

In order to claim compensation the tennis player has to prove that the presentation of the picture to the public is combined with other circumstances which diminish his value and reputation, causing an injury to his honour.

(b) Do the damages include skimming off the profits earned by the company through their use of the photograph?

There is no ground in Greek scholarship and court decisions to accept the pecuniary exploitation of aspects of personality, such as name, image, voice, etc. As the Supreme Court has stated 'the claim to non-pecuniary damages exists even when a person's image is exposed for promotional reasons'.⁸⁶

⁸⁵ S. Gottwald, *Das allgemeine Persönlichkeitsrecht* (Berlin/Baden-Baden: 1996), 18 and 145.

⁸⁶ Supreme Court (Areopag) Decision 1010/2002.

(c) *What would be the result if the famous tennis player had died prior to the publication but he has a surviving spouse and child?*

The right to claim the cessation of the offence and the non-recurrence thereof in the future, as well as damages for non-economic harm belongs to the relatives (spouse, descendants, brothers, sisters) and legatees appointed under a will in case that the offence was directed against the personality of a deceased person (Art. 57(1) CC).

Ireland

I. Operative rules

The tennis player would have an action in defamation if it could be established that the association with the electronics company would – objectively speaking – damage the player’s reputation. If that were the case, the tennis player could obtain an injunction and damages. An action in passing off could possibly succeed notwithstanding the fact that there is no evidence the tennis player and the electronics company shared the same market.

II. Descriptive formants

As outlined in the English report, an action in defamation can only be brought about where the tennis player’s false association with the electronics company would damage his reputation in the eyes of right-thinking members of society.⁸⁷ If such a claim were successful, the tennis player could seek an injunction limiting further publication of the photograph and obtain financial damages as compensation for the consequent damage to his reputation.

The tennis player would not have an action for infringement of copyright as the photographer would be considered the first owner of the copyright in the photograph.⁸⁸

The common law action of passing off has provided little protection to ‘image’ rights. Traditionally, case law would suggest that the misrepresentation must be made by a trader acting in a common course of trade with the plaintiff.⁸⁹ The rationale for this requirement would appear to lie in the fact that the plaintiff would suffer little damage where the defendant was not directly competing with him/her in the

⁸⁷ *Tolley v. J.S. Fry and Sons Ltd.*

⁸⁸ S. 21(h) of the Copyright and Related Rights Act 2000.

⁸⁹ *Erven Warnink Besloten Vennootschap and Another v. Townend & Sons (Hull) Ltd* and *McCulloch v. Lewis A. May (Produce Distributors) Ltd.*

marketplace. There is no common field of business – of which we are aware – between the tennis player and the electronics company and therefore there can be no passing off. It has been suggested by some commentators that the law should be developed – based on the constitutional guarantees of a citizen’s personal and property rights – to offer such protection.⁹⁰ Indeed, recent English case law on this point has indicated that an action in passing off will not necessarily fail simply because there was no ‘common course of trade’ between the plaintiff and the defendant. It would seem logical that Irish law on passing off would develop in a similar manner and recognise a claim in these circumstances on the basis that such a false association weakens the goodwill which the tennis player has created in his image. To succeed in such an action it would be necessary to show that the public reasonably believed that the tennis player had consented to the endorsement.⁹¹

Advertising in Ireland is regulated by the Advertising Standards Authority of Ireland (ASAI). This is an independent self-regulatory body which is financed by the advertising industry. The ASAI has developed its own voluntary code of conduct which has proven very effective. Under the code of conduct, all advertisements must be honest and truthful,⁹² should not mislead by inaccuracy or ambiguity,⁹³ should not claim or imply an endorsement where none exists⁹⁴ and should not exploit or make unfair use of the goodwill attached to the name of another person.⁹⁵ The electronics company here is in breach of the ASAI’s code of conduct. It is clear that the advertisement by the electronics company implies that the tennis player has endorsed their products where no such endorsement exists and they are making unfair use of the goodwill attached to the tennis player’s name. However, the ASAI is a self-regulatory body primarily designed to protect public consumers and as a consequence the tennis player’s remedies are somewhat limited. On foot of a complaint, the ASAI could order that the advertisement be amended and the media could refuse to continue publication of it. Any member who refuses to comply with any such decision could be fined or suspended from membership. Thus, while the tennis player may not

⁹⁰ J. Healy, ‘The Tort of Passing Off: Part 1 – Developments and Current Tensions’ (1997) *Irish Law Times* 196 at 198.

⁹¹ *Irvine v. Talksport Ltd.*

⁹² Rule 2.1 of the ASAI Code of Conduct (5th edn., 2001), available at www.asai.ie/documents/ASAI%202001%20Codes.pdf.

⁹³ *Ibid.* Rule 2.22. ⁹⁴ *Ibid.* Rule 2.31. ⁹⁵ *Ibid.* Rule 2.53.

obtain an injunction preventing the publication of the advertisement, censure from the ASAI can be just as effective in preventing the continued display of the advertisement.

Italy

I. Operative rules

The tennis player can sue the company for injunction and damages. Damages do not in principle include skimming off the profits earned by the defendant. If the famous player has died prior to the publication it is likely that the surviving spouse and child would be granted the same remedies.

II. Descriptive formants

(a) Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?

Under Italian law, every person has a protected interest in the publicity value of his/her personality. It is debated whether this interest should be qualified as a property right – and hence alienable – or as a personality right with economic aspects.⁹⁶ However, it is clear that commercial exploitation of one's own identity requires the permission of the person involved. This conclusion is supported by a huge number of decisions and by specific provisions on name, nickname and portrait (Arts. 6–10 CC, Arts. 96–97 CA, Art. 21 Trademark Act); it is also affirmed in academic literature.

It is not always easy to determine the exact scope of protection of this right,⁹⁷ however in cases such as this one an unlawful infringement is undisputable. This is a typical example of commercial exploitation. It is irrelevant that the photograph was well-known, as it had appeared in the press some years earlier. As a matter of fact, its reproduction lacks any informative function: it is not aimed at informing the public – for instance – about the unforgettable match won by the tennis player in late 1973. It is just intended to reap the benefits associated with the value of the player's personality. No consent was given here.

⁹⁶ On this matter, see A. Zoppini, 'Le "nuove proprietà" nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)' (2000) *Rivista di diritto civile* I, 185, 236; G. Resta, *Autonomia privata e diritti della personalità* (Naples: 2005) 245–7.

⁹⁷ Particularly difficult are the cases in which the exploitation has been carried out using a medium with intrinsic informative value: see Trib. Milano 23 Dec. 1999, *Dir. inf.* 2000, 622; on this issue, see C. Scognamiglio, 'Scopo informativo ed intento di lucro nella disciplina della pubblicazione del ritratto' (1991) *Dir. inf.*, 129.

Therefore, according to Art. 10 CC, in connection with Arts. 96–97 CA, the claimant can enjoin the publication.

He/she can also recover damages in respect of lost profits for the foregone royalties. As explained in Case 8, this action is based on Art. 2043 CC, which is the general clause on extra-contractual liability, and not on the general provision on unjust enrichment (Art. 2041 CC). Therefore, the burden of proof is on the claimant, who has to demonstrate the commercial value of his/her personality and the ‘damage’ suffered.

The damage is not assumed to be *in re ipsa*.⁹⁸ However, presumptions are commonly admitted with the result that the burden of proof is significantly relaxed. There is no doubt that a famous tennis player’s image has a high market value. As a consequence, the loss can be presumed and the claimant only has to prove the amount of the reasonable royalties.

(b) *Do the damages include skimming off the profits earned by the company through their use of the photograph?*

Damages do not in principle consist of skimming off the profits ‘unjustly’ earned by the defendant.⁹⁹ However, it may happen that the judge, exercising discretionary power (Arts. 1226–2056 CC), will take the circulation of the advert into account and, indirectly, the profits gained. Up to now, one of the highest amounts awarded was around €100,000 (claimant: Elizabeth Taylor).¹⁰⁰

(c) *What would be the result if the famous tennis player has died prior to the publication but has a surviving spouse and child?*

It is likely that the result would not be different in the hypothesis that the tennis player died prior to the publication, but had a surviving spouse and a child. Art. 96 CA states that after the death of the person portrayed, the required permission must not be obtained from the heirs, but from the relatives. The qualification of this interest is disputed. Traditionally, it has been considered either as a reflection of the personality right of the deceased or as a peculiar entitlement acquired *iure proprio* (under the assumption that personality rights can

⁹⁸ Cass. 25 Mar. 2003 no. 4366, *Dir. inf.* 2003, 521.

⁹⁹ See Case 8.

¹⁰⁰ See E. Borrelli, ‘La quantificazione del danno per violazione del *right of publicity*’ (1996) *Danno e responsabilità*, 166.

be extinguished and are not transmissible after death).¹⁰¹ More recently, however, some scholars have been adopting the view that personality rights – or at least their economic components – are descendible to some extent and can be acquired *iure hereditario*. This controversy is not a purely dogmatic one since it has relevant systematic implications. Nevertheless, it is not necessary to go into theoretical details in order to answer our question.¹⁰²

Case law offers clear guidelines. It is undisputed that – under proper conditions – surviving relatives can be granted injunctions in order to oppose unlawful exploitations of the deceased's personality. Many decisions can be cited – concerning the right to one's own name, to one's own image and to privacy¹⁰³ – which support this solution. Yet the same can be said in relation to damages. It is important to note that while in Germany this issue has been openly debated for years, in Italy, the courts – moving from the *same theoretical assumptions* about the non-transferability of personality rights – have commonly allowed the right of the relatives to sue for compensation. Already in 1953, tenor Caruso's son was awarded about €1,000 for the unlawful appropriation of his father's identity (the damage was calculated on the basis of foregone royalties).¹⁰⁴ In two recent cases, both regarding the unlawful commercial exploitation of someone's likeness, the sister of Massimo Troisi was granted €12,500, while the child of Antonio De Curtis (known as Totò) was awarded €25,000.¹⁰⁵ Looking at these

¹⁰¹ G. Bonilini, *Manuale di diritto ereditario e delle donazioni* (2nd edn., Turin: 2003) 10; A. Palazzo, *Le successioni*, vol. 1, *Trattato di diritto privato Iudica-Zatti* (2nd edn., Milan: 2000) 188; L. Ferri, *Disposizioni generali sulle successioni, Commentario del codice civile Scialoja-Branca*, II, *Delle successioni* art. 456–511 (3rd edn., Bologna/Rome: 1997) 32.

¹⁰² See for a discussion of this issue, A. Zaccaria, *Diritti extrapatrimoniali e successione. Dall'unità al pluralismo nelle trasmissioni per causa di morte* (Padova: 1988) 72 *et seq.*; A. Zoppini, 'Le "nuove proprietà" nella trasmissione ereditaria della ricchezza' at 185, 238; G. Resta, *Autonomia privata e diritti della personalità* at 396 *et seq.*; V. Zeno-Zencovich, 'Profili negoziali degli attributi della personalità' (1993) *Dir. inf.*, 579.

¹⁰³ See e.g. Trib. Milano 24 Sept. 1953, *Foro pad.* 1953, I, 1341; App. Milano 27 Oct. 1954, *Dir. aut.* 1955, 221; Trib. Roma 25 Feb. 1956, *Rass. dir. cin.* 1956, 136; Pret. Roma 15 Mar. 1956, *Rass. dir. cin.* 1956, 47; Trib. Roma 20 Mar. 1985, *Dir. aut.* 1987, 67 (De Chirico); Pret. Roma 3 Mar. 1986, *Giust. civ.* 1986, I, 2279; Pret. Verona 30 Oct. 1990, *Dir. inf.* 1991, 171; Trib. Milano 15 Sep. 1994, *Dir. inf.* 1995, 626; Trib. Milano 30 Jun. 1995, *AIDA* 1995, 702.

¹⁰⁴ Trib. Roma 23 Feb. 1955, *Rass. dir. cin.* 1955, 100, 107; Trib. Roma 14 Sep. 1953, *Foro it.* 1954, I, 115; App. Roma 17 May 1955, *Foro it.* 1956, I, 793.

¹⁰⁵ Trib. Napoli 18 Apr. 1997, *Dir. ind.* 1997, 903; Trib. Roma 22 Dec. 1994, *Foro it.* 1995, I, 2285 (Totò); see also App. Roma 4 Jun. 2001, *Dir. aut.* 2001, 468.

decisions – but it has to be noted that no Supreme Court decision is reported – one gets the impression that, notwithstanding the contrasting theoretical assumptions, personality rights are treated as descendible rights by the law in action.

Therefore, it is likely that the relatives of the deceased can prevent the publication *and* recover damages.

The Netherlands

I. Operative rules

- (a) The tennis player can claim compensation for missed profits and for an injunction against the future publication of the advert.
- (b) The tennis player can claim for damages that consist of skimming off the profits, but he cannot claim for both compensation of loss of his own profits and for skimming off profits of the company.
- (c) The spouse and child can obtain compensation on the same basis as the tennis player himself.

II. Descriptive formants

(a) Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?

Presupposing that the tennis player has not authorised the electronics company to use this picture before for the purposes of advertisement, the case will depend on reasonable foreseeability with regard to the method of publication, the form, the context and the size/dimension and frequency of publication. Given the fact that the picture had been published several years earlier, we can assume that the tennis player did not reasonably foresee that the picture would be used several years later.¹⁰⁶

Assuming that the picture shows the image of the tennis player, Art. 21 *Auteurswet* applies. Whether it is unlawful to publish the portrait without the authorisation of the person portrayed depends on the outcome of the ‘reasonable interest’ test (see Case 7). In this case, the tennis player has at least a financial interest not to have his portrait published without consent, since if his consent had been requested

¹⁰⁶ It is also possible that the assumed contract provided that the picture was only to be used to a certain, well-outlined, extent. In that case, the use of the picture after several years and outside the contractual limits is a breach of contract. With regards to damages, the same rules apply as when the breach is based on extra-contractual liability.

he could have asked for payment. In such cases the outcome of the reasonable interest test is that the publication is unlawful. The tennis player can ask for compensation for the profits that he missed and for an injunction against the future publication of the advert.

(b) Do the damages include skimming off the profits earned by the company through their use of the photograph?

As explained under Case 1, the tennis player may choose to base his claim for compensation of damages either on Art. 6:96 BW or on Art. 6:104 BW. The tennis player cannot get both compensation for missed profits and also the profits made by the electronics company. He can however base his claim for damages both on Art. 6:96 BW and 6:106 BW (in which case he has to raise facts that support the claim). In the end, the judge has to decide whether the compensation should be based on Art. 6:96 BW or 6:104 BW. If he considers Art. 6:104 BW to be applicable, he has to assess the damages according to Art. 6:96 BW and 6:104 BW and has to choose the provision which is most favourable to the tennis player.

(c) What would be the result if the famous tennis player had died prior to the publication but has a surviving spouse and child?

If the tennis player died before the publication of the advert, according to Arts. 21 and 25a *Auteurswet* his parents, spouse and children can invoke the right to the portrait. In testing the reasonable interest, the same factors have to be balanced as those that apply when the tennis player himself invokes the right to his portrait. On behalf of the tennis player and his spouse and child, these factors are the right to privacy (which is not a persuasive interest, given the fact that the picture had already been published several years ago) and the right to profit from the portrait. If the publication is unlawful for that reason, the spouse and child can be awarded compensation on the same basis as the tennis player himself (see (b)). It is subject to debate whether the right of the tennis player is a right that can as such be inherited by his heirs or that the heirs obtain their own (commercial) rights from the right of the tennis player.

Portugal

I. Operative rules

The tennis player can sue the company for an injunction and compensation. It would be very unlikely that the damages would consist of

skimming off the profits earned by the company through the use of the photograph. If the famous tennis player had died prior to the publication but has a surviving spouse and child, they would, in principle, be entitled to initiate a claim.

II. Descriptive formants

As previously explained, according to Art. 79(1) CC the image of a person shall not be published without his/her prior consent, unless the exposure is justified by the notoriety of the person, his/her functions, justice or police requirements, scientific, didactic or cultural aims, or when the image is taken in a public place or facts are disclosed that are public or of public interest (para. 2), but not if the image harms the honour, reputation or decorum of the depicted person.

There are two independent issues that have to be addressed relating to this question: firstly, if there is a wrongful act, and secondly, if there are damages. In relation to the first issue, using the image in question without permission might not violate Art. 79, since the person is famous and this publicity does not harm his/her honour or reputation (Art. 79, paras. 2 and 3 CC). However, this conduct is wrongful because using the image or words of a person in advertising without his/her authorisation is forbidden (Art. 7 (2)(e) C_{Pub}). With regard to the existence of damages, even if the tennis player did not suffer any direct damage arising from the advertisement (*damnum emergens*), he did in fact lose the profits he could have earned using that picture for advertising or any other purpose (*lucrum cessans*). In fact, in spite of not particularly harming his honour, dignity or reputation, the tennis player suffers a loss of the value that he could have gained for the commercial use of his photograph. Therefore, he has the right to sue the company for an injunction and compensation for the benefits that he did not obtain due to the wrongful conduct (Art. 70(2) CC) (although he did not already own those benefits when the wrongful conduct took place). He may file for an injunction to remove his image from the press and claim compensation for the amount of the lost value (Art. 70 CC).

The C_{Pub} also determines that, according to the general rules, all entities who contribute to the advertisement in some way are civilly and jointly responsible for the damage caused as a result of their wrongful acts (Art. 30(1)). Finally, using the image or words of another person in advertising without his/her authorisation is also sanctioned with a fine.

Regarding ‘punitive damages’, see Case 8.

Personality rights are protected post-mortem by Art. 71 CC. The surviving widow or widower, ascendants, descendants, siblings, nephews/nieces and heirs of the deceased may file claims. However, Art. 71(3) CC states that if the wrongfulness of the offence results from the absence of consent, only the persons who were entitled to give that consent can legitimately take any measures. This means that if the tennis player was already dead when the publication took place, only the persons who own any rights over that picture (not necessarily any family member or heir) can go to court. In any case, both the surviving spouse and child would, in principle, be entitled to file a claim before a court. There is, however, disagreement among legal scholars concerning compensation. Some deny compensation to the persons mentioned in Art. 71 CC since they do not exercise a right that is rightfully theirs. On the contrary, others admit that these persons exercise their own right. There are also those who argue that, under Art. 71 CC, it is the personality of the deceased him/herself that is safeguarded post-mortem, however this is an isolated opinion.

Scotland

I. Operative rules

A claim for passing off will only be successful if the tennis player can prove economic damage. An action in defamation could also be raised if it can be shown that the tennis player's professional reputation is likely to suffer at the hands of the new 'advertising campaign'. Under s. 85 of the Copyright Act, the tennis player can apply for an injunction against the advertising firm for breach of his moral rights in the use of his photograph.

II. Descriptive formants

This is the classical situation of appropriation of personality for commercial use. It relates to the right of a well-known professional to determine which commercial activities he/she wishes to be associated with. Neither the law of defamation nor breach of confidence are likely to offer a remedy here. On the facts given there has been no impropriety in accessing the photograph, nor is there any suggestion that the tennis player is lowered in the eyes of right-minded people. It is a true misappropriation of personality claim: the tennis player has neither consented to the re-use of his photograph in a new commercial context nor has he consented to being part of the new advertising campaign. In addition, it may well constitute a data protection issue.

However, the foregoing is subject to the following remarks: there is no such thing in either English or Scots law as a right to one's own image. Privacy as such is not generally deemed to extend to one's trade or business.¹⁰⁷ Case law on the misappropriation of personality for commercial use has focused on the claim of defamation and passing off, and contrasts greatly with the position in both the US and Canada.¹⁰⁸

There are two main issues here: ownership of the photograph and use of the tennis player's photograph for commercial advertising for a company with which he has no contacts (false attribution through misappropriation of personality). This photograph has presumably been taken from the public domain. Paparazzi photographs belong to the photographers, so there will be no claim against the original photographer. An injunction will be granted on the basis of s. 85 of the Copyright Act as a means of enforcing his moral rights:

Generally speaking an individual's privacy is only protected by the law of copyright if he has an interest in the copyright ... the only protection available to someone who is not the copyright owner is that provided under s. 85 of the 1988 Act to prevent publication by a third party against whom the author or subsequent copyright owner intends taking no action himself.¹⁰⁹

The common law action of passing off is designed to prevent the unauthorised use of certain attributes and, as stated above, traditionally related to a commercial environment. Given that the tennis player is 'famous', he will be classified as a professional in the sense of being able to attach an economic value to his photograph. The only requirement for action in passing off is proof of damage. Recent English authority¹¹⁰ confirms the suitability of the action for the tennis player and gives further enlightenment on commercial misappropriation and character merchandising. Scots law here is presumed to be on level pegging with English law.

Spain

I. Operative rules

The tennis player can sue the company for an injunction and compensation. Damages are comprised of skimming off the profits earned by

¹⁰⁷ See Case 1 re Press Code on Privacy.

¹⁰⁸ *Carson v. Here's Johnny Portable Toilets Inc.* 698 F. 2d 83 I (1983).

¹⁰⁹ See Calcutt Report, Committee on Privacy and related matters, Cm 1102, June 1990 at para. 9.5.

¹¹⁰ *Irvine & Ors v. Talksport Ltd (No. 2)*.

the company. If the tennis player was deceased prior to publication, his surviving spouse and child could initiate an action.

II. Descriptive formants

An identical case to this one was resolved by the Spanish Supreme Court.¹¹¹ Pictures of several Spanish sportsmen were taken at a competition in the 1984 Los Angeles Olympic Games. Afterwards, a calendar sponsored by a famous beer brand published pictures of the medallists. The medallists filed a claim as they did not authorise the publication. The Supreme Court decided in favour of the claimants, given that, although the image was taken in a public place and referred to public persons, the commercial use thereof must be expressly consented to.¹¹²

In relation to the action of the surviving spouse and child, Art. 4 *LO* 1/1982 provides that actions to protect the honour, privacy and image of a deceased individual can be taken by persons appointed to this effect in his/her will. If there is no appointment in the will, or the person appointed is also deceased, then the action can be initiated by the surviving spouse, children, parents or siblings of the deceased person who were alive at the time of the death.

Additionally, according to Art. 9.4 *LO* 1/1982, the amount to be awarded for pain and suffering, in the case of Art. 4, will correspond to the persons mentioned in that provision and, if not, to their successors in the proportion in which the court considers they have been affected.¹¹³

Switzerland

I. Operative rules

The tennis player may put an end to the infringement by asking the judge to issue an injunction against any further distribution of the

¹¹¹ STS, 3 Oct. 1996 (RJ 7012).

¹¹² A similar case was resolved in STS, 1 Apr. 2003 (RJ 2979). Picture cards of members of the Spanish soccer national team were commercialised by an entity who only had the authorisation to commercialise the image of these members as players of their respective clubs, but not as members of the Spanish national team. The twenty-two members of the national team claimed against the picture cards company, and the Supreme Court confirmed the amount awarded by the lower courts. The public sphere of a person legitimises the capture of his/her image and publishing for informative reasons, but never when the goal is commercial exploitation. The players did not authorise the publication of their images with the national team, only with their respective clubs.

¹¹³ See STS, 23 May 2003 (RJ 3593); STS, 27 Jun. 2003 (RJ 4312); STS, 2 Feb. 1993 (RJ 794); and STS, 27 Jun. 1996 (RJ 4792).

advertisement. He also has the right to demand a declaratory judgment holding the infringement unlawful so that he may claim damages from the advertising company. Damages include restitution of any profits made from the use of the tennis player's image.

After his death, his wife and child may bring proceedings in their own names for the unlawful infringement based on their right to '*piété filiale*', meaning the feelings of attachment and consideration that relatives have for one another. However, the spouse and child cannot bring the same claims that the tennis player would have had. Only where the tennis player had already initiated legal action before his death could his family stand in for him and continue to pursue those claims on his behalf.

II. Descriptive formants

(a) *Can the tennis player, who had not authorised this advert, sue the company for injunction and compensation?*

As stated above, the right to one's own image is part of the personality rights protected under Art. 28(1) CC. As we have seen, an image may not, in principle, be reproduced by drawing, painting, photography, or any comparable process without the prior or subsequent consent of the individual concerned; moreover, such a reproduction cannot be distributed without consent.¹¹⁴

A famous tennis player is a public figure. Thus, the protection of his personality rights is more limited than that of average individuals; however, it does include the use of his image for advertising purposes.¹¹⁵ The fact that athletes make a large part of their income from advertising does not authorise advertisers to use athletes' images without their consent. Such behaviour was classified as 'inhumane' by a court in Zurich, because the athlete finds him or herself reduced to publicising the product being advertised.¹¹⁶ Anyone voluntarily participating in an advertisement will be identified with the product presented and if his or her image is used without authorisation in connection with this product, he or she will be seen as having given an opinion on or having a certain relationship with the product.¹¹⁷ To the person used in the advertisement, this may seem like a serious infringement of his or her personality rights.

The fact that the tennis player had authorised the publication of this photograph in a newspaper several years earlier does not legitimise

¹¹⁴ RVJ 2003, p. 252 c. 4a.

¹¹⁵ Judgment of the District Court of the area of Zurich, in: SIC 2003, p. 127 c. 28 *et seq.*

¹¹⁶ *Ibid.* c. 30. ¹¹⁷ *Ibid.* at c. 28 *et seq.*

its subsequent use for advertising purposes.¹¹⁸ His renewed consent is, in fact, necessary; without it there is an unlawful infringement of his right to the protection of his image. The protection given by this right also extends to distortion or abusive exploitation.¹¹⁹ In that respect, the *Obergericht* of Zurich has held that any photography taken for use in advertising may not be used for another advertising campaign without the consent of the individual concerned.¹²⁰ Moreover, an unlawful infringement against personality rights will be more easily recognised where there is a notable divergence between the initial intended use of the image and its use for advertising purposes.¹²¹

Therefore, the tennis player may bring proceedings to put an end to the infringement (Art. 28a, 1(2) CC) by asking for injunctive relief against any further distribution of the advertisement. He may also ask for a declaratory judgment declaring that the infringement is unlawful (Art. 28a(3) CC) and demand economic and non-economic damages from the advertising company (Art. 28a(3) CC). According to the general rule (see Art. 49 CO), damages for pain and suffering will not be awarded unless he proves that the infringement he suffered was particularly egregious.

(b) Do the damages include skimming off the profits earned by the company through their use of the photograph?

The tennis player has the right to demand restitution of any profits made by the advertiser through a claim for the restitution of profits (Art. 28a(3) CC and Art. 423 CO). However, he has no legal means of forcing the company to provide any documents or information that would permit him to calculate and prove the amount of profits earned. Therefore, he would probably ask the judge to make a determination in equity taking the normal course of affairs into account (Art. 42(2) CO).

(c) What would be the result if the famous tennis player had died prior to the publication but has a surviving spouse and child?

Under Art. 31 CC, personality rights expire upon the death of their holder.¹²² However, this principle does not prevent heirs from bringing

¹¹⁸ Judgment of the *Obergericht* of the area of Zurich, in SJZ 71 (1975), p. 27 c. 3 to 5.

¹¹⁹ P. Tercier, *Le nouveau droit de la personnalité* (Zurich: 1984) n. 458.

¹²⁰ Judgment of the *Obergericht* of the area of Zurich, in ZR 71 (1972), p. 104.

¹²¹ Judgment of the District Court of the area of Zurich, in SIC 2003, p. 127 c. 28 *et seq.*

¹²² A. Büchler, 'Die Kommerzialisierung Verstorbener, Ein Plädoyer für die Vererblichkeit vermögenswerter Persönlichkeitsrechtsaspekte' (2003) *Pratique Juridique Actuelle* 7.

proceedings in their own names for an unlawful infringement committed against their own familial sentiments regarding the deceased. This includes the memory of the deceased, and it permits those close to him/her to bring proceedings to protect the honour or the image of the latter, primarily by means of specific injunctive relief.

Since personality rights are not transferable, it is only if the personality rights of the spouse and child are infringed by the advertisement that they can bring suit for recognition and cessation of the infringement.¹²³ Actions for the restitution of profits will not be open to them because their familial rights do not confer a legal position which would include the economic and commercial elements of personality rights.¹²⁴ So far, Swiss law retains the purely ideal aspect of personality rights in such situations.

The situation will be different if the publication takes place prior to the tennis player's death and if the deceased brings proceedings while still alive. His heirs could then stand in for him and continue the claim after his death. It is only where the tennis player commenced legal action during his lifetime that the right to continue the proceedings may be inherited.¹²⁵

III. Metalegal formants

The notion that benefits of the personality only have an ideal value is open to criticism. It is more useful to recognise that the benefits also have an inheritable value. Even if the Swiss courts currently seem reluctant to grant more than an ideal value, the legislature has clearly recognised this by expressly establishing an action for the restitution of profits in order to protect personality rights (Art. 28a(3) CC).

Images, signs, or objects bearing the mark of an individual are benefits of the personality for which the value is often not only ideal but also and foremost commercial. The exploitation engaged in by celebrities concerning their images shows that the personality is based on economic reality.¹²⁶ A large number of these celebrities are athletes who receive a significant portion of their incomes from the

¹²³ ATF/BGE 104 II 225 c. 5b, JdT 1979 I 546.

¹²⁴ ATF/BGE 129 I 302, in: PJA 2004, p. 742; A. Büchler, 'Die Kommerzialisierung Verstorbenen', at 7.

¹²⁵ ATF/BGE 104 II 225 c. 5b, JdT 1979 I 546.

¹²⁶ F. Werro, 'La tentation des dommages-intérêts punitifs en droit des médias' (2002) *Médialex* 82 at 88. See also, Franz Werro, 'Une remise du gain sans gain? Une illustration de l'arbitrage délicat entre liberté et dignité', in *Mélanges en l'honneur de Pierre Tercier* (Zürich: 2008), p. 495.

commercialisation of their personality rights. To the extent that an individual holds a right, the media has no right to enrich itself at the expense of that individual. As a result, anyone who appropriates the image of an athlete and uses it to serve his/her own economic purposes appropriates the benefits of others who alone are entitled to decide if their image may be used for free or not. The fact that unjust enrichment may be difficult to establish does not change anything. Rather, it is better to reinforce the protection of the victim, famous or not, and to sanction any unlawful infringements more forcefully through adopting actions for the restitution of profits.

Comparative remarks

This is the first case which deals exclusively with the appropriation of personality for commercial purposes. In contrast to Case 9, there is a shift in focus from privacy interests to publicity interests. Indeed, at first glance, there is no obvious damage to the honour or reputation of the tennis player as this photograph was taken at a public event, had already appeared in the press and the advertisement merely consists of three neutral words under his photograph. In this case, we see a marked difference in approach between the civil law legal systems and the common law systems and Scotland. The tennis player has a claim in all of the civil law countries. However, the outcome is far from certain in the common law and Scotland.

I. The claimant's claim

The tennis player will be entitled to a preventative injunction and compensation in all of the civil law legal systems considered. This will be achieved in continental Europe through the use of general tort law and special copyright provisions. There are two deciding factors in ascertaining the unlawfulness of the defendant's conduct. Firstly, the photograph was used for purely commercial purposes and this excludes the defence of freedom of expression or public interest. Secondly, the photograph was published without the consent of the tennis player. In this sense, even though the picture was taken at a public event and was already well-known, publication in such a manner will not be permitted.

In Finland, a person's right to decide whether his or her picture is used for commercial purposes is mainly based on case law and academic

writings. The Finnish Supreme Court has allowed claims for injunction and damages (based on the Tort Liability Act) where a person's picture is used in advertising without authorisation. Moreover, according to the Finnish Act on Unfair Business Practices, when a picture is taken of a person who is acting for business purposes, this person can claim before the Finnish Market Court. The Market Court can, however, only grant an injunction: claims for damages must be brought before the general courts.

In England, Ireland and Scotland, the tennis player has fewer options in relation to his causes of action. He can only proceed on the basis of defamation and/or passing off. Copyright does not play a role as it is the photographer who owns the copyright. Even though there is case law to support the use of defamation in such a scenario, it is unlikely that the claimant would be successful with this action, given that, on these facts, it is difficult to prove damage to reputation. Traditionally, the use of passing off has also proved somewhat troublesome. However, recent case law has suggested a less restrictive approach to pleading the tort. Nevertheless, in this case, the claimant would have to prove that he enjoyed significant goodwill at the time of publication and that the publication led a substantial proportion of the market to believe that the product had been endorsed by the claimant. In this particular case, the advertisement in question contained a well-known and unabridged photograph of the claimant at a tournament match with three neutral words underneath. It might be difficult to conclusively prove that a significant proportion of the market saw an endorsement link between the claimant and the company. Nonetheless, if successful using these torts, the claimant would be entitled to damages under defamation and an injunction and/or damages under passing off.

In Ireland, self-regulation plays an important role in this case. The publication of such an advertisement amounts to a breach of the code of conduct of the Advertising Standards Authority of Ireland (ASAI). The ASAI could order that the advertisement be amended and the media could refuse to continue publication of it. Any member who refuses to comply with any such decision could be fined or suspended. Thus, while the tennis player may not obtain an injunction preventing the publication of the advertisement, censure from the ASAI can be just as effective in preventing the continued display of the advertisement.

II. Damages awarded

The question of damages is of significance in this case because of the publicity interests involved. In this respect, the form of damages and the method of award should differ considerably from cases involving pure privacy interests. If these publicity interests are seen as having proprietary characteristics in the individual legal systems, then the damages awarded could conceivably be similar to damages awarded in breach of intellectual property cases, i.e. compensation for the property owner's lost profits and disgorging the unjust enrichment on the part of the defendant.

In the first instance, it is clear that most legal systems appreciate a difference between privacy interests on the one hand and the commercial nature of this case on the other. Indeed, for the majority of countries, the loss in this case is solely economic. The only exception to this general observation is Greece where there does not seem to be a possibility to claim damages for economic loss. However, damages for non-economic loss appear to be recoverable, even in purely commercial cases.

The majority of civil law legal systems consider that the claimant can claim for the lost opportunity of earning money resulting from the publication of his photograph. In France, while there might not be a distinct divide between economic and non-economic damages, in such cases courts have implicitly awarded damages for the lost earning opportunity. In most countries, this award will usually be calculated on the basis of a hypothetical licence fee. In the common law countries and Scotland it is more difficult to assess how the damages will be determined in an individual case. If the claimant is successful with the action in defamation, then restitutionary damages will not be available. In respect of passing off, the goodwill of the claimant will be treated as a property right. Therefore, he can claim damages for the lost opportunity of earnings. This is calculated either on the basis of what the claimant usually charges for such advertisements or on the basis of a reasonable endorsement fee determined by the court.

In Finland, the recoverable economic damage is limited to the loss actually suffered by the tennis player. The amount of damages usually awarded by the courts is fairly low.

Only some of the legal systems consider that the claimant will have a claim in respect of skimming off the profits made by the defendant. However, in some systems, there are certain requirements attached to

the granting of this remedy. In Germany, it is only possible provided that the claimant does not resist the commercial use of his personality in general. The Dutch courts will allow a skimming of profits but it cannot be awarded in conjunction with damages for a lost earning opportunity. It also seems likely that this remedy would be granted in Austria, Belgium, Portugal, Spain and Switzerland. The possibility of seeking this remedy is ruled out in Finland, France and Greece. In the case of England, Italy and Scotland, in principle, the remedy will not be entertained. However, the court may, on its own discretion, take the profits into account when assessing damages.

III. Post-mortem appropriation of personality

As a matter of principle, personality rights are connected to the living individual and therefore cease to exist on the death of that person. It is for this reason that the issue of post-mortem appropriation of personality is noteworthy in this case. If the publicity interests involved can be 'inherited' by the surviving spouse and child, then this could be regarded as a further proprietary characteristic.

In many countries such as Belgium, France, Italy, Germany and Switzerland, personality interests are prevalently treated, at least in theory, as being purely personal and non-transferable. Accordingly, the spouse and child would be entitled to an injunction, but not to monetary compensation of the tennis player's losses. However, the issue is highly controversial. Some courts and scholars tend to also allow damage claims for economic loss. The German Supreme Court and the lower courts in France and Italy clearly acknowledge some kind of appropriation of the economic aspects of personality by the heirs of the deceased, which enables them to recover damages.

In Austria, the economic loss of the deceased may be recovered by the relatives under the law of unjust enrichment. This solution is also defended by the Swiss report.

In the Netherlands, Portugal and Spain, specific legislative causes of action enable the relatives and heirs to claim injunction and damages for violation of personality and the image rights of the deceased. The theoretical justification of this cause of action (own rights of the relatives, or inherited rights of the deceased) is subject to debate.

In Greece, the spouse and child will be able to recover non-economic damages on grounds of violation of the personality rights of the deceased. On the contrary, in Finland claims of surviving family

members for non-economic loss are explicitly excluded, but claims for economic loss could be theoretically allowed.

The surviving dependants will not have a claim in the common law systems and Scotland. Defamation is only actionable during the lifetime of the aggrieved person. In respect of passing off, it would not be possible to prove that a significant proportion of the market reasonably believes that the deceased endorsed the product in question.

14 Case 11: The popular TV presenter

Case

A popular TV presenter with a very distinctive voice once did a voice-over on some adverts for a coffee company. After he had made it clear that he did not want to do any more of these adverts, the company produced a radio commercial in which his voice had been imitated by another person. Can the TV presenter sue the company for an injunction and compensation?

Discussions

Austria

I. Operative rules

The presenter can claim for forbearance and for compensation under the law of unjust enrichment. He also might have a claim for non-economic damages. Economic damages are probably not recoverable in this case.

II. Descriptive formants

A right to one's own spoken words and to the protection of one's characteristic voice against imitation can be established on the basis of a consideration of other personality rights and constitutional aspects (above all Art. 10 ECHR) and a general weighing of interests, combined with § 16 ABGB.¹

¹ J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 16 no. 22; M. -T. Frick, *Persönlichkeitsrechte* (Vienna: 1991) 154; H. Koziol, *Österreichisches Haftpflichtrecht II* (2nd edn., Vienna: 1984) 13.

In 2001, the *OLG Wien* (Higher Regional Court of Vienna) passed judgment on a similar case, tackling the same problems as the case at hand. The court had to decide whether to issue a preliminary injunction in relation to a radio commercial for a political campaign in which the voices of actors from a well-known television series were imitated.² In another decision addressing the same legal dispute, the *OGH* approved the protection of someone's characteristic voice against exploitation through use in a commercial.³ From these two judgments it follows that the coffee company encroaches on the presenter's personality right and has to pay a hypothetical licence fee under § 1041 *ABGB* for any unjust enrichment.⁴

Since the presenter's voice is very distinctive and hence easy to remember it is an important part of his personality. Although the presenter was not mentioned by name on the radio, the average attentive listener could – because of the cadence, the intonation, the pitch and the melodic characteristic of the voice – identify him as the narrator of the commercial. In addition, the audience was accustomed to hearing his voice on the old radio adverts. By broadcasting the unauthorised commercial the presenter's fame, reputation and personality were exploited because the listeners got the false impression that the presenter decided to promote the coffee.⁵ The coffee company obviously wanted to allow people to recognise the TV presenter's voice.

As a matter of principle, the Austrian legal order not only protects someone's picture or name but every similar identifying feature of an individual.⁶

In the present case, Art. 10 ECHR (freedom of expression) is also affected. The decision whether or not to participate in adverts belongs to the sphere of freedom of expression.⁷ This is another argument demonstrating the unlawfulness of imitating a distinctive voice for advertising purposes.⁸

The presenter can submit a claim for forbearance. Furthermore, he can demand publication of the judgment of forbearance under § 78 and

² MR 2002, 27. This decision was reviewed by the OGH. However, the OGH did not have to deal with any of the elements we are interested in.

³ MR 2003, 95.

⁴ In the second judgment, the OGH granted ATS 80,000 (approximately €5,800) for the unjust enrichment.

⁵ See Case 10.

⁶ Cf. G. Korn, commentary on *OLG Wien* MR 2002, 29; consentient: OGH MR 2003, 95.

⁷ VfGH (Verfassungsgerichtshof, Constitutional Court) MR 1986, 16; see also Case 10.

⁸ G. Korn, commentary on *OLG Wien* MR 2002, 29.

§ 85 *UrhG* by analogy⁹ or by making reference to the general principles of law.¹⁰

The only supposable economic loss could be the equivalent of an adequate hypothetical licence fee.¹¹ Regarding the unauthorised use of a picture for an advertisement, the *OGH* did not accept such a loss in terms of § 87, subs. 1 *UrhG* so it probably would not do so either in terms of § 1295 *ABGB* (the general clause of tort law).

Since a special provision awarding compensation for non-economic damage in the legally protected area of the presenter's personality is lacking, we have to exert the general principles of fault-based liability in the *ABGB*. According to §§ 1323, 1324 *ABGB* non-economic damages are only awarded if the tortfeasor acted with gross negligence at least.¹² However, there is no case law to approve this position in respect of the right to spoken words. The *OGH* often limits compensation for non-economic loss to cases in which it is regulated in express terms.¹³ Given that personality rights are absolutely protected rights, this approach is not appropriate here.

The TV presenter can claim under the law of unjust enrichment. He has a certain fame of monetary value, which, in connection with unauthorised commercials, the *OGH* classifies as a 'property' in terms of § 1041 *ABGB*.¹⁴

III. Metalegal formants

Regarding compensation for non-economic harm we have to differentiate between personality rights anchored in the Copyright Act and those derived from § 16 *ABGB*. In the first case, the injured person can recover compensation for non-economic harm for any fault on the basis of § 87, subs. 2 *UrhG*, which, according to the *OGH*, is restricted to cases of particularly serious violations.¹⁵ In the second case, we do not

⁹ *OGH MR* 2003, 95.

¹⁰ W. Posch in M. Schwimann, *ABGB-Praxiskommentar I* (3rd edn., Vienna: 2005) § 16 no. 54.

¹¹ For the problems in respect of this damage and the preference of a solution under the law of unjust enrichment see Case 10.

¹² E. Karner and H. Koziol, *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform, Verhandlungen des 15. Österreichischen Juristentages, Bürgerliches Recht II/1* (Vienna: 2003) 17 *et seq.*; E. Karner and H. Koziol, 'Non-Pecuniary Loss Under Austrian Law', in W. V. H. Rogers, *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Vienna/New York: 2001) 1 *et seq.*

¹³ Cf. Case 17. ¹⁴ *MR* 1992, 95; see also Case 10.

¹⁵ See Cases 7, 8, 9 and 10. Cf. the situation regarding § 1328a *ABGB*: this provision presupposes (any) culpable behaviour on the one hand and a serious infringement

know the position of the OGH; there is no case law. In our opinion the general provisions of the ABGB should be applied. According to §§ 1323, 1324 ABGB compensation for non-economic harm can only be awarded if the wrongdoer acted with gross negligence at least.¹⁶

In our minds the legislator should explicitly harmonise the provisions on the compensation of non-economic harm within the sphere of personality rights in order to avoid an offence against the principle of equal treatment.¹⁷

Belgium

I. Operative rules

The TV presenter has a claim against the coffee company.

II. Descriptive formants

Belgian singer-songwriter Rocco Granata was asked to adapt his song *Mi sono innamorato di Marina* for Melitta coffee filters ('Melitta aroma Melitta'). He refused to sing the adapted version himself so as to avoid being identified with a commercial product. His voice was then imitated by another singer. The Brussels Court of Appeal granted €12,500 in economic and non-economic damages to Rocco Granata. The singer had only granted a so-called 'synchronisation right'.

A person's voice is part of an individual's personality (timbre, tone, sonority, skill). Imitating a person's voice without his/her consent in a pure commercial and publicity context, which creates confusion between the original and the imitation, constitutes a fault *in sensu* Art. 1382 CC.¹⁸

England

I. Operative rules

The claimant may have a claim for an injunction and compensation under the torts of defamation and passing off.

on the other (see Case 8). In contrast, according to the provisions of the Media Act aimed at the protection of personality, a claim does not depend on culpable behaviour; see Case 1.

¹⁶ *Ibid.* Indeed, it could be possible that the OGH denies any compensation of non-economic loss at all or implements the requirement of seriousness in the sense of § 87, subs. 2 UrhG or § 1328a ABGB respectively by analogy.

¹⁷ See the Metalegal formants in Case 5.

¹⁸ CA Brussels 19 Jan. 2001, RW 2001-2002, 207; AM 2002, 450, note by F. Brison.

II. Descriptive formants

1. *Defamation*

In this case, an action can be grounded in defamation if the broadcasted voice could reasonably be understood to be that of the TV presenter. It would then depend on whether his reputation could have been harmed in the eyes of right-minded people.¹⁹ However, since he had done a voiceover on radio commercials for this particular coffee company before, this seems unlikely. Nevertheless, he may have had a special reason for distancing himself from the company, such as a sudden decline in the company's reputation, for example, due to the unethical exploitation of coffee planters in thirdworld countries. In such a case, the imitation would be capable of bearing a defamatory meaning.

2. *Passing off*

The TV presenter may also claim damages under the tort of passing off.²⁰ This issue had first been touched upon by Hodson LJ in *Sim v. Heinz*²¹ but has not been decided upon nor followed up in later years.²² However, the recent decision in *Irvine v. Talksport* might also cover the case of the TV presenter. It would probably be crucial to know whether the TV presenter has only recoiled from making radio commercials for this particular coffee company, or whether he has completely retired. In the latter case, he would not have suffered damage and therefore would not have a claim.

Finland

I. Operative rules

It is quite possible that the TV presenter has a right to sue for an injunction and compensation.

II. Descriptive formants

The issue of a person's right to his/her own voice has not arisen in Finnish law as such. There are no applicable provisions. The use of a person's voice can be judged in the same way as the use of a photograph. A good imitation should be understood as if the voice of the

¹⁹ *Sim v. HJ Heinz Co Ltd* [1959] 1 WLR 313.

²⁰ For details, see the answer to Case 10. ²¹ *Sim v. HJ Heinz Co Ltd*.

²² See T. Frazer, 'Appropriation of Personality - A New Tort?' (1983) 99 *Law Quarterly Review* 281, at 286-7.

imitated person was used and the imitated person should have a right to compensation.²³ However, if the listener gets the impression that the imitator is making only a parody of the presenter's voice, the situation possibly has to be judged otherwise.

A comparison can be made to a case before the Finnish Market Court²⁴ where a weatherman sued a company which used an actor to imitate him in an advertisement. The Court found that the company had acted contrary to good business practices. The Court also referred to the ICC International Code of Advertising Practice (see Art. 9 of the Code of 1997, which is now in force), according to which referring to a person in an advertisement without this person's prior consent is prohibited.

It would be very likely that the Market Court would grant an injunction if the TV presenter can be regarded as acting in the course of his business activity. If the TV presenter is only an employee, the employer could bring the case before the Market Court. Thus, it is probable that the TV presenter would be granted an injunction on the grounds that the practice of the coffee company is not in accordance with good business practices.

According to Ch. 5, s. 1 of the Finnish Tort Liability Act, the possibility of obtaining compensation for pure economic loss, as was described in Case 7, requires an especially weighty reason for compensation. In some court cases, acting against good business practices and therefore against the Act on Unfair Business Practices has been considered to be an especially weighty reason. Consequently, the court has granted damages for pure economic loss.²⁵ As was stated in Case 7, it is unclear as to what will constitute an especially weighty reason otherwise.

France

I. Operative rules

The TV presenter can sue the company for an injunction and compensation.

II. Descriptive formants

Just as images are protected, the voice is also protected under French law as an expression of the personality. Even though there are far

²³ Muhonen, 'Henkilön persoonallisuuden kaupallinen hyödyntäminen Yhdysvalloissa ja Suomessa' (1996) *Defensor Legis* 780 and 781.

²⁴ The Market Court case 1996:25 *Juha Föhr v. Korpivaara Oy*.

²⁵ See Hemmo, 'Selvitys puhdasta varallisuusvahinkoa koskevan sääntelyn uudistamistarpeesta' (2002) 26 *Oikeusministeriön lausuntoja ja selvityksiä* 7–8.

fewer decisions than those dealing with the image of persons, French law recognises everyone's right to his/her voice, defined as the right of every individual to prohibit the recording of his/her voice and the diffusion of such a recording.²⁶ Just as the use of a *doppelgänger* in advertising can be the basis of an action for the infringement of the right to one's image,²⁷ the imitation of a person's voice is an infringement of the right to one's own voice if it is recognisable as such.²⁸ In a case similar to the present one, which concerned the imitation of the voice of the actor Claude Piéplu for advertising purposes, French courts held that 'the voice constitutes one of the attributes of personality (and) that all persons have the right to forbid another from imitating their voice in conditions likely to create a confusion of persons, or to cause them any other harm'.²⁹ The TV presenter could thus obtain an injunction without difficulty preventing the company from broadcasting the radio advertisement in question.

In relation to compensation for the harm suffered by the TV presenter, it is likely that the courts will take his decision to refuse to produce any further advertisements into consideration and thus the rarity of his voice to determine the extent of the economic loss. In the Piéplu decision, cited earlier, the French judges held that the artist suffered 'a professional harm for he only very rarely participated in advertising publicity. He can thus demand, due to his fame, a high rate of remuneration, which is so high in part precisely because his appearances in advertisements are so rare.'³⁰ The existence of non-economic harm on the other hand will probably not be accepted as the products for which the publicity is made have no negative character.

²⁶ Huet-Weiller, 'La protection juridique de la voix humaine' (1982) *Revue trimestrielle de droit civil*. 511.

²⁷ TGI Paris 17 Oct. 1984, aff. Depardieu, D. 1985, somm., 324.

²⁸ CA Pau 22 Jan. 2001, D. 2002, somm., 2375: 'the voice constitutes one of the attributes of personality. It can enjoy the protection established by Art. 9 CC, insofar as a characteristic voice can be related to an identifiable person'.

²⁹ TGI Paris 3 Dec. 1975, Piéplu, D. 1977, jur., 211. The court held in that case that 'the audience was led to believe that the text accompanying the cartoon was recited by Claude Piéplu, and there was nothing else which could have enlightened the audience on the truth'. See also TGI réf. Paris 11 Jul. 1977, D. 1977, jur., 700: 'the commercial use of the voice of a person easily identifiable by reason of his/her notoriety and the public character of his/her activity is reprehensible'.

³⁰ TGI Paris 3 Dec. 1975, D. 1977, jur., 211.

Germany

I. Operative rules

The TV presenter may claim an injunction and probably also damages, although the amount and calculation of damages are disputed.

II. Descriptive formants

This case raises the question of whether a personality interest exists in protecting one's own voice against eavesdropping, storage on a tape recorder and dissemination of this copy. Courts have acknowledged a right to one's voice especially as an aspect of a person's privacy. Therefore, the first cases in this field were cases in which surveillance of the person was verging upon an intrusion into her or his privacy.³¹ Courts have said that the tape recording of a person's voice leads to a form of materialisation (*'Verdinglichung'*) which is equivalent in its intensity to the taking of a person's image by filming him or her.³² The main aspect which legitimates protection through § 22 KUG is the fact that a person becomes immediately identifiable through his/her image. This can also occur through a person's voice, at least if the voice is very distinctive as in the present case.³³ Distinctiveness can be assumed if a substantial part of the general public, relatives or friends of the person will recognise this person by hearing the voice. Therefore, a comparison to the protection of image under §§ 22, 23 KUG would be suitable,³⁴ however the majority of scholars in Germany do not use this analogy but prefer the direct application of § 823(1) BGB to protect the voice.³⁵

The next question is whether the use of an imitator is a use of the claimant's personality attributes. In such cases, it is not suitable to speak of a duplication of the voice but one might still speak of an appropriation of the distinctiveness of a person's voice as a personality feature, which could be termed 'likeness'. Therefore, courts would agree to a violation in cases where doubles are used.³⁶ In a recent decision, even

³¹ BVerfGE 34, 238 246; BGHZ 27, 284; BGH NJW 1982, 277; and in penal cases BGHSt 14, 358.

³² BGH NJW 1987, 2667, 2668.

³³ Similar case in Germany OLG Hamburg, GRUR 1989, 666, concerning the well-known comedian Heinz Ehrhardt.

³⁴ K. -H. Peifer, *Individualität im Zivilrecht* (Tübingen: 2001) 165.

³⁵ A. Freitag, *Die Kommerzialisierung von Darbietung und Persönlichkeit des ausübenden Künstlers* (Baden-Baden: 1993) 150; Anke Schierholz, *Der Schutz der menschlichen Stimme* (Baden-Baden: 1998) 85, 86.

³⁶ OLG Hamburg, GRUR 1989, 666.

the imitation of the distinctive pose of the actress Marlene Dietrich in the movie *Der blaue Engel* was considered an appropriation of Dietrich's likeness.³⁷

If the person appropriated is a public figure, one might argue that this person cannot object to the public use of his or her voice, especially in cases where this voice has been frequently used in public. However, as already explained in Case 7, the general limitation of § 23(1) 1 KUG for the use of personality features for press purposes is not applicable in cases where the voice is used for commercial purposes.³⁸ The defendant will not be allowed to argue that prior commercial use demonstrates a general consent to commercial use.³⁹

Therefore, the TV presenter will be successful in his claim for an injunction. The claim for compensation will usually be successful under the conditions discussed in Case 10. However, in the instant case, the presenter has changed his attitude towards the commercial use of his personality features. Taking this into account, his voice no longer has any commercial value for the claimant. Nevertheless, a growing opinion in Germany would grant a claim for the profits earned by the defendant, concentrating on the fact that he/she has made unauthorised use of another person's right.⁴⁰ The majority opinion would still argue that an action for profits will only be successful if the good appropriated had a commercial value for the claimant.⁴¹ With respect to the intentional and reckless violation of personality rights, courts have granted pecuniary compensation if the violation cannot be repaired by non-monetary restitution.⁴² However, this relief, at least up until now, is only given in cases in which the appropriation constitutes a serious and reckless injury to personal interests. Mere commercial use would not rise to this level.⁴³

³⁷ BGH NJW 2000, 2201.

³⁸ OLG Hamburg GRUR 1989, 666 (*Heinz Erhardt*); similar case OLG Karlsruhe AfP 1996, 282 (singer *Ivan Rebroff*).

³⁹ See Case 9.

⁴⁰ V. Beuthien and A. Schmözl, *Persönlichkeitsschutz durch Persönlichkeitsgüterrechte* (Munich: 1999) 64.

⁴¹ BGHZ 26, 349, 353; BGHZ 44, 372, 375; A. Peuker, 'Persönlichkeitsbezogene Immaterialgüterrechte' (2000) *Zeitschrift für Urheber - und Medienrecht* 710, 716. L. Raiser, 'Der Stand der Lehre vom subjektiven Recht im Deutschen Zivilrecht' (1961) *JZ* 465, 475; E.-J. Mestmäcker, 'Eingriffserwerb und Rechtsverletzung in der ungerechtfertigten Bereicherung' (1958) *Juristenzeitung* 521, 525.

⁴² BGHZ 128, 1, 15.

⁴³ LG München I, ZUM 2002, 238, 240.

III. Metalegal formants

The case clearly shows the distinction between personal (moral) and commercial interests. The case shows that compensatory damages should and need not be constructed in a way to give incentives for marketing the use of personal features.

Greece

I. Operative rules

The TV presenter has a claim against the company for an injunction and compensation.

II. Descriptive formants

As already mentioned, the notion of 'personality' is to be understood as 'a net of values, protected by the Constitution (Art. 2 (1)), which consist of the moral substance of the individual.'⁴⁴ Under this general 'right of personality' many new aspects of personality may be included, which are recognised by modern economic and social mores and whose protection becomes indispensable through the evolution of life and modern technical means.⁴⁵

One of these aspects is also a person's voice, which cannot be used for commercial purposes without prior consent.

Ireland

I. Operative rules

An action in defamation could only arise if it could be proven that the presenter's continued association with the coffee company was damaging to his reputation. Given recent English jurisprudence on the issue, an action in passing off could succeed on similar grounds in Ireland. If this is the case, an injunction could be granted in favour of the TV presenter.

II. Descriptive formants

If an action in defamation were to succeed, the TV presenter would need to establish that the public reasonably believed that the presenter

⁴⁴ Supreme Court (Areopag) Decision 854/2002. Court of Thessaloniki Decision 16923/2003. Decisions cited are available in Greek via the legal database 'NOMOS'.

⁴⁵ See, for example, Court of Thessaloniki 16923/2003: 'the notion of right of personality includes as a specific aspect of it the freedom of a person to enter

was continuing to endorse the products of the coffee company when in fact that was no longer the case and the false association was defamatory. However, given the fact that the TV presenter had previously endorsed these products it would be hard to establish that his association with the company was damaging his reputation. If, however, the company had received some bad publicity, the TV presenter may no longer have wished to be associated with it or its products. If so, then the false impression (whether intentional or not) that the presenter had a continued association with the company could be harmful to the presenter's reputation. If that were the case, the TV presenter would be entitled to compensation for the damage caused and to an injunction preventing the future broadcasting of the advertisements.

It could be very difficult to bring an action in passing off as there was no common course of trade between the presenter and the company.⁴⁶ This requirement has effectively been abolished in England following the decision of *Irvine v. Talksport Ltd.*⁴⁷

A complaint could be made to the Advertising Standards Authority of Ireland (ASAI) alleging a breach of the ASAI's code of conduct. In particular, it would appear that at the very least that the use of the imitator's voice was in breach of the code as it implied that the TV presenter continued to endorse the company's product where in fact this was no longer the case.⁴⁸

Italy

I. Operative rules

It is likely that the TV presenter can enjoin the commercial exploitation of his voice and recover damages.

II. Descriptive formants

The possibility of recognising an interest in one's own voice is disputed. The traditional view rejects this,⁴⁹ while the most recent literature seems to admit it.⁵⁰ One should not be misled. The traditional approach

legally functioning casinos and to take part to the games played there, as long as the person is of the legal age and accepts the terms and regulations of the casino '.

⁴⁶ See generally Case 10. ⁴⁷ [2002] 2 All ER 414. ⁴⁸ *Ibid.*

⁴⁹ See G. Santini, 'Il c.d. diritto alla voce', in *Problemi attuali del diritto industriale* (Milan: 1977) 1027 *et seq.*

⁵⁰ See C.M. Bianca, *Diritto civile*, 1, *La norma giuridica, I soggetti* (Milan: 1984) 121; G. Savorani, *La notorietà della persona da interesse protetto a bene giuridico* (Padova: 2000) 38.

makes sense in a strict ‘personality right’ perspective. The voice – it is argued – has a weak distinctive character and cannot easily identify a person.⁵¹ This perspective changes when one looks at the same problem within the frame of the right of publicity. The voices of actors, journalists, politicians and many other public figures *often* have a distinctive character and therefore a strong publicity value. The restrictive solution could be based on a formalistic reasoning: no provision of the Civil Code or of the Copyright Act openly recognises a right to one’s own voice (but it cannot be forgotten that the voice can be considered ‘personal data’ according to the definition given by Art. 4(1) *b* DPC).⁵² However, this conclusion is not convincing since other personal indicia, which are also not mentioned in the Civil Code, have so far received protection through extensive or analogical interpretation of the provisions on name and likeness.⁵³ Therefore, if the voice has a distinctive character – as in the present case – and it is used as an instrument of commercial appropriation of personality, there is no reason to deny protection.

One should be aware that this conclusion is not yet supported by a sufficient number of authorities to be considered acknowledged law. An important 1993 decision awarded damages to the pop singer Angelo Branduardi whose (imitated) voice was used in an advert for rusks produced by Buitoni; the judges referred to the right to one’s voice as an integral part of the right to control the commercial exploitation of one’s own personality.⁵⁴ Two other cases seem to deny the existence of such a right under Italian law. However, their importance should not be overemphasised. The precedential value of the first decision is weak because it concerns a ‘remix’ of famous songs (which is a copyright issue) and not a use of the voice for advertising purposes.⁵⁵ However, even in the second case – which is actually related to a hypothesis of commercial appropriation – the rejection of a right to one’s own voice only counts as an *obiter dictum*, since the infringer’s liability is affirmed on the basis of performer’s rights (Art. 80 *et seq.* CA).⁵⁶

⁵¹ Trib. Milano 10 Feb. 1966, *Giust. civ.* 1966, I, 810 at 814.

⁵² Garante protezione dati 26 Nov. 1999, *Boll.* no. 6, 1998, 32.

⁵³ A famous example is given by Pret. Roma 18 Apr. 1984, *Foro it.* 1984, I, 2030: the commercial use of the cap and the glasses commonly worn by the singer Lucio Dalla is unlawful.

⁵⁴ Trib. Roma 12 May 1993, *Dir. inf.* 1994, 305 at 308; see also Trib. Milano 26 May 1997, *AIDA* 1997, Rep., 1024.

⁵⁵ Trib. Milano 10 Feb. 2000, *AIDA* 2000, 879.

⁵⁶ App. Milano 30 Mar. 1999, *AIDA* 2000, 700. It is interesting to note that the issue of the violation of a personality interest in the voice was not even raised by the claimant (referring only to his performer’s right).

Another issue should be considered. In the present case, the voice of the TV presenter was not reproduced in its original form but imitated by another person. This element is negligible. Once we take a publicity right perspective, it is completely irrelevant whether the commercial exploitation was realised through the reproduction of the original voice or through a faithful imitation. At any rate, the test is that of 'identifiability'. If a significant number of persons had reasonably identified the claimant from the overall context of the defendant's reproduction, then an infringement of the exclusive right could not be denied.⁵⁷ This conclusion is supported by many cases on 'look-alikes'⁵⁸ and by the decision already discussed concerning the misappropriation of a famous singer's voice and musical style.⁵⁹

The Netherlands

I. Operative rules

The presenter can both ask for an injunction and can claim damages.

II. Descriptive formants

If the commercial as a whole gives the reasonable impression that the TV presenter is involved, the commercial is unlawful.⁶⁰ Whether or not the impression is reasonable depends on the particular circumstances and their interconnection. If, for example, the company uses the same wording as in the former commercial, it is more likely that the imitated voice will be recognised by people as the voice of the TV presenter. If the wording differs greatly from the former commercial and does not make a link to that commercial, the quality of the imitation becomes more important. If the quality is perfect and it is reasonable to be under the impression that the voice of the TV presenter has been used, the commercial can be regarded as unlawful. If the voice is an imitation but is done in such a manner that it cannot objectively be a reason for confusion, the commercial is not an unlawful act.

The basis for the unlawfulness of the act is the fact that the commercial tries to use the TV presenter's popularity. Since this popularity is

⁵⁷ See on this point the remarks by T. McCarthy, *The Rights of Publicity and Privacy*, I (St. Paul: 1998) 3-20.

⁵⁸ Trib. Milano 26 Oct. 1992, *Dir. inf.* 1993, 944; Trib. Roma 28 Jan. 1992, *Dir. inf.* 1992, 830; Pret. Roma 6 Jul. 1987, *Dir. inf.* 1987, 1039. On this problem, see G. Ponzanelli, 'La povertà dei "sosia" e la ricchezza delle "celebrità": il "right of publicity" nell'esperienza italiana' (1988) *Dir. inf.*, 126.

⁵⁹ Trib. Roma 12 May 1993, *Dir. inf.* 1994, 305.

⁶⁰ Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 138.

the reason why the TV presenter can trade in his voice, it is a breach of duty to use that voice without prior authorisation from the TV presenter.

The fact that the TV presenter is a famous person does not change this, since his right to trade in his voice in the way he wishes to is part of the wider personality right.⁶¹

This is also the reason why the use of voices of public figures that are normally not used in a commercial setting (like the voices of members of the royal family) is an infringement of their privacy.⁶² Generally speaking, the right to privacy outweighs the commercial interests. The presenter can claim for both an injunction and damages.

The commercial can also be considered a breach of the former contract between the company and the TV presenter. However, the breach of duty in either contract or tort does not differ in terms of effects for damages and injunctions.

Portugal

I. Operative rules

The TV presenter can sue the company for an injunction and compensation if the imitation was perceived by the public as the TV presenter's original voice.

II. Descriptive formants

Arts. 72 and 74 *CC* provide protection to everyone's name and pseudonym (the latter only if it is famous). From these legal rules, and in conjunction with Art. 70 (general clause of protection of personality rights), one can derive a general protection of personal identity. A person's voice can, we believe, be included in that person's personal identity and, therefore, also deserves legal protection. The voice is understood as part of everyone's identity, everyone's 'sound-image'.

On the other hand, Art. 81 *CC* states that the personality rights holder may freely terminate all agreements or contracts made for the exercise of personality rights whenever he/she wishes. This means that personality rights, even after being bound by contract, may always be recouped. Therefore, it is valid and lawful for the 'popular

⁶¹ In HR 18 Oct. 1987, RvdW 1987, 186, the Supreme Court explicitly held that Art. 21 *Auteurswet* does not apply where the human voice is reproduced.

⁶² Court of first instance Amsterdam, 7 Jul. 2000, KG 2000, 155; Schuijt, *Losbladige Onrechtmatige Daad* no. 111.

TV presenter' to cancel his agreement for the use of his voice in commercial adverts, although he may have to compensate the other party for losses caused by frustration of legitimate expectations arising from the agreement.

There is no Portuguese court decision referring to similar facts. However, voice imitations are a current form of entertainment and could be claimed to be protected by the freedom of artistic creation (Art. 42 CRP). In addition, Art. 7 CPub only considers advertising as unlawful when it contains words from someone who has not given his/her consent, not an imitation of someone else's voice (Art. 7 (1), para. (e)). What we believe to be essential for a voice imitation to be considered lawful is a public awareness that it is just an imitation and not the original voice. Therefore, in the present case it is crucial to know whether it was perceivable by the public that the voice in the advertisement was just an imitation and not the original.

In conclusion, the imitation of the TV presenter's voice may constitute usurpation of identity if done in a way that is capable of leading third parties or people in general to believe that it is his own voice. However, the imitation may be done in such a way that is recognisable as an imitation. Then it may be construed as an artistic deed, which is in principle lawful. Even as an artistic act, its lawfulness is excluded if it is done in such a way as to offend the dignity of the TV presenter. The matter depends on the circumstances to a large extent and the manner in which the imitation is performed, and has to be decided on a case-by-case basis. The TV presenter would probably only be able to sue for injunction and damages (both *lucrum cessans* – see Case 10 – and non-economic damages) if the imitation aimed at and actually succeeded at making the public believe that the voice in the advertisement was the original and not just an imitation or, though recognisable as an imitation, was humiliating or offensive to the TV presenter's dignity (Arts. 70, 483 and 484 CC). If this were the case, he would be entitled to an injunction to prevent the broadcasting of the radio commercial and to compensation for economic and non-economic loss.

Scotland

I. Operative rules

The TV presenter may have a claim for damages and injunction under the tort of passing off.

II. Descriptive formants

Various questions are raised here relating to the law of defamation, the law of privacy and the concept of injury to reputation. It should be recalled that defamation includes cases where ‘right-minded persons’,⁶³ in reading or hearing the libel, fear that there has been an element of hatred, ridicule or contempt. In this particular instance, the public is being misled. The TV presenter is being put in a false light in that the public presumes he is in fact continuing to narrate radio commercials.

The question addresses the problem whether a professional person can be seen to own or have a property right in the exploitation of his voice (image, likeness). Whether or not Scots law protects the appropriation of a professional person’s image, thereby causing him/her damage, depends on the issue of whether professional persons are deemed to have a commercial value in the sense of goodwill in their image. This question has at least been addressed by English courts, commencing with the famous decision in *Tolley v. Fry*⁶⁴ where a photo of an amateur golfer was used in conjunction with advertising. It has an immediate counterpart in the case of *Sim v. H. J. Heinz & Co Ltd*.⁶⁵ The circumstances in the latter decision were very similar to the facts given here – a well-known actor sought to restrain the defendants, Heinz & Co Ltd, from simulating his distinctive voice in an advertisement. The claim was based on both libel and passing off and it was argued that the goodwill (property right to one’s own image akin to *get up*) could cause confusion among the public. Here, the English court said: ‘It would be a great defect in the law if it were possible for a party, for the purposes of commercial gain, to make use of the voice of another party without his consent.’⁶⁶

The court did not entirely dismiss the notion that a person might have good will in respect of his/her image/voice. Proof of commercial interest is paramount to any case in passing off. Therefore, in England an action could not be granted in a subsequent passing off case, where no economic reputation was found to exist.⁶⁷ Despite the lack of

⁶³ *Sim v. Stretch* (1936) 52 TLR 669.

⁶⁴ *Tolly v. J. S. Fry & Sons Ltd* [1931] AC 333.

⁶⁵ [1959] 1 WLR 313. ⁶⁶ *Ibid.* at 313, 317.

⁶⁷ *Lyngstad v. Annabass Products* [1977] FSR 62 (character merchandising without the consent of Abba pop group) – held no commercial interest in the UK under the law

Scottish authority on the point, the law is presumed to be the same as in England. Developments in intellectual property law through the Copyright, Designs and Patents Act 1988 will lead to greater awareness of the notion of copyright in the spoken word ('oral copyright'), particularly through broadcasting and the media.⁶⁸

Spain

I. Operative rules

The TV presenter can sue the company for an injunction and compensation.

II. Descriptive formants

Voice is protected by Art. 7.6 *LO 1/1982*. The rule permits the recovery of economic loss stemming from unauthorised commercial exploitation.

A similar case was resolved by the Spanish Supreme Court⁶⁹ and confirmed by the Constitutional Court.⁷⁰ Emilio Aragón, a famous TV showman famous for wearing a black tie tuxedo with white converse basketball shoes, released a disc titled 'te huelen los pies' (your feet smell), which became the number one selling single on several music charts. Some days later, a deodorant company used an image of two legs in black trousers and white basketball shoes in an advertisement with a caption indicating that 'the most popular person in Spain is just stopping by to say your feet smell'. The Supreme Court reversed the claim because it considered that it was not possible to identify the claimant. A dissenting opinion was included in the judicial ruling. The Constitutional Court added that the claimant had tried to protect the patrimonial aspect of the image of a fictional character. However, this case did not involve a reproduction of the face or other physical aspect of the claimant, but a reproduction of external characteristics of a fictional figure.

of passing off. The aftermath of Princess Diana character merchandising in the USA, in which the Princess Diana Trust lost its challenge before California's courts, indicates the difficulties associated with this particular action, see *The Times*, 12 Jul 2003.

⁶⁸ See H. McQueen, 'My tongue is mine'ain' (2005) *Modern Law Review* 68, 349-377.

⁶⁹ STS, 30 Jan. 1998, (RJ 358).

⁷⁰ STC 71/2001, 26 Mar. (RTC 71).

Switzerland

I. Operative rules

The TV host may bring an action for compensatory and injunctive relief if the imitation of his voice was successful, in other words, if it causes people to believe the commercial was made by the TV host himself.

II. Descriptive formants

The voice is an aspect of the personality and therefore part of the personality rights protected under Art. 28, para. 1 CC.⁷¹ Protection extends to reproductions, distortions or exploitations to the extent that the individual is identifiable.⁷² Thus, two hypotheses are distinguishable.

If the imitation was successful, listeners will be misled in respect of the true identity of the speaker. In fact, they will associate the advertisement for this product with the TV host, believing that they recognise his voice. Two reasons lead to this supposition. First, the job that the TV presenter has assures the wide public distribution of his voice, and second, his particular tone gives his voice a unique character. The fact that the commercial in question was played over the radio further reinforces confusion in the listeners' minds because they cannot see the speaker's face. It appears that the endorsement of this product's qualities is likely to be wrongly attributed to the TV host. As a result, even though the presenter expressly declined to make the commercial, the company has unlawfully infringed his personality rights by imitating his voice without his consent. Since no preponderant public or private interest justifies the infringement, the TV host can sue the company for an injunction and compensation.

If, by contrast, the imitation does not cause listeners to identify the voice as that of the TV host, his right to his own voice has not been infringed upon. Thus, he has no legal remedy available under Art. 28a CC.

III. Metalegal formants

This hypothesis is interesting in two ways. First, it underlines that obtaining someone's permission to use a recording on one occasion does not imply that there is a right to subsequent use. Second, it raises a question surrounding commercials made with the cooperation

⁷¹ P. Tercier, *Le nouveau droit de la personnalité* (Zurich: 1984) n. 453 *et seq.*

⁷² D. Barrelet, *Droit suisse des mass media* (2nd edn., Berne: 1987) n. 531; L. Schürmann and P. Nobel, *Medienrecht* (Berne: 1993) 234.

of TV hosts. Where television stations are controlled by the State, independence must be fiercely guarded; the television media cannot promote one-sided commercial or partisan interests. Thus, when TV hosts freely engage in this exercise, it is incumbent upon them to 'be vigilant that neither their independence nor the media's credibility is compromised'.⁷³

Comparative remarks

This case concerns the commercial appropriation of voice as an aspect of personality. In the majority of legal systems, the TV presenter will be successful in suing for both an injunction and compensation. However, as in Case 10, there is a clear difference between the standard of protection offered by the civil law systems on the one hand and the common law systems and Scotland on the other.

The core consideration in this scenario is that of the distinctiveness of the voice in question. A person's voice may not be as easily identifiable as his/her image. Therefore, in order to have a successful claim, the imitation must be distinct and easily recognisable to the extent that a significant proportion of listeners will identify it with the claimant. Once this has been established, it appears that the claimant will be successful in suing for an injunction and damages, given that he did not consent to the reproduction. The fact that the TV presenter had once spoken on some adverts for the company will not amount to a defence. As a holder of personality rights, the presenter has a right to use his voice for commercial purposes and can decide how and when to do this. In this case, he no longer has a contract with the coffee company. Therefore, the company does not have any right to use or imitate his voice for commercial purposes. These are points of agreement in all of the legal systems considered. However, the legal vehicles used to reach this result and the remedies available differ to a certain extent.

In the majority of the civil law systems, general tort law provisions will be sufficient to award the plaintiff an injunction and damages. In Austria, Germany and Italy, the Copyright Acts could correspondingly be applied in this case. In Spain, the unauthorised use of a person's voice falls within the scope of application of the 1982 Act on the civil protection of honour, privacy and one's image. In Finland, as in Case 10, not only general tort law but also the Act of Unfair Business Practices

⁷³ Statement of the Conseil suisse de la presse 1993, n. 5.

would be engaged: the presenter could probably claim an injunction before the Market Court and damages before the civil courts.

In the common law systems and Scotland it is less certain that traditional torts will offer the claimant adequate protection. Defamation is one possibility but it would have to be shown that the imitation somehow damaged the reputation of the presenter in the eyes of right-minded members of society. A better possibility is the tort of passing off. However, this option is also not without its shortcomings. According to case law, there has to be a commercial interest involved, which means that if the presenter has retired from making adverts in general, he will not be able to sue in passing off. As in Case 10, if the facts of the action fall outside the scope of these torts, then the claimant will not be successful.

In Ireland, as in Case 10, the advertisement constitutes a breach of the ASAI code of conduct, which paves the way for effective preventive remedies.

If we assume that the claimant does have a claim in England, Ireland and Scotland, then all legal systems will award the presenter an injunction to prevent any further appropriation of his voice. In respect of the awarding and calculation of damages see the comparative remarks to Case 10.

15 Case 12: Copied emails

Case

The politicians Smith and Jones exchanged emails in which they discussed a planned tax increase and agreed that this plan should be kept secret until after the election. An unknown person at the internet company which 'delivered' the emails copied them and sent the copies to a newspaper. The newspaper informs Smith that it plans to publish the emails.

- (a) Is Smith entitled to an injunction against the imminent publication of the emails?
- (b) Would it make a difference if the conduct of the unknown person constitutes a criminal offence?

Discussions

Austria

I. Operative rules

Smith cannot initiate any legal proceedings.

II. Descriptive formants

§ 77 *UrhG* provides for the protection of letters, diaries and similar confidential records against public reading and publication.¹ Arguably, an email may be regarded as a similar confidential document, like a letter, since it serves the same purpose.

¹ That means that this provision regulates a very specific personality right which is connected to the right to privacy; cf. H. Koziol and A. Warzilek, 'Austrian Country Report' no. 34 in H. Koziol and A. Warzilek, *The Protection of Personality Rights against Invasions by Mass Media* (Vienna/New York: 2005).

Only documents in written form are protected by § 77 *UrhG*.² An email fulfils this criterion. Although its content is saved, transmitted and presented electronically, it can still be read from the monitor. As a consequence, § 77 *UrhG* is directly applicable.

§ 77 *UrhG* only prohibits the dissemination of confidential documents if the 'legitimate interests of the writer are affected' (*cf.* § 78 *UrhG* and Cases 7 and 10). The honour and privacy of an individual are undoubtedly 'legitimate interests'. Facts concerning family life (e.g. adulterous relations, an illegitimate child), sexual orientation and health (e.g. a sexually transmitted disease)³ constitute the central part of privacy.

However, this is not the issue in the present case; in contrast, the email refers to a work-related matter. The affected persons are politicians exchanging emails about their tax policy. It is rather doubtful whether and to what extent secrets concerning business and professional life are protected by the right to privacy in terms of § 16 *ABGB* and Art. 8 ECHR.⁴ Moreover, it is quite certain that § 7 *MedienG*⁵ is not appropriate here. § 77 *UrhG* can be applied because the 'legitimate interests' referred to in this paragraph not only include the private sphere but also the business sphere.⁶

Now we must examine – always bearing the legitimate interests of the two politicians in mind⁷ – whether disclosing the content of the emails through their publication in the newspaper without the permission of the authors is contrary to law.

At this point, a weighing of interests is required between the politicians' need for protection on the one hand, and the right of the public to obtain information and the freedom of the press, which in Austria is anchored in Art. 10 ECHR and Art. 13 *StGG* (*Staatsgrundgesetz*; a specific

² Thus, recorded tapes can only be subsumed under § 77 *UrhG* by analogy; R. Dittrich, 'Der Schutz der Persönlichkeit nach österreichischem Urheberrecht' (1970) *ÖJZ* 535.

³ See W. Dillenz and D. Gutmann, *Kommentar zum Urheberrechtsgesetz und Verwertungsgesellschaftengesetz* (2nd edn., Vienna: 2004) § 77 no. 3.

⁴ W. Posch in M. Schwimann, *ABGB-Praxiskommentar I* (3rd edn., Vienna: 2005) § 16 no. 40; against J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 16 no. 24; H. Koziol, *Österreichisches Haftpflichtrecht II* (2nd edn., Vienna: 1984) 16. § 1328a *ABGB*, the special provision to protect someone's privacy is inherently not applicable since the defendant is a media outlet (§ 1328a subs. 2 *ABGB*; see Cases 5 and 7).

⁵ See Case 5.

⁶ M. T. Frick, *Persönlichkeitsrechte* (Vienna: 1991) 149.

⁷ According to § 77 subs. 3 *UrhG*, the addressee of a letter also attains protection. We may apply this provision by analogy.

provision of constitutional law), on the other hand.⁸ In our case, the protection of the personality rights of both Smith and Jones comes up against limiting factors. The more someone presents him- or herself to the public, the more he or she loses the related protection of his or her personality. This principle is especially important for public figures (*Personen der Zeitgeschichte*) such as politicians; however, a ceaseless interference with the personality rights of a famous person is not permitted.⁹

We believe that the essential question in this case concerns the following: just how serious was the private nature of the communication which took place between Smith and Jones? Firstly, the information in the emails was confidential because Smith and Jones intended to avoid disseminating it among the public.¹⁰ Secondly, they would have liked to have avoided letting people know how they address one another while communicating on an informal level.¹¹ Both of these two aspects suggest that the impending publication would be unlawful.

However, it is certain that their political opinions expressed in the emails are very important for the general public to form an opinion of these two politicians. The politicians probably wanted to reserve their intention to raise taxes because they were afraid of losing the upcoming election. It is exactly this motivation which illustrates the precise public interest in the information at hand. In a democratic society the media should be allowed to report on this issue even though the acquisition of the information was illegal. As a result, there are no legal remedies available here.

It makes a difference whether the conduct of the unknown person constitutes a criminal offence¹² because then the media's right to publish is subject to stricter conditions, however this only influences the weighing of interests. This means that – under certain conditions – the publication could be still possible.¹³

⁸ U. Brandstetter and H. Schmid, *Kommentar zum Mediengesetz* (2nd edn., Vienna: 1999) Vor § 6 nos. 16 *et seq.*; H. Koziol and A. Warzilek, 'Austrian Country Report' nos. 61 *et seq.*, 68 *et seq.*, 71.

⁹ See Cases 1, 7, 8.

¹⁰ C. Gassauer-Fleissner, 'Geheimhaltung, Offenbarung und Veröffentlichung von Daten in Informationsnetzwerken' (1997) *Ecolex* 102.

¹¹ BGHZ 73, 120.

¹² K. von Holleben, *Geldersatz bei Persönlichkeitsverletzungen durch die Medien* (Baden-Baden: 1999) 24; A. Warzilek, 'Comparative Report' no. 63 in H. Koziol and A. Warzilek, *The Protection of Personality Rights*.

¹³ Cf. BGHZ 73, 120.

III. Metalegal formants

Some scholars stress the legitimate interests in information rather than focusing on the public-figure standard, as the justification is primarily connected to issues relevant to the public and is not connected to the status of a person.¹⁴

Belgium

I. Operative rules

It is uncertain whether Smith would get an injunction.

II. Descriptive formants

The confidentiality of communication is an important aspect of the right to privacy under Belgian law. It is a general principle in civil law that results in the protection of all confidential messages disseminated by post, fax, telephone, email, etc.¹⁵

However, the confidentiality of communication is also protected under criminal law. Anyone who intentionally violates this confidentiality commits a crime (Art. 314bis Penal Code). Nevertheless, the scope of this provision is restricted as it is necessary that the wrongdoer has used a device to obtain the secret information. For example, when a third person just reads another person's email and thus is aware of the content of this message, he/she did not use a device and is not punishable.¹⁶

The confidentiality of emails has become a popular topic under Belgian law, especially regarding the possibility of employers to read their employees' emails.¹⁷

If Smith was to bring his action before a civil court, he would certainly obtain a judgment that the interception of his email by the

¹⁴ W. Berka, 'Grundfreiheiten' no. 107, in H. Koziol and A. Warzilek, *The Protection of Personality Rights*; cf. also A. Warzilek, 'Comparative Report'.

¹⁵ G. Baeteman, A. Wylleman, J. Gerlo, G. Verschelden, E. Guldix and S. Brouwers, 'Overzicht van rechtspraak. Personen- en familierecht 1995–2000' (2001) TPR 1623.

¹⁶ A. Smets, *Vrijheid van meningsuiting van de werknemer, Reeks Advocatenpraktijk – Sociaal Recht*, n° 3 and 4 (Antwerp: 2002) 24–5.

¹⁷ P. De Hert, 'C.A.O. nr. 81 en advies nr. 10/2000 over controle van internet en e-mail. Sociale actoren herlezen strafwetten en grondrechten' (2002–03) RW 1281–94; R. Blanpain, *Gebruik en controle van e-mail, intranet en internet in de onderneming. Praktijk en recht* (Bruges: 2003) 264; P. De Hert, 'Internetrechten in het bedrijf. Controle op e-mail en Internetgebruik in Belgisch en Europees perspectief' (2001) AM 110–125; T. Claeys and D. Dejonghe, 'Gebruik van e-mail en internet op de werkplaats en controle door de werkgever' (2001) JTT 121–34.

wrongdoer violates the confidentiality of his correspondence. The person who intercepted the email committed a fault.

In this case, however, Smith's action is directed against the journalist and not against the privacy invader. Belgian judges are quite hesitant in issuing injunctions as they are attached to freedom of expression.¹⁸

England

I. Operative rules

Smith can claim for an injunction under an action for breach of confidence. If the conduct of the unknown person constituted a criminal offence, it would be more likely that a court would grant an injunction.

II. Descriptive formants

1. Defamation

There would be no cause of action for defamation here as the defence of justification would prevail because the newspaper would only be reporting the truth. Interlocutory injunctions will not normally be granted where the defendant intends to rely on the justification defence.¹⁹

2. Breach of confidence

The emails will attract the protection of the law of confidence. The parties here expected their correspondence to be private. Considering the position of the court in *Francome v. Mirror Group Newspapers*,²⁰ the person intercepting the emails would be viewed as being in the same position as an eavesdropper. In deciding whether to prevent the publication, the courts have to balance this right to privacy against the public interest in knowing about the correspondence. While it might be acceptable to reveal information for the purposes of preventing, detecting or discovering a crime,²¹ or, for example, to show that breathalyser equipment used to convict people was faulty,²² there has to be some inequity served by the disclosure. In *Francome v. Mirror Group Newspapers*,²³ this

¹⁸ See Case 1.

¹⁹ *Bonnard v. Perryman* [1891] 2 Ch 269; *Fraser v. Evans* [1969] 1 All ER 8.

²⁰ *Francome v. Mirror Group Newspapers* [1984] 1 WLR 892.

²¹ *Malone v. Metropolitan Police Commissioner* [1979] Ch 344.

²² *Lion Laboratories Ltd v. Evans and Others* [1985] QB 526; *Malone v. Metropolitan Police Commissioner*.

²³ See n. 20.

has been said to encompass the disclosure of crimes, anti-social behaviour and hypocrisy. The injunction was granted in *Francome* because the court said that it was interested in 'justice not convenience', referring to the usual test of the balance of convenience used for interlocutory injunctions. This shows that the courts are more protective in relation to the law of confidence than when there is defamation. Of course, in order to justify the breach of confidence the politicians might be said to be behaving with hypocrisy. If they had made a categorical statement that they would not increase taxes then the disclosure of the email might be more readily justified. However, one suspects that the judiciary will be protective of the rights of politicians to discuss future policy in private.

3. Copyright

Finally, the publication of the emails would be a breach of copyright. In *Ashdown v. Telegraph Group Limited*,²⁴ it was recognised that copyright can constitute a *prima facie* limitation of the exercise of the right to freedom of expression under Art. 10 ECHR. However, Art. 10 (2) ECHR states that restrictions on the right are permissible if they are: (1) prescribed by law; (2) for the protection of the rights of others; and (3) are necessary in a democratic society. In *Ashdown*, it was held that the provisions of the Copyright Act, and in particular the 'fair use' exemption, satisfy Art. 10(2) ECHR. Therefore, the Copyright Act was considered sufficient protection for any interests in freedom of expression. The legislation already struck an appropriate balance between copyright and freedom of expression.

Would it make a difference if the conduct of the unknown person constitutes a criminal offence? The fact that a crime may have been committed may make it more likely for an injunction to be granted. In *Francome*, the court was keen to stress that people could not simply ignore the law and then pay their way out of having infringed it.²⁵

Finland

I. Operative rules

There seems to be no possibility for Smith to ask for an injunction prior to publication.

²⁴ *Ashdown v. Telegraph Group Limited* [2001] 4 All ER 666. ²⁵ See n. 20.

II. Descriptive formants

As was described in Case 1, it is generally not possible to obtain an injunction preventing a publication, not even when the publication will constitute a crime. According to Ch. 38, s. 4 of the Finnish Penal Code, a person who copies emails severely breaches the confidentiality of communication because his/her position at the internet company makes it possible for him/her to read the content of the messages. The fact that the person remained unknown does not change the harsh position of Finnish law: the publication cannot be prohibited.

France

I. Operative rules

Smith could probably not obtain an injunction against the publication of the emails, even if the employee of the internet company is guilty of the crime of interception of correspondence.

II. Descriptive formants

For a long time now, French law has protected the confidentiality of correspondence, not only through penal law, but also through private law. Furthermore, for a long time the confidentiality of letters has even been the only way in which to protect the values of privacy and the secrets of individuals²⁶ and has represented the point of departure for the recognition of a right to privacy.²⁷ The confidentiality of correspondence is a general principle of law which is recognised by case law without an explicit textual basis, but which can nowadays be related to the right to privacy.²⁸ The extension of the protection of correspondence to electronic methods of communication has only recently been discussed. Art. 1 of the Act of 10 July 1991 ‘On the Confidentiality of Correspondence Transmitted by Telecommunications’ states that: ‘Confidentiality in correspondence transmitted by telecommunications is guaranteed by

²⁶ Cass. civ. 26 Oct. 1965, D. 1966. jur., 356; TGI Saint-Quentin 30 Jan. 1969, D. 1969, somm., 73: ‘within the objective of protection of personality in its most intimate sphere, the possibility to invoke the right to confidentiality is available to the addressee of a letter which is found, without fraud, in the hands of a third person. More generally, this possibility is open to anybody whose intimacy is disclosed in a letter possessed by a person who intends to use it publicly’.

²⁷ Kayser, *La protection de la vie privée par le droit* (3rd edn., Paris: 1995) 121; Lucas-Schloetter, in Beverley-Smith, Ohly, Lucas-Schloetter, *Privacy, Property and Personality. Civil Law Perspectives on Commercial Appropriation* (Cambridge: 2005) 149.

²⁸ Beignier, ‘Lettres missives’ (1994) *Juris-Classeur Civil*, Annexes, Fasc. 20, No. 4.

the law'. However, it was only in 2000 that case law clearly addressed the legal status of electronic mail. The judges in the relevant case considered that 'like telephone conversations, electronic messages represent correspondence transmitted by telecommunication' and 'constitute private correspondence'.²⁹ The issue has since been discussed with particular regard to the relationship between an employer and an employee.³⁰

If Smith brings an action before the civil courts, he could certainly obtain a judgment that the interception of emails exchanged with Jones violates the principle of the confidentiality of correspondence and that the person who made this interception committed a fault. On the other hand, it is not certain whether or not he will obtain an injunction from the civil court against the journalist to prohibit the publication of the emails in question. Such an action would in fact be heard by a judge at summary proceedings, as is specified for urgent matters. Such judges have been quite reluctant to issue preliminary injunctions against publication in the name of the freedom of expression.³¹ The fact that the persons concerned are public figures, and furthermore politicians, and the fact that the content of the emails in question concerns tax increases, i.e. questions of general interest, will probably lead the courts to refuse any prior restraint by means of injunction, and will result in the journalist being judged after publication for having breached the confidentiality of correspondence.³²

²⁹ TGI Paris 2 Nov. 2000, No. 9725223011, www.legalis.net/jurisprudence-decision.php3?id_article=167

³⁰ Thus, in a much discussed decision dated 2 Oct. 2001, the *Cour de cassation* stated: 'the employee, even during worktime and at the workplace, has a right of respect to the intimacy of his/her private life, which particularly implies the confidentiality of correspondence. The employer thus cannot, without violating this fundamental liberty, acquire knowledge of the personal messages sent and received by the employee through an information technology device put at the employee's disposal for his/her work. This even holds true when the employer had prohibited a non-professional use of the computer' (Cass. soc. 2 Oct. 2001, D. 2002, jur., 2296).

³¹ However, in a matter of professional confidentiality, the distribution of the book of the doctor of the former French President François Mitterrand was forbidden in summary proceedings. See, TGI réf. Paris 18 Jan. 1996, JCP 1996, II, 22589 and CA Paris 13 Mar. 1996, JCP 1996, II, 22632. On the Mitterrand judgment, see Case 5 above.

³² See, e.g., CA Paris 25 Apr. 1989, D. 1989, IR, 160: The journalist who 'provided himself/herself with confidential data in an unlawful manner, and ensures the culpable dissemination of that information (...) causes (...) an incontrovertible harm'.

In penal law, Art. 432–9(2) of the Penal Code punishes:

(...) employees of electronic communication networks open to the public, or (...) employees of a supplier of telecommunication services who, acting in the performing of their office, order, commit or facilitate, except where provided for by law, any interception or misappropriation of correspondence sent, transmitted or received by means of telecommunication, or the use or the disclosure of its contents.

It is thus certain that the internet company employee could be found guilty by the criminal courts on the basis of this provision. As for the journalist, if he/she publishes the emails in question he/she could be punished by one year's imprisonment and a fine of €45,000 according to Art. 226–15(2) of the Penal Code which sanctions 'the malicious interception, diversion, use or disclosure of correspondence sent, transmitted or received by means of telecommunication (...)'. On the other hand, the penal judges cannot issue a preventive injunction as the crime must be committed before it can be sanctioned.

Germany

I. Operative rules

Smith is probably not entitled to an injunction against the publication of the emails, although the result is not clear.

II. Descriptive formants

(a) Is Smith entitled to an injunction against the imminent publication of the emails?

Smith's claim for an injunction could be based on § 823(1) BGB since his general personality right is affected. It is accepted in case law that this right includes the protection of confidentiality in communication.³³ The question of whether there is an unlawful violation of this right depends on a weighing of interests which takes the interests of the media and the public into account with regard to the planned publication.³⁴ In this balancing process, it is relevant how the information was obtained, since it is said that if the information has been illegally obtained then there is an indication that the publication thereof is also unlawful.³⁵

³³ BGHZ 73, 120, 122 *et seq.* ³⁴ *Ibid.* at 124.

³⁵ BVerfGE 66, 116, 139; K. Larenz and C. -W. Canaris, *Lehrbuch des Schuldrechts II/2* (13th edn., Munich: 1994) at 509. See, already, RG 28.12.1899, RGZ 45, 170, 173 (publication of photographs showing the body of Bismarck is illegal since they were obtained by criminal trespass).

The publication of confidential emails is not covered by the Criminal Code, unlike the publication of illegally taped telephone conversations which is a criminal offence according to § 201 *Strafgesetzbuch* if there is no overriding public interest in such publication. In this case, the issue of public interest seems open to discussion.³⁶ However, the unknown person in the internet company certainly commits a criminal offence since § 206 *Strafgesetzbuch* penalises any intrusion into classified telecommunication which includes email traffic.³⁷ This provision of criminal law only applies to telecommunication companies and their employees, not to journalists who publish illegally obtained information.

Since the information was obtained illegally, its publication is also deemed illegal unless the published information is so vital for the public that this benefit clearly outweighs the breach of the law which was committed in obtaining the information.³⁸ The Federal Constitutional Court has stated that ‘as a rule’ such public benefit will only exist where the information serves to uncover illegal acts.³⁹ The behaviour of both Smith and Jones is a political issue of great importance but does not fulfil the conditions of a criminal offence. Therefore one could argue that the publication is illegal in this case.⁴⁰ On the other hand, the political importance of this information is so obvious that the voters should be able to take note of it before they make their choice in the election. Hence, this seems to be one of the exceptions to the rule described by the Constitutional Court where even though no criminal behaviour is uncovered, the information is of utmost public importance and thus outweighs the initial breach of the law. After all, the Federal Constitutional Court has repeatedly stressed that freedom of speech is granted by the Constitution in particular to enable public debate in a democratic society.⁴¹

³⁶ However, some commentators only see such an overriding interest if a severe breach of the law is to be uncovered (SK-StGB/Hoyer, § 201 no. 35), while others are more liberal in this respect and allow the uncovering of other important social scandals that do not rise to the level of illegality: Lenckner in A. Schönke and H. Schröder, *StGB* (27th edn., Munich: 2006) § 201 no. 25.

³⁷ See §§ 4 and 85 *Telekommunikationsgesetz*.

³⁸ BVerfGE 66, 116, 139.

³⁹ *Ibid.*

⁴⁰ See also Larenz and Canaris, *Lehrbuch des Schuldrechts* at 508: material obtained through crimes may be used to uncover other criminal acts but not to criticise general problems or scandals.

⁴¹ See, e.g., BVerfGE 7, 198, 208.

(b) *Would it make a difference if the conduct of the unknown person constitutes a criminal offence?*

This would make a clear difference in the weighing of interests described above. If the conduct of the unknown person does not constitute a criminal offence, the balancing process remains fully open.⁴² If this is the situation, the publication of such matters of public importance would clearly not give rise to an injunction.

Greece

I. Operative rules

The politicians do not have a claim. Although there may be a violation of the confidentiality of communication, Smith probably will have no claim for an injunction. The interest in safeguarding freedom of expression shall be taken into account since the information given is of public interest.

II. Descriptive formants

According to Art. 14(2) of the Greek Constitution the press is free and all other preventive measures are in principle prohibited. The freedom of information and press may be restricted by law, however in this case these restrictions should be of a general nature and should have only an *ex post* (after publication) character. As both legal scholarship and the courts have affirmed, freedom of the press is not absolute. It should not lead to the sacrifice of any other lawful interest; therefore, it is subject to a general provision of respecting the laws of the State.

Regulations providing for a restriction of freedom of the press may refer to national security, public order, the protection of honour and other rights of third persons, the prevention of communicating confidential information or securing the validity, objectiveness and impartiality of the courts.

Ireland

I. Operative rules

Smith is unlikely to succeed in obtaining an injunction preventing the publication of the information.

⁴² See Larenz and Canaris, *Lehrbuch des Schuldrechts* at 509: if the information is not obtained by criminal means, but only through breach of contract or other private law violations, an injunction needs special justification.

II. Descriptive formants

As the newspaper could plead the defence of justification, Smith would not be entitled to prevent the publication of the emails by arguing that they were capable of being defamatory. The courts have tended not to award interlocutory injunctions in defamation actions where the defendant intends to rely on the justification defence and where there are substantial grounds that the court will be satisfied that he/she had a reasonable chance of relying on this defence.⁴³

It is unlikely that Smith would be successful in obtaining an injunction under breach of confidence preventing the publication of the information. While it could be argued that the information was communicated to Jones in circumstances that would impose an obligation of confidence on him, there is no evidence of a similar relationship between Smith and the newspaper. Academic commentators have advised against the extension of the law through the creation of an artificial relationship whereby an obligation of 'trust and confidence' would be found to exist between the individual communicating the information (Smith) and the party who has surreptitiously acquired the information (the newspaper). It has been argued that to do so would result in the contortion of the traditional action, leaving it lacking in doctrinal coherence.⁴⁴

The newspaper could argue that the publication of the information was in the public interest on the basis that it was in the interests of freedom of expression and that the public had a right to know the true intentions of its elected representatives. However, this exception has been strictly applied. In *National Irish Bank v. RTE*,⁴⁵ Shanley J stated that the 'disclosure of confidential information will almost always be justified in the public interest where it is a disclosure of information as to the commission or the intended commission of serious crime'.⁴⁶ Beyond the disclosure of information regarding serious crime, Shanley J observed that disclosure in the public interest would include information relating to misdeeds of a serious nature and of importance to the State.⁴⁷

In *Mahon v. Post Publications*, the Irish Supreme Court has recently upheld the right of the press to communicate information.⁴⁸ In that

⁴³ *X v. RTE*, Supreme Court, 27 Mar. 1990.

⁴⁴ McMahon and Binchy, *Law of Torts* (3rd edn., Dublin: 2000) 1004.

⁴⁵ [1998] 2 IR 465. ⁴⁶ *Ibid.* at 475.

⁴⁷ *Ibid.* citing Ungoed-Thomas J in *Beloff v. Pressdram Limited* [1973] 1 AER 241 at 260.

⁴⁸ [2007] IESC 15.

case, the majority of the Supreme Court refused to grant an injunction prohibiting the defendant publishing confidential material which had been distributed to certain individuals in private. Fennelly J (delivering the judgment for the majority) reiterated the importance of the press being able to communicate freely in such circumstances stating that ‘the right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society’.⁴⁹

Italy

I. Operative rules

Smith is probably entitled to an injunction against the publication of the emails.

II. Descriptive formants

In order to answer this question, one should look not only to the Civil Code but also to criminal and constitutional law provisions. The confidentiality of communications is one of the most important and far-reaching examples of privacy protection under Italian law. Every citizen has a constitutional right to freedom and confidentiality of correspondence, post and any other communication (Art. 15 *Cost.*). Any violation of this right amounts to a crime (Art. 616 *et seq. CP*). Emails are also specifically protected (Arts. 616, 617 *quater*, 617 *quinquies*, 617 *sexies CP*). In addition, many provisions of the DPC and the Copyright Act (related to personal letters, Art. 93 *et seq.*) are applicable.

This case involves two problems. First of all, Smith’s action is not directed against the privacy invader, who is unknown, but against a third party, which is not responsible for the violation. Secondly, the defendant could claim a media privilege (Art. 21 *Cost.*).

One could argue that neither the identity of the internet company employee nor the constitutional protection of freedom of the press could lead to the forfeiture of a fundamental liberty, such as confidentiality of correspondence. It should be noted that the Penal Code not only prohibits the active and material violation of this right (Art. 616 PC), but also the *disclosure* of the content of such exchanges, which should have been kept secret and which were unlawfully acquired (Art. 618 CP). However, this disclosure is only punished if there is no *sufficient justification* (*‘giusta causa’*). Obviously, it is not easy to predict how such a general clause will be interpreted and

⁴⁹ *Ibid.* at para. 51.

applied by the judges.⁵⁰ On the other hand, it is not necessary to give a specific answer to this question. What matters in our case is not the punishment of a crime, but rather the prevention thereof by means of injunctive relief (this could simply consist of an order for an injunction provided for by the Data Protection Authority under Art. 7(3)*b* DPC).

The remedy which Smith is requesting is grounded in the right to privacy, namely to the confidentiality of correspondence. This should be available to the claimant even if the defendant were acting in the public interest. Indeed, no *substantive* privilege can be granted to the press if the proper *procedural* conditions are not met. The DPC and the Journalists' Code of Conduct quite clearly state that personal data can only be collected, processed and diffused *according to good faith*. Otherwise the processing is unlawful. The principle of good faith entails both substantive and procedural fairness⁵¹ and implies that there is a duty on the publisher to previously ascertain the lawfulness of the procedure adopted in order to acquire the notice. To publish information which has been obtained in an improper manner, namely to the detriment of a constitutional right, is a clear violation of such a principle.⁵² The highly informative value of the data is not a valid defence.

This conclusion is supported by two interesting decisions of the Data Protection Authority:

In the first case, a well-known politician was waiting to be interviewed in a television studio. He started speaking with a colleague of his about some fervent political issues without knowing (and without being informed) that his

⁵⁰ On this point, see F. Antolisei, *Manuale di diritto penale. Parte speciale*, I (Milan: 1994) 221 *et seq.*; A. Scalisi, *Il diritto alla riservatezza* (Milan: 2002) 142–3.

⁵¹ See on this principle E. Navarretta, 'Art. 9', in C. M. Bianca and F. D. Busnelli (eds.), *Tutela della privacy. Commentario alla l. 31 dicembre 1996, n. 675*, in *Le nuove leggi civili commentate* (Padova: 1999) 318 *et seq.*; P. Iamiceli, 'Liceità, correttezza, finalità nel trattamento dei dati personali', in R. Pardolesi (ed.), *Diritto alla riservatezza e circolazione dei dati personali*, I (Milan: 2003) 419 *et seq.*

⁵² See Garante protezione dati 30 Oct. 2000, in M. Paissan (ed.), *Privacy e giornalismo* (2nd edn., Rome: 2006) 297 (the publication of a videotape illegally recorded during a professional meeting was considered unlawful); see also Trib. Milano 17 Jul. 1982 no. 1390, *Riv. pen.* 1982, 898 (publication of a naked photograph of the actress Sophia Loren). A contrasting solution has been reached by Trib. Milano 21 Jan. 2005, *Dir. inf.* 2005, 104 in a slightly different case: a newspaper had published – lawfully according to the court – the content of a private electronic communication (SMS) taken from divorce proceedings.

microphone was switched on. The content of the discussion – which was quite embarrassing for the politician – was broadcasted on television and the politician filed a claim before the Data Protection Authority. The Commissioner decided that the processing was against good faith and therefore unlawful.⁵³

In the second case, a chief officer of a fire department brought proceedings against the publication and broadcasting of a telephone call made to a local politician from his office (and registered, as is customary, for security reasons) on the website of an Italian newspaper. In particular, he based his claim upon the right of opposition on legitimate grounds under Art. 11, (1), (a) (b) DPC. The Data Protection Authority found the broadcasting to be unlawful under the principles of proportionality and legal certainty, and directed that there be no further dissemination by the defendant.⁵⁴

The Netherlands

I. Operative rules

Smith is not entitled to an injunction.

II. Descriptive formants

Art. 10 of the Constitution and Art. 8 ECHR protect both relational and informational privacy. The right to privacy is not limited to private places. One may also assume that Smith has a right to privacy while at the workplace.

This case concerns informational privacy, more specifically the (breach of) confidentiality of correspondence. Arts. 370 *et seq.* Penal Code recognise this specific right. These rights are not absolute. In relation to freedom of expression, if a good reason exists to publish information that is ordinarily protected both interests have to be balanced.

It is clear that the unknown person here has breached the confidentiality of correspondence by copying it and sending it to the newspaper. In order to determine whether it is unlawful to publish the information depends on whether publication is important for the public interest, e.g. if the publication is necessary for public safety.

In this case, the proposed tax increase is not an interest concerning safety. On the other hand, the public have an interest in knowing about the policies which politicians intend to make after the election. The fact that the information concerning the tax increase is obtained

⁵³ See Garante protezione dati, 22 Jul. 1998, *Boll.* no. 5, 1998, 26.

⁵⁴ See Garante protezione dati, 8 Feb. 2007, *Boll.* no. 80, 2007, doc. web no. 1388922.

by the unknown person in an unlawful manner (and even in a manner which is prohibited by the Penal Code) does not necessarily imply that the newspaper acts unlawfully if it publishes the information.⁵⁵

Given the public interest in knowing these facts which are not related to the private life of either Smith or Jones, the general interest of the freedom of the press and of the public in being informed about facts that are of public relevance outweighs the interest of Smith.

Portugal

I. Operative rules

Smith is entitled to an injunction against the imminent publication of the emails. It would not make any difference if the conduct of the unknown person constitutes a criminal offence.

II. Descriptive formants

Emails are equivalent to letters. This exchange of emails is of a private nature and, therefore, must not be published without the consent and, furthermore, against the will of Smith and Jones.

The inviolability of correspondence is provided for in Art. 34(1) CRP: the confidentiality of correspondence and other means of private communication is inviolable. Furthermore, the Civil Code contains a detailed regulation of private writings, such as correspondence, memoirs, or similar documents under Arts. 75, 76, 77 and 78. Art. 76(1) CC states that the addressee of a confidential letter shall keep its contents secret and shall not take advantage of any information acquired therefrom. Confidential letters may only be published with the prior consent of their authors or that of the Court (Art. 76(1) CC). The same applies to family or personal memoirs, or any other writings that have a confidential nature or which may concern the 'intimacy of private life' (Art. 77 CC). Addressees of non-confidential letters may only use them under such conditions as do not conflict with the expectations of their authors (Art. 78 CC).

The question refers to the publishing, not by the addressee, but by a third party that acquired the text of the email, without the consent of its author. The copying of the email is illegal and so is its publication without the prior consent of its author or of the Court. Thus, there are

⁵⁵ Court of first instance Amsterdam, 8 Oct. 1997, *Mediaforum* 1997-11/12; Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 84.

grounds for injunction to prevent the publication and for compensation (Arts. 70 and 76 CC).

Interfering with the contents of private correspondence constitutes a criminal offence, punishable with imprisonment of up to one year or a fine (Art. 194 CP). This does not alter the civil consequences of the case.

As far as we know, there is no Portuguese court decision with similar facts to the instant case.

Scotland

I. Operative rules

It is possible that Smith has claims under statutory data protection and communication provisions, alongside possible breach of confidence and copyright.

II. Descriptive formants

This question raises various issues surrounding the competing values of privacy and free speech and the illegal interception of mail and copyright. Issues of privilege and parliamentary contempt are presumed not to arise on the facts here but could otherwise have been relevant if the emails were sent on a parliamentary intranet network.⁵⁶ An action by the Members of Parliament (MP) to prevent the publication of their email correspondence (on a matter of public concern, tax) depends on the balance to be struck between the competing interests of confidentiality and public interest in taxation.

Generally speaking, intercepting (e)mail, telephone tapping and general interception fall within the exclusive domain of activities that require a warrant, obtained at the request of the police under the authority of the Lord Advocate or Attorney General. This applies whether the internet activity is illegal or not. The unauthorised interception of electronic communications is an offence, its regulation embedded in the Regulation of Investigatory Powers Act 2000.⁵⁷ The Communications Act 2003 merely governs public regulatory issues for telecommunication providers.⁵⁸

⁵⁶ *Hamilton v. Al Fayed* [2001] 1 AC 395.

⁵⁷ Interception of Communications Act 1985 has been repealed and substituted by the Regulation of Investigatory Powers Act 2000, Ch. 23; for the unauthorised access to computer material, see Computer Misuse Act 2000, Ch. 18.

⁵⁸ Communications Act 2003, Ch. 21.

The Regulation of Investigatory Powers Act applies to Scotland. Unlike the 2003 Privacy Regulations, its provisions extend to the unlawful interception of private networks. S. 18(2) imposes civil liability for unlawful interception. The categories of lawful interception do not cover the situation raised in this case.

Beyond the criminal aspects mentioned here, the notion of freedom of the press and the overriding public interest may be of assistance. The balance to be struck in this particular instance is between the right to privacy of communication between parliamentarians and the public's right to learn of such planned tax increases. The court is required to take the Press Council's code of conduct into account when striking this balance. Within its rules, this includes the protection of the public from being misled.⁵⁹ Taxation is a matter of public interest and concern.

Some assistance can be gained from English authority on the matter, discussed before the Court of Appeal in *Campbell v. Frisbee*:⁶⁰ 'In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth.'⁶¹

Whereas the *Campbell* case related to private information, the issue before the court here relates to tax, which is a matter of public concern. On the balance of probabilities, a claim for breach of confidence is unlikely to succeed if the public interest defence is accepted.⁶² It will be difficult for the politicians here to allege that the communication has any overriding confidential or private nature. The statutory offence of illegal interception remains unaffected by this.

There is some relevant authority concerning confidential information of a public nature in relation to an MP, Paddy Ashdown,⁶³ where information from his professional diaries became available through an unknown source to the press and was subsequently published. This case was held to be a clear breach of copyright. Here, there was no more than an indication of the competing right of freedom of the press.⁶⁴ In

⁵⁹ S. 18(iii) Press Complaints Commission Code of Practice; see Case 1.

⁶⁰ *Campbell v. Frisbee* [2002] EWCA Civ 1374 at para. 29.

⁶¹ *Woodward v. Hutchins* [1977] 1 WLR 760 per Lord Denning at 763-4.

⁶² This does not take any claims the employer may have against the employee into account.

⁶³ *Rt Hon. P. Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142.

⁶⁴ *Ibid.*, per Lord Phillips MR at para. 82: 'There may in law have been justification for the publication of the confidential information that was contained in the minute. This is not an issue before the court.'

this instance, the court focused more on the issue of authorisation of publication – it was known that the diaries were to be published at a later stage – and the author’s right to receive any resulting profit. The case is not an authority on how the balancing of interests under s. 12(4) HRA is to be undertaken in the individual case.

In relation to the intercepted communication relating to tax, even if there is a breach of copyright, the overriding balance will be struck in favour of publication. The statutory rules against interception remain unaffected.

Spain

I. Operative rules

Although there is no specific injunction, the right to privacy could be protected in the same way as was described above in the second part of Case 1. In this respect, there would be no difference if the unknown person’s conduct constituted a criminal offence.

II. Descriptive formants

Art. 7.3 LO 1/1982 considers the revelation or publication of letters, reports and any other personal private writings as an illegitimate interference.⁶⁵ For the remedies provided under LO 1/1982 see Case 1.

Switzerland

I. Operative rules

Smith can request that the judge prevent publication of the email in a newspaper by means of specific injunctive relief. It does not make a difference whether the conduct that caused the infringement constitutes a criminal offence or not.

II. Descriptive formants

According to Art. 13, para. 1 of the Swiss Federal Constitution, every individual has the right to respect for his or her private and family life, domicile, correspondence and the relationships established through postal correspondence and telecommunications. This provision

⁶⁵ Art 7.3 LO 1/1982 reads: ‘It will be considered an illegitimate interference with the right to honour, privacy and own image: ... (3) to disclose or spread facts concerning the private life of a person or family which affect their reputation or good name, as well as the disclosure of the content of letters, memoirs or any other private and intimate written material.’

especially guarantees the confidentiality of telecommunications. In a recent decision, the Federal Court held that this protection also extends to electronic mail transmitted via the internet.⁶⁶

In relationships between private persons, Art. 28 *CC* guarantees the right to respect for the private sphere. This sphere includes events that each individual wishes to share with a limited number of people. Such is the case regarding an electronic message system.⁶⁷

Arguably, the tax increase plan raised in the facts of this case belongs to this category of information because the two politicians intended to keep the plan a secret for a certain amount of time. Thus, this information could be considered part of their private spheres. According to Art. 28, para. 2 *CC*, an infringement is unlawful to the extent that it cannot be justified by a preponderant public or private interest or by the law. Freedom of the press and the latter's role as watchdog may constitute a defence for the publication of the email.

Thus, the politicians' interest in keeping this information secret, the respect of the confidentiality of their communications and their private spheres must be balanced against the fact that the publication of this information contributes to transparency of the political debate during the election period and that it permits people to vote with full knowledge of their representatives' policies. The protection of the politicians' private sphere will usually prevail over the public interest in being informed.

The fact that the information was obtained illegally by the employee makes no real difference. The unlawful infringement of the politicians' private spheres will only be more effortlessly proved because the information was illegally obtained by the internet company employee.

The employee of the internet company violated two provisions of Swiss law. By sending a copy of the emails to the newspaper, the employee violated his obligation to keep the information he was able to access through his job functions secret. Art. 43 of the Telecommunications Statute⁶⁸ prohibits any individual responsible for the functioning of the telecommunications service from passing on information regarding the communications of its users to third parties without authorisation. In light of this legislative mechanism, the copying of the politicians' email will be held to be contrary to their rights. Subsequently, breaking into a computer system without authorisation is a criminal offence

⁶⁶ ATF/BGE 126 I 50 c. 6a, JdT 2001 I 764. ⁶⁷ ATF/BGE 130 III 28 c. 4.2.

⁶⁸ Loi du 30 avril 1997 sur les télécommunications (LTC) (RS 784.10).

punishable under Swiss law (Art. 143*bis* of the Swiss Criminal Code (CP)⁶⁹).

Thus, if the infringement is admitted and not justified by the public interest, the politicians will have the right to request that the judge issue an injunction against the publication of the article (Art, 28a, para. 1(1) CC).

III. Metalegal formants

This hypothesis touches on the question of publication of confidential information. On several occasions, the Swiss Press Council has had the opportunity to make statements in this respect. According to the Council, ‘the job of the media – which is to make things public – presupposes that their investigations are not limited and that they take into consideration anything that, in their estimation, will interest the public’.⁷⁰

More specifically related to the facts of our case, the Council has also affirmed that ‘indiscretions and disclosures to the media of secret or confidential information are practically inevitable’⁷¹ and that the State should only punish them in particularly obvious cases. It has, however, specified that publication should not take place except when the importance of the subject matter demands that it be published for public knowledge and where good reasons exist to publish it sooner rather than later. In addition, the publication must not include information obtained by methods such as corruption, blackmail, wiretapping or illegal eavesdropping, or theft or burglary unless it serves preponderant interests.

Comparative remarks

This case concerns the privacy interests of politicians in having their private correspondence respected and the competing interests of freedom of the press and the right of the public to receive information which may be in its interest. For the purposes of this case, it is important to point out the difference in standing between the unknown person at the internet company who initially infringed the privacy interests of the politician and the third party who intends to publish

⁶⁹ Code pénal suisse du 21 décembre 1937 (CP) (RS 311.0).

⁷⁰ Statement of the Conseil suisse de la presse 1994, n. 2. ⁷¹ *Ibid.*

the emails. The injunction is sought against the latter party. The legal consequences for the unknown person are not considered here.

The confidentiality of correspondence is a general legal principle recognised in all of the legal systems considered. Indeed, the right to respect for one's correspondence is expressly mentioned in Art. 8 ECHR. It also finds expression in the constitutional texts of Italy, Portugal, and Switzerland and in the civil law and/or criminal law of many other legal systems. The principle has been developed by case law in England, France (as part of the wider right to privacy) and Germany (as part of the general personality right). The legal instruments used to protect the confidentiality of correspondence include criminal and general tort law provisions, copyright and data protection law and equitable doctrines in the case of the common law systems.

The question put forward in this case is whether or not Smith is entitled to an injunction to prevent the publication of the emails. In the first instance, it is clear across the board that the unknown person at the internet company has unlawfully and, in some countries, illegally interfered with private correspondence. In ordinary circumstances one would expect that this alone would result in an injunction in favour of the claimants. However, we have to consider that the correspondence in question was between politicians and, thus, the publication of the emails may be warranted if these contain information which is in the public interest. In this particular case the information concerns a planned tax increase and an arrangement that this increase should be kept secret until after the next election. Most national reporters agree that there is a public interest in respect of such information. As a consequence, the courts must attempt to strike a balance between the privacy interests of the politicians and the right of the public to receive this information.

While the approach to this question of balancing is similar across most of the legal systems considered, the outcome of the process varies considerably. The results can be divided under three broad headings.

I. Smith is entitled to an injunction

It seems that the politician will most likely be entitled to an injunction in both Italy and Portugal. The combined effects of constitutional, criminal and civil protection means that confidentiality of correspondence has an extremely important status in Italian law. In the instant case, the privacy interests of the politicians should win out, even if the defendant was acting in the public interest, because the defendant's

action will not be deemed lawful if the ‘proper procedural conditions’ have not been met in the first instance. Indeed, the Data Protection Code and the Journalists’ Code of Conduct state that data must be processed in accordance with good faith. An interference with the constitutionally guaranteed confidentiality of correspondence is an infringement of this principle. Interestingly, in such a scenario, the public interest in obtaining the information will not constitute a defence. Similarly, in Portugal, politicians enjoy a very high level of protection. The starting and ending point is that the exchange of emails is of a private nature and, therefore, it is a breach of the law to publish them without consent. It seems that the issue of public interest in the subject matter of the emails does not play a role in this hypothetical case and the claimants will consequently be entitled to an injunction under the civil code.

In England, case law has established that the law of confidence should protect private correspondence. Seemingly, courts will be more ready to grant an injunction in these types of cases than in defamation actions. Thus, the claimant will presumably be successful in seeking an injunction. In Switzerland, the fact that the politicians wanted to keep their planned tax increase secret denotes that the information belongs to the category of private information, the infringement of which is actionable under the civil code. Even though there is a public interest in the subject matter, the protection of this private sphere should win out.

II. Smith is not entitled to an injunction

In Finland, the claimant will not be entitled to an injunction because such a remedy is practically non-existent in cases involving freedom of expression (see Case 1). Similarly, the Greek courts will not allow an injunction as remedies in such cases should only be granted after publication. In the Netherlands, the public interest in the information means that freedom of the press will outweigh the privacy interests of the claimants, taking into account that the facts are not related to the private lives of the politicians. Likewise, in Ireland there would be an overriding public interest in the information contained in the emails and the claimants would not be successful with their action.

III. Smith will probably not be entitled to an injunction

The result is less clear-cut in Belgium, France, Germany and Scotland, although the consensus is that Smith will probably not be entitled to an

injunction. In Belgium and France, although it is apparent that there is a violation of confidentiality of communication, it is not completely clear whether an injunction will be awarded. Belgian and French courts are traditionally wary of issuing injunctions in cases concerning freedom of expression, in particular when politicians are involved and the correspondence concerns issues of policy. In Germany, the publication of information, which is obtained illegally, will usually be considered unlawful. However, taking into account the importance consistently attached to freedom of expression by the Constitutional Court, the information in question may be of such political relevance that it could perhaps be an exception to this rule. Therefore an injunction may not be available to the claimant.

In Scotland, Smith would possibly be entitled to an injunction under statutory data protection and communication law. Claims under breach of confidence and copyright law would probably fail.

(b) Does it make a difference if the conduct of the unknown person constitutes a criminal offence?

In England and Germany, the criminal offence appears to have an impact on the outcome of the proceedings. In England, there is case law to suggest that an injunction will be more readily granted in such a scenario. As pointed out above, in Germany if information is obtained illegally, then, in general, the subsequent publication is also deemed unlawful.

Whether or not the conduct of the unknown person constituted a criminal offence appears to be of varying significance. In many countries, it will not make a difference to the civil action against the defendants. For example, under Dutch law, just because the information is initially obtained in an unlawful way, it does not necessarily follow that the newspaper acted unlawfully in publishing the information.

16 Case 13: Brigitte's diaries

Case

Jonathan, a house owner, found some diaries in his attic belonging to Brigitte who had been living there twenty years before. Jonathan became the owner of the books and published the diaries. Does Brigitte have any claim against Jonathan? Would it make a difference if Jonathan made some effort to contact Brigitte before the publication?

Discussions

Austria

I. Operative rules

If Brigitte's legitimate interests are injured by the publication, she can request forbearance and publication of the judgment. Apart from this, she can recover damages for economic and non-economic loss.

II. Descriptive formants

It is irrelevant that Jonathan became the owner of the diaries. The property right according to § 354 ABGB has to be strictly segregated from copyright and personality rights.

If the diaries can be seen as a specific intellectual creation in terms of § 1 *UrhG*, Brigitte obtains protection as an author. Indeed, this would not make a big difference, since, generally speaking, the legal consequences for infringements of her copyright are the same as for violations of § 77 *UrhG*.¹

¹ Admittedly, as an author Brigitte could benefit from § 86 *UrhG* (hypothetical licence fee under the law of unjust enrichment) and § 87, subs. 3 and 4 *UrhG* (double

As already mentioned in Case 12, the protection of diaries, letters and similar confidential records under civil law is anchored in § 77 *UrhG*, which only prohibits the dissemination of such records if the ‘legitimate interests of the writer are injured’ (the field of these interests includes, *inter alia*, facts from private life). Brigitte can only take legal measures if this precondition is fulfilled.

If Brigitte had already died in the meantime, her direct relatives (ascendants and descendants) and surviving spouse would benefit from the protection granted by § 77 *UrhG*, provided that their legitimate interests are affected. Furthermore, under certain conditions Brigitte’s personality can also be protected post-mortem.²

If Jonathan made some effort to contact Brigitte before the publication she can still make reference to her legitimate interests.

Brigitte can claim for forbearance (§ 81 *UrhG*). Furthermore she can demand the publication of the judgment of the forbearance under § 85 *UrhG*.

Compensation for both economic and non-economic loss is also available (§ 87 *UrhG*).³

Moreover, the publication has to be qualified as a ‘medium of communication’ in the sense of § 1(1) *MedienG*. As a consequence, under § 7 *MedienG* Brigitte is entitled to ask for compensation of up to €20,000 for non-economic harm against the publisher,⁴ but this is only possible if her strictly personal sphere is affected⁵ and she is publicly compromised by the infringement.

She cannot claim for a hypothetical licence fee under tort law (§ 87, subs. 1 *UrhG*). Given that she is not famous and the infringement is not connected to an unauthorised commercial, the *OGH* would presumably not grant this fee under the law of unjust enrichment either (here, a claim would be independent of Jonathan’s fault). This questionable result can be derived from case law under § 78 *UrhG*.⁶

hypothetical licence fee as material damage; skimming off the net profits earned by Jonathan in place of the licence fee).

² See Case 10.

³ Non-pecuniary loss is only recoverable if the infringement was particularly severe; see Case 7. If Jonathan took all reasonable efforts to contact Brigitte, he would possibly not be liable due to § 87 *UrhG* because then he did not act with fault.

⁴ This provision is part of a strict liability regime; see Case 5.

⁵ In this case, she could refer to her right to privacy under § 16 ABGB, together with Art. 8 ECHR also. Given that the publication has to be regarded as a ‘medium of communication’ in the sense of the *MedienG*, § 1328a ABGB is not applicable (see § 1328a, subs. 2 ABGB; furthermore Cases 5, 7 and 12).

⁶ Cf. Cases 8, 10 and 11.

Belgium

I. Operative rules

Brigitte can claim damages from Jonathan.

II. Descriptive formants

Diaries are protected under Art. 1, § 1 of the Copyright Act as a work of literature or as the author's personal views – e.g. 'X is a horrible person'. The author, and, up until seventy years after his/her death his/her heirs, have the exclusive right to publish the work and to consent to publication by another person. Invasion of this right gives grounds for damages for economic and non-economic loss.

Diaries would not be protected under the Copyright Act if they contain no personal views, in other words if they are only calendars – e.g. '12/6, 7.00 p.m.: meet A at his home'. Publishing such 'information' could constitute an invasion of the right to privacy and give cause for damages on those grounds.

England

I. Operative rules

Brigitte has a claim against Jonathan under breach of confidence and under copyright law.⁷ It would not make a difference if Jonathan had made some effort to contact Brigitte before publication.

II. Descriptive formants

The test of private information is whether matters fall within the ambit of private life. Furthermore, 'essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'.⁸ Certainly recording one's personal thoughts in a diary would seem to fall under this category. In the recent case of *Michael Barrymore v. News Group Newspapers Ltd*,⁹ correspondence between two parties setting out their personal views had been treated as confidential. It is only if the information was in fact public that the diaries would lose their confidentiality. As they no doubt expressed personal opinion, it would not be sufficient that the facts on which they were based were well-known. There would have to

⁷ On copyright law, see the Scottish report.

⁸ *Campbell v. MGN Ltd* [2004] 2 WLR 1232, at para. 21 (per Lord Nicholls).

⁹ *Michael Barrymore v. News Group Newspapers Ltd* [1997] FSR 600.

be some overriding public interest to justify the breach of confidence. Efforts to contact Brigitte prior to the publication are irrelevant.

Brigitte could claim an account of profits if Jonathan has made any. Furthermore, she can claim damages for distress.¹⁰

Finland

I. Operative rules

Brigitte cannot obtain an injunction prior to publication. Brigitte has a right to claim damages for the publication.

II. Descriptive formants

Firstly, the publication here can constitute a violation of a person's private life or honour according to Ch. 24, ss. 8, 9 or 10 of the Finnish Penal Code, as was described in Cases 1 and 5. Such a violation can constitute grounds for compensation.

Secondly, Brigitte's right as the author of the diaries is regulated under the Finnish Copyright Act. Anyone who has created a literary work has the copyright to that work. A fairly low level of quality is required in order for the work to be considered a literary work.¹¹ There seems to be no doubt that Brigitte's diaries are protected by the Copyright Act. Jonathan is therefore not entitled to publish the diaries without Brigitte's consent. This prohibition exists irrespective of the fact that Jonathan can be regarded as the owner of the actual copies of the diaries.

There is no provision granting the possibility of an injunction in connection with the violation of copyright. As was stated in the previous case, the main principle is that it is not possible to prohibit publication prior to the actual publication.

According to s. 57 of the Copyright Act, the unlawful use of a work protected by copyright constitutes grounds for damages. In any case, the damages consist of appropriate compensation for the use. If the violation of the copyright is intentional or negligent, the damages additionally consist of compensation for other loss and for suffering and other detriment. It is difficult to assess the amount of the damages, but the starting point is that Brigitte should be put in the same position as if there had not been any violation of her copyright. The fact that Jonathan tried to contact Brigitte prior to publication does not have

¹⁰ See the answer to Case 5.

¹¹ Haarmann, *Tekijänoikeus ja lähioikeudet* (Jyväskylä: 2005) 63.

any substantial impact on the amount of the damages because the publishing was nevertheless intentional in both cases.¹²

III. Metalegal formants

While there is no provision for an injunction in copyright law, views can also be found which maintain that an injunction is possible.¹³ However, freedom of speech has a strong position in Finnish law nowadays as it is one of the fundamental rights. A limitation of a fundamental right is only possible through law.

France

I. Operative rules

Brigitte can sue both on the basis of her copyright and on her right to privacy and can obtain an injunction against publication along with damages.

II. Descriptive formants

First, Brigitte can bring an action on the basis of copyright. French copyright law grants moral rights including the right of disclosure (Art. L.121-2 Intellectual Property Code, *CPI*), that is the right to decide the time and conditions in which the work can be rendered accessible to the public. A publication made without the consent of the author infringes his/her right of disclosure as well as his/her rights of exploitation, and specifically the right of reproduction.¹⁴ Jonathan is thus liable for copyright infringement if he publishes Brigitte's diaries without her consent, and it does not really matter that he has made an effort to contact Brigitte prior to publication. Having found her diaries in his attic, he can be considered the owner of the physical object according to private law¹⁵ but, since the property in the physical object is independent of the copyright (Art. L. 111-3 line 1 *CPI*), Jonathan is not relieved of his duty to obtain the consent of Brigitte for the publication.¹⁶

¹² See Viljanen, *Perusoikeuksien rajoitusedellytykset* (Vantaa: 2001) 37-114.

¹³ Norrgård, *Interimistiska förbud i immaterialrätten* (Jyväskylä: 2002) 89-93.

¹⁴ Art. L. 122-3, 1 *CPI*: 'Reproduction shall consist of the physical fixation of a work by any process permitting it to be communicated to the public in an indirect manner.'

¹⁵ Acquisition of property by possession (Art. 2276 C.civ.: 'In matters of movables, possession is equivalent to a title'), occupation of *res nullius* and *res derelictae* (Art. 716 C.civ.: 'Ownership of a treasure trove belongs to he who discovers it on his own property').

¹⁶ See CA Paris 16 Feb. 1945, D. 1945, jur., 259: he who receives a letter, although undoubtedly the proprietor of the material object, does not own the

However, such a cause of action is only available under the condition that the diaries in question are protected by copyright law: for this, the diaries must be an original work. In French law, originality is found where the work carries 'the stamp of the personality of the author'. French law also states that the copyright protection is independent of the kind, form of expression, merit or purpose of the work (Art. L. 112-1 *CPI*). French case law appears very generous and accords the benefit of copyright to 'works' where the originality is not particularly evident such as technical notices, address lists, telephone books, contracts, etc.¹⁷ Thus, it is very likely that Brigitte's diaries enjoy copyright protection under French law.

Brigitte's action against infringement of her copyright, more precisely the infringement of her right of disclosure and her right to reproduction, is likely to be accepted by the French courts which will probably enjoin the publication. They will certainly award damages in reparation of the economic and non-economic loss the person suffered due to the unauthorised publication.

However, Brigitte can also bring a claim on the basis of her personality rights. Her diaries certainly contain details of her intimate private life. Divulging this information without her consent irrefutably constitutes an infringement of her right to privacy. It is unlikely that this injury could be justified by some overriding interest possessed by Jonathan.¹⁸ Thus, the injury will certainly be sanctioned on the basis of Art. 9 *CC*.

Germany

I. Operative rules

Irrespective of any efforts to locate Brigitte, she will be granted an injunction against the publication of her diaries, as well as damages. Depending on the content and circumstances of the publication, Brigitte may also have a claim for non-economic damages. In addition, she may demand any profits that Jonathan might have gained through the publication.

thought of the author and its expression. See, also, Perot-Morel, 'Droit d'auteur et lettres missives', in Françon and Goyard (eds.), *Les correspondances inédites* (Paris: 1984) 27-45.

¹⁷ Lucas, *Traité de la Propriété Littéraire et Artistique* (3rd edn., Paris: 2006) 70 and 79.

¹⁸ The publication of a diary against the will of its author has been admitted by the courts, however the particular case concerned divorce (Cass. civ. 6 May 1999, D. 2000, jur., 557).

II. Descriptive formants

A person's diaries or other personal writings such as letters or notes are protected under German law regardless of who owns the paper on which they are written. This protection may be granted under the law of copyright in special cases if the diaries reach a certain artistic or intellectual level which would qualify them as a 'work' under the German law of copyright.¹⁹ This depends on the level of artistic expression which the diaries exhibit and cannot be determined here. Usually, a diary will not reach that level and therefore will not be protected by copyright in the strict sense.²⁰ Nevertheless, if the diary deals with the private sphere of its author, any unauthorised publication of the diary is regarded as an infringement of the general personality right.²¹ There may be justifications where there is great public interest in the published material, but this particular case does not offer any facts that could be used for such a justification. Therefore, Brigitte can claim an injunction. She may also claim damages based on § 823(1) *BGB* including a hypothetical licence fee for the publication. The claim for skimming off the profits may be based either on § 823(1) or on § 687(2) *BGB*.²²

As with every violation of the general personality right, a claim for damages for non-economic loss requires that the violation be of a certain seriousness and gravity.²³ This might be the case if the publication exploits intimate details of Brigitte's diaries for purely commercial reasons. If Jonathan did not even try to contact Brigitte, he would show a certain recklessness which would be weighed in favour of an award for non-economic damages.

Even if Jonathan made efforts to locate Brigitte, an injunction may still be granted against him since this remedy does not require the showing of fault on the part of the defendant. However, Brigitte probably cannot claim any non-economic damages in this case unless the content of the publication is so intimate that this is sufficiently serious in and of itself.

¹⁹ See, for an illustration, BGHZ 15, 249, 255 ff. (the diaries of Cosima Wagner).

²⁰ KG NJW 1995, 3392 (Letters of Botho Strauss); Schack, *Urheber- und Urhebervertragsrecht* (4th edn., Tübingen: 2007) no. 54; Rehlinger, *Urheberrecht* (15th edn., Munich: 2008) no. 438.

²¹ Ehmann, in Erman, *BGB* (12th edn., Münster/Cologne: 2008) appendix to § 12 no. 120.

²² See Case 8. ²³ See Case 1.

Greece

I. Operative rules

Brigitte has a claim against the publication of her diaries on the basis of her personality right, as well as for the infringement of her copyright, especially her moral rights.

II. Descriptive formants

Publishing the diary of a person which contains personal and intimate information without the person's consent constitutes an infringement of that person's right to privacy.

Furthermore a diary enjoys protection under the terms of Copyright Law (Law 2121/1993) as a written text, as long as the minimum level of originality required is fulfilled (Art. 2(1) Law 2121/93). The copyright in the work includes the right to exploit the work (economic right) and the right to protect any personal connection with the work (moral right) as exclusive and absolute rights (Art. 1 Law 2121/93).

The moral right, in particular, confers powers upon the author to *inter alia*:

- (a) decide on the time, place and manner in which the work shall be made accessible to the public (publication);
- (b) to demand that his/her position as the author of the work be acknowledged and, in particular, to the extent that it is possible, that his/her name be indicated on the copies of his/her work and noted whenever his/her work is used publicly, or, conversely, if he/she so wishes, that the work be presented anonymously or under a pseudonym (Art. 4(1) Law 2121/93).

In all cases of infringement of copyright the author is entitled to demand recognition of his/her right, the suppression of the infringement and the omission of the infringement in the future. A person who culpably infringes copyright, apart from the penalties provided under penal law, must repair the moral damage caused and is liable for the payment of damages (Art. 65 Law 2121/93).

Ireland

I. Operative rules

Brigitte may have a claim for breach of copyright depending on whether or not she can establish that she transferred ownership of the diaries with the house.

II. Descriptive formants

It would seem unlikely that an action for breach of confidence would be successful. In order to maintain such an action, the information must be confidential, it must be imparted in circumstances importing an obligation of confidence and there must be an unauthorised use of the information to the detriment of the party who communicated it.²⁴ It could not be said that the information was imparted in a manner which imported an obligation of confidence.

It is unlikely that an action could be maintained for breach of privacy by Brigitte.²⁵

As the author of the diaries, Brigitte would own the copyright.²⁶ Under s. 47(3) of the Copyright Act 1963 and s. 120(3) of the Copyright and Related Rights Act 2000 an assignment of copyright will not be effective unless it is in writing and signed by or on behalf of the individual transferring the copyright. There is no evidence that in selling the house to Jonathan she also intended to assign the copyright of the diaries. As a consequence Brigitte may have a claim for breach of copyright against Jonathan.

Italy

I. Operative rules

Brigitte can recover damages from Jonathan. It is immaterial whether Jonathan made some effort to contact Brigitte before the publication.

II. Descriptive formants

This case raises an interesting question, which refers – in some sense – to the distinction between *corpus mysticum* and *corpus mechanicum*. Assuming that the diaries contain personal information and deal with Brigitte's private sphere it should be determined whether the owner of these manuscripts is free to publish their content. The conflict is between tangible property (the book) and intangible property (the information contained in it).

A solution can be found on the basis of the Copyright Act. If a diary reaches a sufficient artistic or intellectual level it may be granted protection as a 'work' under the Italian law of copyright (Art. 1 CA). Otherwise the provisions on neighbouring rights can be applied.

²⁴ *House of Spring Gardens v. Point Blank Ltd* [1984] IR 611 (SC).

²⁵ See generally Case 3. ²⁶ Ss. 8(1) and 9(2) of the Copyright Act 1963.

According to Art. 93 CA, personal writings which refer to the private sphere, such as letters, notes and memoirs, cannot be published without the author's permission. Consent is not required if the publication is necessary for reasons of justice or for the protection of personal or familial honour and reputation (Art. 94 CA).

A diary can be considered to be personal writing under this provision.²⁷ Its publication is not intended to satisfy any relevant public interest. Therefore, it should be considered unlawful and can be enjoined by Brigitte, regardless of whether Jonathan has made some effort to contact her before the publication. It should be noted that the period of twenty years which has passed is not relevant, since the right of privacy is not subject to any period of limitation. Indeed, even after Brigitte's death, the right can be exercised by her surviving relatives (Art. 93, n. 2 CA). It is interesting to observe that the same result could be reached by applying the Data Protection Code, under the assumption that a diary is a collection of personal information.

Brigitte can also claim damages. Up until a few years ago it was difficult to recover non-pecuniary loss in privacy infringement cases because of the obstacle represented by Art. 2059 CC. Damages were only awarded if the tort amounted to a crime (Art. 185 *et seq.* CP). Since the enactment of the Data Protection Act 1996 and the overruling of the old restrictive doctrine in 2003 by the Italian Supreme Court, this limitation has been overcome.²⁸

The Netherlands

I. Operative rules

Brigitte can claim damages and an injunction.

II. Descriptive formants

As the owner of the diaries, is Jonathan entitled to publish facts belonging to Brigitte's sphere of privacy? Cases often concern freedom of expression and the right of the public to be informed on the one hand, and the protection of one's private life on the other. In this case it is unclear whether there is a specific general interest involved in publishing the diaries. On the other hand, it is clear that the diaries

²⁷ Seemingly, only one decision deals with a diary as an object of privacy rights. In Pret. Trapani 20 Mar. 1993, *Foro it.* 1994, I, 2575 a woman was denied an injunction prohibiting the exhibition of her personal diary, which was in her husband's possession, in a divorce trial.

²⁸ See Case 5.

contain information of an utmost private nature. The right to privacy outweighs the right to freedom of expression, and given the limited importance of the diaries for the public, the general interest to be informed.²⁹

The extent of intimacy of the published information invokes a duty on behalf of the publisher to at least investigate whether Brigitte is still alive and whether she can be traced. Without taking any such measures, the publication of the diaries is an unlawful infringement of Brigitte's privacy. Brigitte can claim non-economic damages and ask for an injunction. If Jonathan made efforts to trace Brigitte and did not find her, the publication might be justified. If Brigitte appears afterwards, it can be injurious to her not to recall the publication. However, in this situation Jonathan's interest will not only be that of freedom of expression but also the financial interest in selling the publication.

Portugal

I. Operative rules

Brigitte can sue Jonathan for an injunction and compensation. It does not make any difference whether or not Jonathan made any effort to contact Brigitte before the publication.

II. Descriptive formants

In accordance with Art. 77 CC, the diaries may not be published without Brigitte's consent. Any efforts made by Jonathan to contact Brigitte bear no relevance in connection with the publication of the diaries.

Brigitte may file for an injunction to prohibit publication and/or to seize the diaries which have already been published (Art. 70 CC). She may also claim restitution of the diaries and demand compensation for moral damages (Art. 483 CC).

Apart from personality rights, this case also involves a question of copyright. Brigitte has an author's moral right over her diaries and, thus, their publication by Jonathan without her consent constitutes a criminal offence of usurpation punishable by up to three years' imprisonment (Arts. 177 and 179 Code of Authors Rights). This Code also provides for the seizing of the diaries which have already been published (Art. 201) and compensation (Art. 203).

²⁹ President of the Court of first instance Arnhem, 8 Aug. 1990, KG 1991, 14; Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII (Deventer: 2000) no. 106.

Scotland

I. Operative rules

Brigitte has a claim for infringement of copyright and a remedy in damages or an account of profits in relation to what Jonathan will defend as an innocent breach of copyright. An action in passing off will not succeed unless Brigitte can establish a strong commercial (literary) or economic connection with her name and/or business. She also has a claim for breach of confidentiality and privacy.

II. Descriptive formants

Diaries are the incarnation of what the law of confidentiality and copyright are all about. Jonathan has published Brigitte's diaries without her permission. If he has adopted the form of the diaries and not merely re-written the information contained therein, there is a clear breach of copyright alongside considerations of breach of confidentiality, privacy and passing off. Passing off is a remedy available in specific situations where work is either 'passed off' as belonging to another or appropriated and erroneously made to appear to be the work of another. From the facts, this does not appear to be relevant in the immediate case. It is conceivable that Brigitte has a right to all or a combination of these remedies.

Under the Copyright, Patents and Design Act 1988, copyright subsists in written works³⁰ for seventy years *post mortem auctoris*.³¹ From the facts of this case, we can presume that copyright still exists and that there was no consent to publication, since this would be a complete defence.³² Firstly, there is a rebuttable statutory presumption that the publisher or person named on the publication is the copyright owner.³³ This in itself does not transfer either the author's copyright under s. 11(1) of the 1988 Act or the moral rights in the works to the new owner Jonathan.³⁴ The diaries qualify for copyright under s. 153 of the 1988 Act. The right to be identified as the author under s. 77 continues

³⁰ Ch. 48. Applicable in Scotland, see s. 157.

³¹ S. 12 Copyright and Patents Act 1988 as amended by Directive 93/98/EC on Duration of Copyright and Rights in Performing, now implemented by SI 1995/3297.

³² Beverly-Smith, *The Commercial Appropriation of Personality* (Cambridge: 2002) 126; *Dubrulle v. Dubrulle French Can. School Ltd* (2001) 8 CPR (fourth) 180.

³³ S. 104(1)(a) Copyright, Patents and Design Act 1988.

³⁴ The right to rely on moral rights alone under s. 77(1) only exists when the author has first asserted his/her rights, see s. 78.

as long as copyright in the work subsists; the right to correct any false attribution persists for twenty years after a person's death.³⁵

The publication of diaries without the author's consent is a clear breach of copyright under s 96. Remedies under s. 96(2) are described as 'all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right'.

This provision is subject to the defence of *innocent publication* provided by s. 97. Under this rule, damages (but not other remedies) are only available if it can be shown that the breach was not a conscious one. Nevertheless, s. 97(2)(b) allows accounting for profit in cases where breach is established. According to this provision, Jonathan may well have a solid defence of innocent publication, and may only be liable to account for any profits made and not under any further heads of damage. This can only be established after proof. A defence of fair use is not relevant here.³⁶

An action under the law of passing off is more complex in the immediate situation. Effectively, both Brigitte's name and work have been misappropriated and attributed to Jonathan. The delict of passing off is a common law right to assertion of ownership and good will in a business. Should Jonathan imply that he is the author or creator of the publication, there may be at least an arguable case for passing off. Nevertheless, passing off actions depend on damage or any likelihood thereof being shown. The passing off action has inherent limitations in this case due to a lack of commercial interest. Brigitte would have to prove that her name and professional reputation were at stake and that she has suffered economic loss as a result.³⁷ Neither Scots law nor English law has any authority which wholeheartedly supports the misappropriation or use of an individual's name that is not immediately within a commercial context. From the facts of this case, we can only presume that Brigitte herself is not commercially active in either this or another compatible field of activity.³⁸

The development of the law in both Canada and Australia in relation to the tort of misappropriation of personality demonstrates a broader

³⁵ S. 86 Copyright, Patents and Design Act 1988.

³⁶ *Rt Hon. P. Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142.

³⁷ Beverly-Smith, *The Commercial Appropriation of Personality*, 98.

³⁸ See H.L. McQueen, 'My tongue is mine'ain' (2005) 68 *Modern Law Review* at 129.

approach to the misappropriation of names for commercial and non-commercial purposes than the law in the UK.³⁹

This leaves Brigitte with a choice of actions for both invasion of privacy and breach of confidentiality. Diaries are confidential by their very nature, so that an unauthorised publication by any third party (in this case Jonathan) would appear *prima facie* to be a breach of confidence. Privacy and confidentiality can coexist without their borders requiring specific demarcation. Even though no particular confidential relationship existed between Jonathan and Brigitte, since the enactment of the HRA, such a relationship is not or rather is no longer required by the law in order to establish a breach of confidence.⁴⁰ British courts are reluctant to recognise a blanket approach to privacy, preferring to decide a claim on the individual circumstances of each case. The action for breach of confidentiality is admissible at the same time as breach of privacy.⁴¹

III. Metalegal formants

The English Court of Appeal decision in *Paddy Ashdown*⁴² is of relevance here, although the specific circumstances should be distinguished. That case involved competing claims of breach of copyright by the politician and the defences of public interest and fair use raised by the press as defendants. The case is important for its method of balancing copyright protection and confidentiality against freedom of expression and public interest in reporting: there will be circumstances where the public interest trumps copyright.⁴³ Neither copyright nor confidentiality confer an automatic right to enforcement or prevention of free speech.

³⁹ See Beverly-Smith, *The Commercial Appropriation of Personality*, 92–102.

⁴⁰ See *Douglas v. Hello!* [2003] EWCA Civ 139; [2005] EWCA Civ 595: ‘a right of privacy or equitable remedy for breach of confidence has been recognised, even in the absence of any pre-existing confidential relationships, in ... *Venables v. MGN* [2001] Fam 430, *A v. B plc* [2002] 3 WLR 542l and in *Campbell v. MGN* [2003] 2 WLR 80’, per LJ Rix at para. 5.

⁴¹ *Campbell v. MGN Ltd*: ‘The development of the law of confidentiality since ... the Act ... has seen information described as “confidential” not where it has been confided by one person to another but where it relates to an aspect of an individual’s private life which he does not choose to make public. We consider that the unjustifiable publication of such information would be better described as breach of privacy, rather than breach of confidence’, per Lord Phillips at para. 70. *Douglas v. Hello!*: ‘The judge dealt with breach of confidence and invasion of the right to privacy together’, at para. 27.

⁴² See n. 36. ⁴³ *Ibid.* at para. 58.

Spain

I. Operative rules

Brigitte has a claim against Jonathan. It would not make a difference if Jonathan made some efforts to contact Brigitte before the publication.

II. Descriptive formants

As long as a diary is, categorically, a person's most private writing, its publication must be considered an illegitimate interference with the right to privacy. Diaries are protected as a part of the author's privacy. Therefore, according to Spanish Law, the Copyright Act is not applicable to this case. The diaries were not written for commercial use, only for private use.

According to Art. 7.3 *LO 1/1982*, irrespective of who owns the diaries, unless there is a previous authorisation from the author it is provided in Art. 2.2 that 'there will not be an intromission in the rights protected when authorised by law or when the holder had given his express consent'.

The fact that Jonathan has become the owner of the writings should not interfere with Brigitte's right to privacy, and in this respect, it is irrelevant how much of an effort Jonathan made to contact Brigitte.

Switzerland

I. Operative rules

By publishing Brigitte's diaries without her consent Jonathan has violated her rights as an author. Therefore, Brigitte is entitled to the compensatory and injunctive remedies provided by the law. The solution will be no different if Jonathan had made an effort to contact Brigitte before publication of her diaries.

II. Descriptive formants

Brigitte's diaries are protected by the Statute on Copyright ('*LDA*').⁴⁴ A 'work of art' under Art. 2, para. 1 *LDA* is any creation of the mind, literary or artistic, which has an individual character. More precisely, creations of the mind are works which use language, whether literary, scientific, or otherwise (Art. 2, para. 1 lit. a *LDA*).

⁴⁴ Loi fédérale du 9 octobre 1992 sur le droit d'auteur et les droits voisins (*LDA*) (RS 231.1).

Case law defines ‘literature’ broadly.⁴⁵ However, the result of the mind’s creation must materialise into something that is new and which has an individual character. This individuality consists of the fact that the work must carry the stamp of the author’s personality. ‘A low level of individuality’⁴⁶ is sufficient to trigger the protection of the law. Undoubtedly, Brigitte’s diaries constitute a literary work within the meaning of Art. 2, para. 2 lit. a LDA. Even if Brigitte has already died, her work is protected and remains so up to seventy years after her death. Her heirs will therefore have the right to bring a claim.

Authors have a series of prerogatives at their disposal, including the exclusive right to decide how the work will be used (Art. 9, paras. 2 and 10 LDA). By publishing Brigitte’s diaries without her consent, Jonathan has offered them to the public and put copies of them into circulation, which constitutes a violation of Art. 10, para. 2, lit. a LDA.

Thus, Brigitte may request a declaratory judgment holding the infringement unlawful (Art. 61 LDA) and ask the judge for an injunction against the further distribution of the diaries (Art. 62, para. 1, lit. b LDA). She also has the right to demand publication of the judgment (Art. 66 LDA). Finally, Art. 62 of the LDA provides for the compensatory actions found in the Code of Obligations. This provision should allow Brigitte to receive any profits that Jonathan earned from the publication of the diaries. In addition, if details of her intimate or private life were revealed to the public the infringement must be considered serious, which will allow Brigitte to claim damages for pain and suffering.

The result will not be different if Jonathan attempted to contact Brigitte before the publication of the diaries.

III. Metalegal formants

In contrast to Case 5 in which a statesman contested the publication of a biography about him, here we are dealing with a ‘private’ individual who serves no official function. Thus, the defence that exists in the public’s right to information may not be validly used here. In fact, only Brigitte’s consent would effectively eliminate the unlawful nature of the infringement.

⁴⁵ Judgment of the District Court of the Unterrheintal, in SIC 2002, p. 589 c. II 3.

⁴⁶ *Ibid.*; D. Barrelet and W. Egloff, *Das neue Urheberrecht, Kommentar zum Bundesgesetz über das Urheberrecht und verwandte Schutzrechte* (Berne: 2000) n. 6 *et seq.* and Art. 2 LDA.

Comparative remarks

Diaries usually contain the most private and intimate information about the writer's person, his/her thoughts and feelings. In addition, they may be regarded as an intellectual work or a piece of art. When diaries are published without the writer's consent, a conflict arises between the writer's interests in privacy and copyright on the one hand and the interest of the owner of the manuscript and the public on the other. In the present case, Jonathan's ownership of Brigitte's diaries is beyond question. The core issue is what Brigitte can claim from Jonathan for having neglected to ask for permission to publish her diaries. Does it matter that Jonathan made an effort to find and contact Brigitte before publication?

I. Foundations of liability: privacy, copyright and media law

In most of the legal systems considered, both privacy rights and copyright law are engaged in this case. An exception is made in Spain where copyright law would only apply if Brigitte had written her diaries with the intention to publish and commercially exploit them herself. Under Spanish law, the remedies against the unauthorised publication of documents written for purely private use are exclusively regulated by privacy law, i.e. the 1982 Act on the civil protection of honour, privacy and one's image.

1. *Privacy law*

In all other private law regimes it is certain that Jonathan's publication of the diaries without Brigitte's consent constitutes an unlawful violation of her privacy. From the facts of the case, no justification is given based on an overriding public interest. Jonathan will be liable:

- in England, Scotland and Ireland for breach of confidence;
- in Belgium, France, Finland and Spain under the delict of intrusion into one's privacy;
- in Germany, Greece, Italy, the Netherlands and Portugal under the delict of violation of a personality right;
- in Italy under data protection law also.

The legal consequences are the same as in Case 5.

2. *Copyright law*

In relation to the applicability of copyright law, a first question has to be addressed: which requirements should a diary meet in order to become a 'work' which is protected by copyright? Most legal systems,

at least in theory, require a certain degree of originality and some intellectual or artistic requirements before considering a piece of writing a 'work'. In practice, however, these requirements are dealt with in the individual countries in a relatively strict manner. In Belgium, France, Finland, Greece, Ireland, Portugal, Switzerland, England and Scotland, ordinary private diaries also suffice for copyright. They can only be published with the author's consent, no matter who the owner is. Jonathan will therefore be liable under copyright law.

On the contrary, Austria, Germany and Italy seem to still adhere to a quite narrow definition of 'work' which excludes ordinary diaries without intellectual or artistic requirements. In Germany, such writings fall completely out of the scope of copyright law. Protection of these documents against unauthorised publication can only be granted by the law of privacy, i.e. a subdivision of the general personality right.

In Austria and Italy, the Copyright Acts provide for two different sets of rules: those applicable to 'works' and those applicable to private documents which cannot be considered 'works', such as diaries, letters, notes, memoirs and other personal writings. According to these Acts, the unauthorised publication of such documents is prohibited when it amounts to an unjustified intrusion into the writer's private sphere. Since no justifications are at hand, Jonathan will be liable under Austrian and Italian copyright law – not for breach of copyright in the strict sense, but for the unauthorised publication of private writings regulated in the Copyright Acts. The remedies provided for by these Acts are substantively the same in both cases of violation (see 'Remedies' below).

3. *Media law*

In Austria, Jonathan will also be liable for the unauthorised and unjustified publication of Brigitte's diaries under the 1981 Media Act. For the consequences of this liability see III. below.

II. Due care

In most of the legal systems considered, Jonathan will be liable for the unauthorised publication regardless of his possible efforts to locate and contact Brigitte beforehand. The publication remains an intentional violation of either Brigitte's copyright or her privacy. These attempts to locate her only seem to matter in Austria, Germany and the Netherlands.

In the Netherlands, if Jonathan made an effort to locate Brigitte but could not find her, the publication may be justified. However, if Brigitte

shows up afterwards and opposes the publication, Jonathan might be under a duty to recall it. In this case, both Jonathan's freedom to use his property and his commercial interest in the publication will have to be balanced against Brigitte's personality rights.

In Austria, if Jonathan took due care in trying to locate Brigitte or her heirs before publishing the diaries, he will not be liable under copyright and privacy law, since this liability requires fault. Slight negligence will be sufficient in this regard. If Jonathan cannot even be found to be slightly negligent, he will nevertheless remain responsible under the Media Act (as the diary is considered a 'medium of communication'), which provides for a strict liability regime.

In Germany, non-economic loss is only recoverable in case of serious and grave violations of personality rights. If Jonathan, for example, did not even try to locate Brigitte, this recklessness would constitute a grave violation.

III. Remedies

In all of the legal systems considered, Brigitte has a claim for damages against Jonathan. In most countries except Spain and Germany, both economic and non-economic loss is recoverable. Compensation for economic loss is possible under copyright law and the general law of delict (if there is a 'work' in the sense of copyright law). Damages alternatively cover the concrete economic loss, a hypothetical licence fee or skimming off Jonathan's profits.

In Finland, under copyright law appropriate compensation for the unauthorised use of the work shall be paid regardless of fault, while compensation for pain and suffering and other kind of losses is only possible in cases of intentional or negligent violations of copyright.

In Austria, England and Scotland, Brigitte will also be able to skim off the profits made by Jonathan; however, in Germany this is only permitted when the requirements of copyright law are met.

In relation to the non-monetary remedies, Brigitte will be able to obtain an injunction in all countries except for Belgium and Finland, for the same reasons outlined in Case 5. In the present case, however, the Belgian and French solutions on this point diverge since in France a claim for injunction is given on the basis of copyright law.

Additionally, in Switzerland, the claimant may seek a declaratory judgment stating that the infringement was unlawful.

17 Case 14: Tape recordings of a committee meeting

Case

During a municipal authority committee meeting which was open to the public and concerned the widening of a public road, Maria, a member of the public, secretly recorded the discussion. Maria was the tenant of a house on the road in question and was, like most of her neighbours, opposed to the widening project. At the end of the sitting, committee members noticed that Maria had recorded the discussion and they wanted her to hand over the tape. Maria refused. Do the committee members have any claim against Maria?

Discussions

Austria

I. Operative rules

The participants of the meeting can claim for abatement and forbearance.

II. Descriptive formants

The right to one's own spoken words is derived from § 16 ABGB and can be invoked in relation to the values underlying different provisions of the Austrian legal order.¹ § 120 StGB ('misuse of sound recorders or listening devices') can be considered, however it is too restricted on its own.²

¹ OGH AnwBl 1993, 952 = JBl 1993, 338 = ÖJZ 1993/111 = RdA 1993, 143 = RdW 1993, 82 = SZ 65/134; see also OGH MR 2003, 92 and OLG Wien MR 2002, 27.

² J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 16 no. 22; W. Posch in M. Schwimann, *ABGB-Praxiskommentar I* (3rd edn., Vienna: 2005) § 16

The secret recording of a private conversation is unlawful. If a public conversation is involved, in Posch's opinion there could only be an infringement of a personality right if there is an untrue, an abridged or a manipulated quotation.³

The crucial point in this case is whether the secret recording of the discussion at the committee meeting should be allowed considering that there was public access to the meeting. According to the *OGH*, the right to one's own spoken words includes the speaker's autonomy to decide if his/her voice should be taped by a recording machine.⁴ In this particular case, although the meeting was open to the public the participants did not anticipate that it would be recorded.

The statement of the *OGH*, which maintained that there is a strong interference with the right to the free development of one's personality if a participant in a conversation is afraid that his/her words and the sound of his/her voice with all its characteristics and imperfections will be secretly recorded,⁵ should not just be limited to private conversations. The participants of the meeting could not expect that their conversation would be saved on a tape for posterity. In a heated discussion it is always possible that somebody uses crude and impolite expressions which might only express meaning at a specific moment in the conversation and which are fleeting and transitory and might possibly be put into context during the ongoing discussion.⁶ This argument is connected to the standards of Art. 10 ECHR.⁷

Therefore, recording the discussion was an infringement of the speakers' right to decide who they wanted to speak to⁸ because Maria

no. 35. § 120 StGB reads: 'Subs. 1: A person who uses a sound recorder or a listening device to inform himself or somebody else of a non-public comment of another person, which was not addressed to him or to the other person, will be punished by a term of imprisonment of up to 2 years or a fine of up to 360 instalments (Tagessätze). Subs. 2: The same penalty applies to a person who allows a third person access to a sound recording of a non-public comment without the consent of the speaker, if it was not addressed to the third person, or who publishes such a recording. Subs. 3: The wrongdoer can be punished only if there is an authorisation of the injured person.'

³ He suggests therefore to use the principles elaborated by the German BGH (see e.g. BGHZ 13, 334 and BGHZ 31, 308); W. Posch in M. Schwimann, *Praxiskommentar* § 16 no. 37.

⁴ OGH JBl 1993, 339. ⁵ *Ibid.*

⁶ Cf. BGHZ 27, 287. ⁷ See Case 11.

⁸ H. Hubmann, *Das Persönlichkeitsrecht* (2nd edn., Cologne/Graz: 1967) 313.

expanded the public without informing them first.⁹ Furthermore, there is the danger of improper use.¹⁰

This point of view is supported by the law of civil procedure. Pursuant to Art. 90, subs. 1 *B-VG* (*Bundesverfassungsgesetz*, Constitution) and § 171, subs. 1 *ZPO* (*Zivilprozessordnung*, Code of Civil Procedure), court cases have to be open to the public. However, television and radio recordings of court proceedings are prohibited (§ 22 *MedienG*).¹¹ This example demonstrates that the law accepts different types of public spheres.

Though a weighing of interests could lead to a justification in the individual case, such a justification should only be accepted in exceptional circumstances¹² since the protection of someone's personal sphere is of high importance and since a secret recording has the stigma of fraud and insolence. Indeed, Maria cannot refer to the principle of freedom of the press because she is not working for the media. Overall, one could be of the opinion that in this particular case there is an infringement of the right to one's own spoken words.

As a consequence, the participants of the meeting can claim for forbearance, the publication of the judgment on the forbearance (§ 85 *UrhG* by analogy),¹³ abatement and compensation.

According to the general principle of §§ 1323, 1324 *ABGB*, compensation for non-economic harm is only granted if Maria acted in gross negligence.¹⁴ As this is a borderline case, this question remains open.¹⁵ However, the amount of the award for non-economic loss, if there is to be any at all, should be very low. Furthermore, considering the facts of our case economic loss is hardly conceivable. Thus, the most relevant claims would be for abatement and possibly also for forbearance.

Belgium

I. Operative rules

The members of the committee have no cause of action against Maria.

⁹ OGH JBl 1993, 339.

¹⁰ H. Hubmann, *Persönlichkeitsrecht* at 312. As Maria is an opponent of the project, this danger is increased.

¹¹ See W. Rechberger and D. -A. Simotta, *Grundriss des österreichischen Zivilprozessrechts* (6th edn., Vienna: 2003) nos. 281 *et seq.*

¹² H. Hubmann, *Persönlichkeitsrecht* at 314.

¹³ See Case 11. However, in the present case this might not be an appropriate instrument.

¹⁴ See again Case 11.

¹⁵ It could be discussed if it is enough to meet this standard that she consciously recorded the talks.

II. Descriptive formants

Art. 8, § 1, para. 2 of the Copyright Act allows the unrestricted reproduction and publication of speeches delivered at the meetings of representative assemblies. The members of the committee can only prevent publication as a separate work.¹⁶

England

I. Operative rules

The committee members do not have a claim against Maria.

II. Descriptive formants

1. *Defamation*

As Maria has only taped what has been said there can be no question of her defaming any of the speakers by merely recording the discussion. Of course, if anything defamatory was uttered by the speakers this might give rise to separate legal issues which we need not go into here.

2. *Breach of confidence*

As everything was expressed in public, the information can hardly be said to be confidential.

Finland

I. Operative rules

It is not possible to claim against Maria.

II. Descriptive formants

The discussion during the committee meeting was open to the public and therefore Maria was allowed to attend the meeting. According to Ch. 24, s. 5 of the Finnish Penal Code, the listening to or the recording of persons speaking is prohibited if the listening or the recording is a violation of privacy in the home, or if the listening or recording is done secretly and the discussion was not intended to be heard by any outsider and under such circumstances the speaker did not expect that an outsider would hear the speech. However, as Maria attended a public meeting, her recording was lawful and no claim can be made against her.

¹⁶ F. Van Isacker, *Kritische synthese van het Belgisch auteursrecht* (Antwerp: 1985) 93 *et seq.*; J. Corbet, *Auteursrecht*, in *APR* (Brussels: 1991) 79–80.

In Finnish legal doctrine, this same question has rarely been discussed. The main principle is mentioned: it is lawful to record in public places.¹⁷ There is a relevant Supreme Court case¹⁸ where a person who was questioned by two policemen had videotaped his interrogation. The Supreme Court found that the recording was not illegal because the person had not recorded anything else other than what he himself had been able to observe during the interrogation. The legal principle of this case can be applied *mutatis mutandis* to mere audio recording.

France

I. Operative rules

The members of the committee do not have a cause of action against Maria.

II. Descriptive formants

The protection that French law offers the right of privacy undeniably covers words spoken in private places and/or those words which have a confidential character. Art. 226-1 of the Penal Code punishes ‘any wilful violation of the intimacy of the private life of other persons by resorting to any means of ... intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker (...)’. The same holds true in private law – conversations are protected against third parties who listen to or record the words of another person without his/her knowledge. However, case law on this subject is scarce.¹⁹

Nevertheless, for this protection to apply it is necessary that the conversation be confidential or at least held in private. In the instant case, the place (in public) and the subject, which is a matter of public interest, means that it is less likely that there is an injury to the speakers’ right of privacy. The members of the committee cannot successfully argue that Maria deceitfully gained access to the council meeting or that she has violated any obligation of confidentiality, inasmuch as the meeting of the municipal council was held in public. As a consequence,

¹⁷ Vuortama, *Journalisti* 15/1999, www.journalistiliitto.fi/journalisti/arkisto/1599/ala/alakerta.htm (9 Jun. 2003) p. 45.

¹⁸ Supreme Court case 1990:36.

¹⁹ TGI Paris 11 Jul. 1977, D. 1977, 700: the act of recording another’s voice ‘abusively during a private telephone conversation without the consent of the interested person (...) amounts to a violation of privacy’.

Maria cannot be held to be at fault. The members of the committee have no claim against her.

Germany

I. Operative rules

The committee members probably do not have a claim against Maria although the matter is disputed.

II. Descriptive formants

The situation in this particular case would be different if a private or non-public conversation was recorded, since then a Criminal Code provision (§ 201) would be applicable, which prohibits the unauthorised recording of non-public speech. However, even in those cases there is considerable debate regarding certain exceptions in which the secret recording of non-public speech should be allowed.²⁰

As stated in the case description, the committee meeting was ‘open to the public’ and thus any speeches which were delivered there can only be described as public speeches which do not deserve special protection. Nevertheless, in 1979, the *OLG Köln* decided on a case in which a public committee meeting was secretly recorded and held that the affected speakers had a claim to have the tapes handed over based on their general personality right.²¹ The court reasoned that the recording was not justified by the public interest in controlling political or governmental activity since taking notes would have been sufficient.²² However, the Federal Court and Constitutional Court cases cited in that decision only relate to speech in private situations.²³ Nevertheless, the 1979 decision serves as a basis for some scholars to argue that even public speech may not be recorded without authorisation.²⁴

²⁰ See Ehmann, in Erman, *BGB* (12th edn., Münster/Cologne: 2008) appendix to § 12 no. 131 *et seq.*

²¹ *OLG Köln*, NJW 1979, 661; see also BVerwG 85, 283.

²² *Ibid.* at 662.

²³ BGHZ 27, 284; BVerfGE 34, 238. See also BVerfG NJW 2002, 3619, 3621: the Federal Constitutional Court states that the Constitution protects the right to decide whether one’s spoken words are taped or not. However, this case deals with listening to telephone conversations by loudspeaker without the knowledge of the person on the other end of the line – a situation that is hard to compare with speaking at a public meeting.

²⁴ K. Larenz and C. -W. Canaris, *Lehrbuch des Schuldrechts* II/2 (13th edn., Munich: 1994) 505; Hager in Staudinger, *BGB* (13th edn., Munich: 1999) § 823 no. C 161.

In 1986, the *OLG Celle* held that tape recordings by guests at a city council meeting are allowed, at least if these guests mention the fact that they are recording beforehand.²⁵ This Court argued that the constitutional right to the free acquisition of information of both the press and citizens (Art. 5 *Grundgesetz*) protects this activity. The same has been said by a prominent author in constitutional law.²⁶ This view seems more convincing since the general personality right should not be used to restrict public discussion on matters of public interest such as the road widening in the instant case. Therefore, the recording of public meetings is lawful as long as it does not interfere with the orderly holding of the meeting (with regard to noise, etc.).

Accordingly, there is no claim against Maria if she had announced beforehand that she was recording the meeting. The question whether the mere secrecy of her recording makes it unlawful remains unanswered.

III. Metalegal formants

Contrary to the 1979 court decision described above, Maria's conduct should not be regarded as unlawful. The danger that the speakers might have said things which they would not have said if they had known about the recording is not limited to a recording. In a stenographic transcript which Maria could certainly have used, the situation would be the same. Furthermore, the main argument advanced by the 1979 decision is rather odd: The recording is said to possibly distort or change the true meaning of what the speaker said. One would think that this possible distortion would even be magnified if one takes notes instead of recording every word.²⁷ Whoever speaks in a public meeting about local politics must know that his/her words are taken seriously and can be used later in the political discussion. Therefore, in this particular case, the citizen's interest in gathering information should outweigh the personality interests of the speakers.

Greece

I. Operative rules

The committee members do not have a claim against Maria for the recording of the public session.

²⁵ *OLG Celle*, AfP 1986, 57.

²⁶ C. Degenhart in *Bonner Kommentar* (Heidelberg: 1991) Art. 5 GG no. 349.

²⁷ Stober, 'Zur Tonbandaufzeichnung in öffentlichen Gemeinderatssitzungen' (1976) *Deutsche Verwaltungsblatt* 371.

II. Descriptive formants

As an activity of public administrative bodies, the meeting of the municipal authority is open to the public. Ensuring access to the public serves the transparency of administrative actions and the right of citizens to be informed about these actions.

Ireland

I. Operative rules

The committee members would not have an action against Maria.

II. Descriptive formants

The meeting was a public meeting and as such any communications made during the meeting could not be considered to be confidential.

Italy

I. Operative rules

It is likely that the committee members cannot force Maria to hand over the tape.

II. Descriptive formants

It is not easy to answer this particular case since no specific precedent seems to exist in Italian case law.²⁸ However, it can be argued that the committee members cannot force Maria to hand over the tape; they can only exercise the rights granted by the Data Protection Code under proper conditions.

First of all, it should be determined whether the DPC applies. The answer is in principle affirmative. The voice qualifies as ‘personal data’ according to Art. 4(1) b DPC.²⁹ One can assume that in this case committee members can be easily identified by their participation in the discussion. Secondly, the recording of sound and its storage can be qualified as ‘processing’ of personal data (Art. 4(1) a DPC). One could argue that Maria is only processing this information in the course of a purely personal activity. However, even ‘personal processing’ is subject to the data privacy regulation if the information is intended

²⁸ By contrast, many cases can be found relating to the issue of recording of a private communication made by one of the parties with the aim of acquiring evidence to be used in the event of litigation (see e.g. *Garante protezione dati* 12 Jul. 2000, doc. Web no. 1113769; Cass. 19 Feb. 1981 no. 5934, *Cass. pen.* 1982, 1529).

²⁹ *Garante protezione dati*, 26 Nov. 1999, *Boll.* no. 6, 1998, 32.

to be systematically communicated or publicly disseminated (Art. 5(3) DPC).³⁰ It could be the case that Maria is recording the discussion because she is a tenant and she is opposing the planned widening of the road. Hence, one should ascertain whether she intends to use the tape simply in order to analyse the political issues on the table or, for instance, to publish the dialogue on the internet.

Even if the DPC is applicable, it seems that the previous permission of the person who is being taped is not required in order to lawfully record the discussion. Indeed, the meeting was open to the public and concerned matters of public interest (ex Art. 24(1) c DPC). Personal data has to be processed according to good faith and the committee members have to be previously informed of the recording;³¹ however, this duty does not exist if the information is collected with the aim of acquiring evidence to be used in litigation (Art. 15(3) DPC). In any event, the rights recognised by Art. 7 DPC have to be respected. The committee members could claim for the alteration of incorrect data (for instance, if the speaker's voice is attributed to another person); the erasure of unnecessary information according to the principle of finality (for example, the parts of the discussion not strictly related to political matters); the integration of the data. The right to object on compelling legitimate grounds (Art. 7(4)(a)) could be particularly relevant for this case. However, the balancing of the two positions is required and it is likely that the principle of transparency of public procedures³² will prevail over the opposing principle of data protection. Such a conclusion is also supported by the regulation on access to and publication of courts decisions and proceedings (Art. 51 *et seq.* DPC).

The Netherlands

I. Operative rules

The committee does not have a claim.

II. Descriptive formants

Dutch law recognises the right of inviolability of the home (see Case 8) and the right of inviolability of a room intended for public service (that

³⁰ See the report by the Data Protection Authority: Garante protezione dati, *La privacy nelle pubbliche amministrazioni - Relazione 2003 - 28 Apr. 2004.*

³¹ This was expressly stated by the Data Protection Authority in its report (see n. 30 above), in a case quite similar to our question.

³² See in general Arts. 22 *et seq.* Legge 241/1990; and more specifically Art. 10 Decreto legge 18 Aug. 2000 no. 267, *Testo unico delle leggi sull'ordinamento degli enti locali.*

is a room which is used by public/law bodies such as rooms in state universities, courtrooms, rooms in the town hall, etc.). These rights protect against unlawful entry to a dwelling (Arts. 138 and 139 *Sr*). The provision that one is not allowed to intentionally intercept or record a conversation being held in a house or in a place intended for public service (Art. 139a *Sr*) or at another place ('anywhere except in a dwelling, an enclosed room or premises') (Art. 139b *Sr*) without having been authorised to do so by a participant in such a conversation (Art. 139a *Sr* and Art. 139b *Sr*) is derived from this penal provision.

In this case, the meeting was open to the public. Maria did not unlawfully intrude into the tranquility of someone's house. She secretly recorded a discussion in which she participated herself. None of the abovementioned penal provisions apply.

Whether Maria breached a non-statutory duty towards the committee needs to be assessed. It is unclear which interests of the committee could be infringed by the recording of the public discussion. The committee does not have the capacity to ask Maria to hand over the tape on behalf of the other people who came to the meeting. Moreover, it is unclear whether the tape contains information that is of a private nature. Under these circumstances, there is no indication that the recording was injurious to the committee. The committee does not have a claim.

Portugal

I. Operative rules

The members of the committee do not have any claim against Maria.

II. Descriptive formants

There is no legal rule or case law which directly protects the right to voice. However, it is possible to use analogy in order to protect voice in the same way as the right to image is protected (Art. 10 (1) and (2), and Art. 79 *CC*). In fact, one can claim the reasonability of not allowing someone's voice to be played, reproduced or commercialised without his or her consent. Nevertheless, we cannot forget two additional remarks:

- Art. 79 *CC* only protects the right to image when it is exposed, reproduced or commercialised, not when it is merely taken (see Case 7 for further developments);
- drawing an analogy with the exceptions also established by Art. 79, one should also conclude that consent can be overridden when the recording of the voice is done within a public place, or facts of public interest or facts which have taken place publicly are recorded.

As the meeting was public, attended by the public and of public interest, any possible need for consent would easily be overridden.

Maria's conduct is lawful. Therefore, she may keep the tape and the committee members have no grounds to claim against her.

Scotland

I. Operative rules

The committee members do not have a claim against Maria.

II. Descriptive formants

Proceedings at municipal public meetings which have been called to discuss a public planning matter are regulated in Scots law under the provisions of the Town and Country Planning (Scotland) Act 1997.³³ Such meetings are, by their very nature, designed to give the public an opportunity to express opinions, to make written statements and to appear as witnesses. Statutory regulation is complex, and details of administrative rules are governed by departmental orders.³⁴ Provisions exist which are similar to those applicable in England:³⁵ a register of participants according to specific categories, along with outline statements of members of the panel, must be made available to members of the public. Since 2000, the UK has a Freedom of Information Act the Scottish counterpart of which enables citizens to request access to certain public information.³⁶ In this particular case, the meeting is unlikely to attract more than qualified privilege.³⁷ The type of body to which the qualified privilege attaches itself is governed by particular statutes.³⁸ Attending and recording the meeting would then be inconsistent, particularly if those recordings are published.

Scots law, like English law, regards the unauthorised recording of *legal* proceedings as contempt of court,³⁹ the distinction drawn in *Attorney*

³³ Ch 8. See further Town and Country Planning (Consequential Provisions) (Scotland) Act 1997, Ch. 11. For England, see Planning Inquiries (Attendance of Public) Act 1982, Ch. 21. The Local Government (Access to Information Act) 1985 inserts public access provisions into the Local Government (Scotland) Act 1973.

³⁴ Scottish Office Circulars; see J. Rowan-Robinson, *Scottish Planning Law and Procedure* (Edinburgh: 2001) para. 20.97.

³⁵ See Department of Environment Code.

³⁶ Ch. 36 (Eng); Freedom of Information (Scotland) Act 2002, entered into force on 1 Jan. 2005.

³⁷ Sch. 1, Part II Defamation Act 1996.

³⁸ Local Government (Scotland) Act 1994, Public Bodies (Admission to Meetings) Act 1960.

³⁹ Contempt of Court Act 1981, Ch. 49, applicable in both Scotland and England.

*General v. BBC*⁴⁰ clearly separating judicial proceedings from administrative proceedings. The planning committee meets in an administrative capacity, not in a judicial capacity, so contempt is not an issue here. Nevertheless, such meetings are subject to rules of procedure, which include the possibility of excluding the press and public where matters are confidential (this itself is open to judicial review). The meeting has not excluded the public, but information which is imparted during the proceedings is *prima facie* confidential, since the proceedings are arguably subject to at least qualified privilege. However, the categories of privilege are not easy to define.⁴¹

The recording is clearly unauthorised. Copyright may well exist in relation to the recording of a conversation, although the recording of a public meeting held under statutory authority is not an infringement of copyright *per se* unless it is subsequently published. In assessing whether there is a *prima facie* breach of confidence, a balance needs to be made between public access to information and the need for maintaining confidentiality in so far as it serves the purposes of good administration. A correct and fair newspaper report on the meeting, as opposed to a recording of the proceedings, would normally not be prohibited. In the past, Scottish courts have made use of Art. 6(1) ECHR in planning cases where tribunals have functioned in an unacceptable manner.⁴² The Scottish courts are also willing to determine those aspects of planning proposals and decisions that belong to the public domain.⁴³ The information recorded by Maria relates to public proceedings, so that the crux of the matter relates to the confidentiality of the situation and the exact position regarding the information presented at the hearing, subject to the foregoing rules on privilege.

The overriding principle of freedom of expression contained in s. 12 HRA requires the court under s. 12(4)(a), in considering whether to grant any relief, to examine:

- (a) the extent to which:
 - (i) the material has, or is about to, become available to the public; or

⁴⁰ [1980] 3 ER 161 (HL).

⁴¹ *Trapp v. Mackie* 1979 SLT 126 per Lord Fraser at 134: 'provided the tribunal is one recognised by law, there is no single element the presence or absence of which will be conclusive in showing whether it has attributes similar to those of a court of law to create absolute privilege'.

⁴² *Lafarge Redland Aggregates, Petitioners* 2000 SLT 1361.

⁴³ *Cumming v. Sec. of State for Scotland* 1993 SLT 228.

- (ii) it is, or would be, in the public interest for the material to be published;
- (b) the existence of any privacy code.

Where a meeting is non-adversarial and witnesses are not being called, evidence and statements require less legal protection. Breach of confidentiality is arguable where evidence is made causing the proceedings to fall within a privileged category. Arguments would need to be put to a court establishing that this is the case.

Spain

I. Operative rules

The committee does not have a claim against Maria.

II. Descriptive formants

Art. 7.2 of *LO 1/1982* only prohibits recording which aims to obtain information about another person's private life.⁴⁴

The meeting was open to the public, the information was of public interest and there was no specific provision prohibiting the recording of the discussion. Thus, in this case, there would be no action against Maria.

III. Metalegal formants

We have not found any similar cases in Spain. However, decisions on cases relating to the broadcasting of recorded private conversations, such as the *STS*, 14 May 2001,⁴⁵ reiterate that only the recording of conversations relating to private life is prohibited.

Switzerland

I. Operative rules

The committee members have no legal recourse to force Maria to hand over the recording.

II. Descriptive formants

The protection afforded by Art. 28 *CC* generally only covers information related to private or intimate life. This information is not supposed to

⁴⁴ 'The following will be considered an illegitimate interference with the right to honour, privacy and own image: ... (2) to use any equipment to know about the private life of people, their statements or private letters not addressed to who is using this equipment, as well as the recording, reproducing or registering thereof.'

⁴⁵ *RJ* 6494.

be known by a large part of the general public, in contrast with information related to public life.

In this case, the meeting was open to the general population and its subject was in the public interest. As a result, the information released during the meeting must be considered part of the public domain. According to case law such information may not only be known by anyone, but may also be released without authorisation.⁴⁶ Thus, Art. 28 CC may not be invoked. The same holds true for recorded comments made by any other participants during the course of the meeting.

The result might have been different if a private association had held the meeting. In fact, members' activities that are not public are considered part of their private spheres.⁴⁷

III. Metalegal formants

Recording a private conversation without the consent of the participants constitutes an offence according to Art. 173^{ter} of the Swiss Criminal Code. Even a conversation held in a large assembly is considered private if the organisers have taken special measures to prevent third parties attending. Hence, it is the context in which the conversation takes place that matters. In the case at hand, the committee meeting was open to the public. Therefore, it is a public conversation and recording it is neither an infringement of personality rights nor an offence in criminal law.

Comparative remarks

This case deals with a conflict between a special personality interest, the 'right to one's own spoken word', and the freedom of information in matters of public interest. The core question here is whether and to what extent European private laws protect a person's interest in deciding about the recording and the use of his or her public speech. In the present case, speeches are delivered in a committee meeting open to the public, on a topic which is in the public interest. Maria secretly recorded the speeches. These circumstances may be decisive in order to question the lawfulness of her conduct. The committee members might have a legitimate interest in knowing in advance whether or not their speeches are recorded. Indeed, people usually speak less freely if they know that each single word they say

⁴⁶ ATF/BGE 97 II 97 c. 3, JdT 1972 I 242. ⁴⁷ *Ibid.*

is being recorded and possibly may be reproduced at any time before an audience in the future.

I. Prevalent solution: no claim

In the majority of the legal systems considered, the committee members will not have any claim against Maria since the meeting was open to the public. Anyone could hear the speeches, and no private information was at stake. A 'right to one's own spoken word', or a correspondent personality interest, would only enjoy protection in the context of a private or confidential speech, which may only include the meetings of administrative bodies when these are not open to the public.

In some countries, such as Belgium, the unrestricted right to reproduce and publish speeches delivered in meetings of representative assemblies is granted by statute. In other countries such as England, France, Finland, Greece, Ireland, the Netherlands, Portugal, Spain and Switzerland, the lawfulness of Maria's recording emerges *a contrario*, as the requirements of privacy and confidentiality are not met in the case at hand.

II. Possible claims of the committee members in the individual countries

In Austria, Germany, Italy and Scotland the committee members could possibly have a claim against Maria. In this regard, three different models can be outlined:

- In Austria and Germany, damages and an injunction would be granted on the basis of the general law of delict applicable where the violation of personality rights occurs (see Cases 1 and 5). Austrian and German courts and scholars have acknowledged the 'right to one's own spoken word' as a personality right under § 823(1) *BGB* and § 16 *ABG*. This right includes the power to decide whether or not one's own voice may be recorded. However, it is unclear to what extent this right is touched upon in cases of speeches open to the public.
- In Italy, Maria could not be ordered to hand over the tape; however an injunction and other specific committee member claims (but not damages) could arise from data protection law. For example, the committee members have a right to access the recordings of their speeches, they can request the erasure of unnecessary information, the modification of incorrect data, the integration of incomplete data, and on justified grounds they can also oppose the data processing as a whole.

- In Scotland, the equitable doctrine of breach of confidence applies (see Case 5). A balance needs to be made between the public access to information and the need to maintain confidentiality in so far as it serves the purposes of good administration. In this balancing, the public interest would probably prevail.

18 Case 15: ‘Light cigarettes reduce the risk of cancer’

Case

In an advertisement for ‘light’ cigarettes, Dr Smith was quoted as saying: ‘Light cigarettes reduce the risk of cancer by up to 50%.’ The doctor’s opinion was authentic; he had uttered these words at a scientific conference. But Dr Smith had always been a fierce opponent of smoking in general. Does the doctor have any claim against the tobacco company?

Discussions

Austria

I. Operative rules

Dr Smith can claim damages for economic and, in the case of gross negligence or intent, non-economic loss.

II. Descriptive formants

According to prevailing opinion, mentioning someone’s name in a commercial is not an arrogation of the name under § 43 ABGB (protection of the name)¹ because the producer of the commercial actually intended the product to be associated with this particular person and so the name is used as a mark of that person in a correct manner.²

¹ § 43 ABGB states: ‘If the right of any person to use his name is contested, or if any person is harmed by the unauthorised use of his name (assumed name), he may proceed to enjoin such interference and, in case of fault, to collect damages’. OGH ÖBl 1998, 298; OLG Wien, MR 1986/4, 19; J. Aicher in P. Rummel, *Kommentar zum ABGB I* (3rd edn., Vienna: 2000) § 43 no. 10; for Germany see BGHZ 30, 10.

² OLG Wien MR 1986/4, 19; H. Koziol, *Österreichisches Haftpflichtrecht II* (2nd edn., Vienna: 1984) 10.

However, another personality right, derived from § 16 together with § 43 and § 1330 ABGB, called the 'right to not be mentioned by name' (*Recht auf Namensanonymität*),³ is applicable in such a constellation.

By stating a person's name in a commercial, the audience could be under the impression that the name has been made available to the concerned company for such purposes. The right to decide if the name of a person should be used in a commercial has to be strictly reserved to that particular person.⁴

Moreover, in our case, the product could be classified as offensive due to the fact that many people hold cigarettes – as a carcinogenic product – in low regard. To make matters worse, Dr Smith is a fierce opponent of smoking. The commercial objectively caused the wrong impression that he allowed his name and his statement to be used in return for remuneration. As a consequence, his reputation was injured. On the one hand, his chance to make any future commercials was affected, and on the other hand his public reputation and his reputation amongst scientific colleagues was affected.⁵

§ 1330, subs. 2 ABGB, which contains a specific provision to protect one's 'economic reputation'⁶ (reflected in one's creditworthiness, earnings and advancement in profession), is not applicable, given that this regulation explicitly requires a fallacious infringement.⁷

Moreover, the use of the statement infringes the right to one's own spoken words. Although the statement was made in public, protection is granted because the statement was modified and taken out of its context.⁸

In connection with unauthorised commercials, a person's degree of fame has to be considered as 'property' under § 1041 ABGB.⁹ Thus, Dr Smith can make a claim under the law of unjust enrichment.¹⁰ The

³ J. Aicher in P. Rummel, *Kommentar* § 16 no. 23; H. Koziol and A. Warzilek, 'Austrian Country Report' nos. 40 *et seq.* with further ref. in H. Koziol and A. Warzilek, *The Protection of Personality Rights against Invasions by Mass Media* (New York/Vienna: 2005).

⁴ OLG Wien MR 1986/4, 19; see also Cases 10 and 11.

⁵ *Ibid.* at 20. ⁶ See Case 1.

⁷ According to this provision, only pecuniary damages are compensated. See Case 1; furthermore M. Hinteregger, 'Der Schutz der Privatsphäre durch das österreichische Schadenersatzrecht – de lege lata et de lege ferenda' in Bundesministerium für Justiz (ed.), *Aktuelle Entwicklungen im Schadenersatzrecht* (Vienna: 2002) 168.

⁸ See Case 14.

⁹ OGH ÖBl 1991, 40; MR 1995, 109 = ÖBl 1995, 284; ÖBl 1998, 300; see also Cases 10 and 11.

¹⁰ If Dr Smith was not famous, the OGH would not grant this claim; see Cases 10, 11 and 13.

cigarette company received financial benefit by using Dr Smith's name, since they saved money by not paying a licence fee.

It is not possible that Dr Smith could alternatively ask for this hypothetical licence fee as pecuniary loss under the law of torts (§ 1295 *et seq.* ABGB).¹¹ In contrast, other pecuniary losses (e.g. loss of income as a result of the fact that his clients do not trust him any longer) could definitely be substituted under §§ 1295 *et seq.* ABGB, the general provisions of tort law.¹²

If the tortfeasor acted with gross negligence, Dr Smith could possibly ask for compensation of non-pecuniary harm according to §§ 1323, 1324.¹³

III. Metalegal formants

In contrast to the German *BGH*,¹⁴ for the Austrian courts¹⁵ it is decisive whether the audience is under the wrong impression that the famous person concerned made his/her name available for the commercial (on receipt of payment). The more generous German approach should be favoured.

Belgium

I. Operative rules

Dr Smith can claim for damages and injunction.

II. Descriptive formants

Arts. 21 and 22 of the Copyright Act provide for the right to quote (scientific) works of literature.¹⁶ However, this right only applies to quotations which have exploratory purposes or those for the purpose of criticism or public debate, education or scientific research. Other quotations require the author's consent.

This protection applies to *spoken* words. Art. 8 of the Copyright Act defines a work of literature – which includes scientific works – as, *inter*

¹¹ See Cases 10 and 11.

¹² In respect of personality infringements it is usually very difficult for the claimant to prove such loss.

¹³ See Cases 11, 14.

¹⁴ BGHZ 30, 13. For the BGH it is enough that there are 'instinctive associations of ideas between the involved person and the product'.

¹⁵ OGH ÖBl 1998, 299 *et seq.*; OLG Wien MR 1986/4, 20.

¹⁶ D. Voorhoof, 'Letterkundige werken. Wetenschappelijke werken. Fotokopie. Leenrecht' in F. Gotzen (ed.), *Belgisch auteursrecht van oud naar nieuw – Le renouveau du droit d'auteur en Belgique* (Brussels: 1996) 153.

alia, verbal or spoken expressions of thought, lessons, lectures, speeches and sermons. The free reproduction of speeches in public assemblies does not apply to lectures or conferences.

In addition, the name (and fame) of a scientist cannot be used for commercial purposes without his/her consent. The President of the Antwerp Civil Court ruled in a similar fashion in a case involving a Belgian minister. An advertisement (mis)used one of that minister's policy documents, referred to her by name and included a photo.¹⁷

Finally, the doctor in this case can refer to his moral right not to be identified with a commercial product.

For all these reasons, he can seek an injunction and sue for damages for non-economic loss.

England

I. Operative rules

It is possible that Dr Smith has a claim in defamation against the tobacco company.

II. Descriptive formants

True words may still be defamatory if placed in a context where they lower the opinion of the claimant in the minds of right-thinking people generally. In order to do this it will have to be shown that the claimant was a fierce opponent of the tobacco industry and the impression given by the statement was that he had changed his opinion or was in some way endorsing light cigarettes.¹⁸

Finland

I. Operative rules

Dr Smith can claim for an injunction at the Market Court and probably for damages at a local court.

II. Descriptive formants

Opinion in legal doctrine is that the individual has a right to decide whether he/she is cited in an advertisement or not.¹⁹ As the tobacco

¹⁷ Civil court Antwerp (President), 22 May 2001, *AM* 2002, 170.

¹⁸ *Tolley v. J.S. Fry & Sons Ltd* [1931] AC 333.

¹⁹ Kempainen, 'Henkilön ja henkilön kuvan käyttö mainonnassa ja tiedotusvälineissä', in Tommila (ed.), *Tekijänoikeuskysymykset markkinoinnissa* (Loimaa: 1986) 80-1.

company has not asked Dr Smith for permission to use this statement, he has the possibility to request an injunction. There is no possibility for a private person to ask for an injunction at the Market Court, only a local court can grant an injunction to a private person. If Dr Smith can be considered as a person acting within his business capacity, he can ask for an injunction at the Market Court.

The possibility of obtaining damages depends on whether the special grounds as stated in Ch. 5, s. 1 of the Finnish Tort Liability Act exist: the prerequisite for damages – when the act causing pure economic loss is not a crime – is that there are especially weighty reasons for compensation. As was stated in Case 7, it is unclear what constitutes an especially weighty reason.

Furthermore, the quotation can constitute a violation of Dr Smith's honour. In that situation, the case will be judged as in Case 1.

France

I. Operative rules

Dr Smith can bring a cause of action against the tobacco company on the basis of the general rules of tort liability and will probably be granted damages in reparation of non-economic loss. It is not certain on the other hand whether or not he will be able to obtain an injunction against the advertisement.

II. Descriptive formants

Quoting the words that Dr Smith stated during a scientific conference in the advertisement for the 'light' cigarettes cannot be seen as an infringement of his right of privacy. The citation faithfully repeats the exact statement made by Dr Smith. Thus, he cannot argue that his statements as such were somehow twisted or distorted.

However, Dr Smith can blame the tobacco company for linking his statements to the advertisement against his will, i.e. not only for using his name and scientific reputation for commercial purposes, but also for altering his personality in the eyes of the public by taking his statements out of context. Dr Smith cannot base his action on the right to his own name in so far as the commercial use of his name alone is not susceptible of injuring his personality, having regard to the fact that his name is a common one which excludes all risk of confusion.

French private law does not recognise a right of protection of reputation nor a general right of personality. Thus, Dr Smith's action can

only be based on the principles of tort law, i.e. on Art. 1382 Civil Code.²⁰ However, the applicability of this provision requires an act which can be characterised as a 'fault' and which causes harm. In relation to fault, it is probable that the French courts will consider that this is constituted by the distortion of Dr Smith's personality by the cigarette manufacturer. In relation to harm, it is even more important that Dr Smith is a fierce opponent of smoking in general. Thus, it is likely that the French courts will award damages to Dr Smith to compensate his non-economic loss. On the other hand, it is not certain whether Dr Smith can obtain an injunction against the broadcasting of the advertisement since French judges often consider that damages are sufficient in such cases.

Germany

I. Operative rules

Dr Smith can claim an injunction and damages including compensation for non-economic loss.

II. Descriptive formants

The right of identity is not merely infringed by the distortion of the truth but also by the distortion of the context in which a true statement has been expressed.²¹ A distortion of truth will result in a violation of the right to identity if an ordinary person sees or hears the advertisement and gets the impression that Dr Smith is a supporter of 'light cigarettes'.

The citation cannot be legitimated by freedom of expression (Art. 5(1) GG). In principle, companies may possess this basic right (*cf.* Art. 19(3) GG), but the use of personal attributes for commercial purposes is not legitimated by Art. 5(1) GG in cases where the advertisement is not related to a service or product made or willingly distributed by the person whose attributes are being used.²² Therefore, citations taken from a conference statement may be used to commercialise a book which the person has written. If, as in this case, the cited person has no link to the product, the misleading combination of both the personal features and the product gives rise to an exclusion of the press privilege. Therefore,

²⁰ Mestre, 'La protection, indépendante du droit de réponse, des personnes physiques et des personnes morales contre l'altération de leur personnalité aux yeux du public' (1974) *JCP I*, 2623.

²¹ BGH ZUM-RD 2008, 117.

²² *Cf.* Case 10.

Dr Smith can claim an injunction against the further publication of the advertisement. As the use of his personal attributes is intentional because there was clear knowledge about the lack of consent, and as this gravely affects his professional position, a mere correction will not be able to repair the damage which has been done. Therefore, courts would also grant monetary compensation. The fear of deterring free expression does not exist with respect to commercial speech.

Greece

I. Operative rules

Dr Smith can sue the tobacco company for damages and an injunction.

II. Descriptive formants

In this case, the statement is used (a) without the consent of the doctor, (b) under such circumstances that one may presume that he is a supporter of cigarettes and the whole advertisement took place with his participation and approval, and (c) is harmful to his scientific reputation, showing an inconsistency in his opinion.

Dr Smith has a claim against the tobacco company for compensation of non-economic loss due to an infringement of his personality right. The doctor can claim for the cessation of the offence and the non-recurrence thereof in the future. He can also claim for reparation in kind. This can be achieved through a rectification by the press explaining that this sentence does not represent the doctor's personal opinion.

Ireland

I. Operative rules

Dr Smith might have an action in defamation depending on the context in which the statement was made by the tobacco company.

II. Descriptive formants

Dr Smith could possibly claim that the statement was defamatory as it portrayed him in a false light. If the statement was taken out of context and it falsely led ordinary reasonable readers to believe that Dr Smith was a hypocrite he could have an action in defamation. This is known as innuendo.²³ Dr Smith could argue that although the published

²³ *Tolley v. Fry & Sons Ltd, Berry v. The Irish Times* [1973] IR 368.

statement is authentic, the insertion of it in an advertisement promoting cigarettes could lead the public to believe that Dr Smith was hypocritical, i.e. espousing views which are anti-smoking, while accepting payment from a tobacco company to promote their product.²⁴ The burden of proof would be on Dr Smith to establish that the words had such a secondary meaning.²⁵

Italy

I. Operative rules

Dr Smith can sue the tobacco company for an injunction, damages and rectification. He also can make a claim for the publication of the court's judgment in one or more newspapers.

II. Descriptive formants

In 1974 a new personality right was born in Italian case law: the right to personal identity.²⁶

This right was originally created in order to extend the applicability of the remedies provided by Arts. 7 and 10 CC (right to one's own name and image) to cases where the picture of a person was used for purposes which were different from those the person had allowed the publication for.²⁷ Nevertheless, the new right then came to encompass all types of cases where one's personal data was reported incorrectly or reported so as to put the person in a false light.

Personal identity is commonly defined as the projection of a person in the context of his/her social relationships, ideas, experiences and moral, social, political beliefs. It can be infringed by attributing acts to the person he/she never committed, opinions he/she never expressed, qualifications he/she never possessed, etc., regardless of whether or not this attribution is detrimental to the person's honour and reputation.²⁸

²⁴ *Ibid.* ²⁵ *Berry v. The Irish Times*.

²⁶ However, the preparation for this judicial development took place through discussion in academic literature since the late 1940s: see A. De Cupis, *Il diritto all'identità personale* (Milan: 1949).

²⁷ The first judgment which acknowledged this doctrine is Pret. Roma 6 May 1974, *Foro it.* 1974, I, 1806. A married couple had allowed the publication of their picture in a farm review. Then the same picture was published, without the couple's knowledge, in a referendum poster advertising against divorce. The couple, who were actually in favour of divorce, successfully sued the committee which had issued the poster for injunction and damages under Art. 10 CC (right to image).

²⁸ See e.g. Trib. Roma 27 Mar. 1984, *NGCC* 1985, I, 71 with commentary by M. Dogliotti. On the right to personal identity, see A. De Cupis, *I diritti della personalità, Trattato di*

In 1985, a case perfectly similar to the present one was decided by the *Corte di cassazione*.²⁹ Some phrases from an interview given by the director of the National Institute for the study and treatment of tumours were used by a tobacco company to advertise 'light' cigarettes. In the opinion of the Court, such a use of the interview distorted both the social image of the doctor and the Institute, who were constantly engaged in the prevention of tumours and the fight against smoking, and therefore constituted an infringement to their right to personal identity. Accordingly, the Court held the remedies of injunction, damages and publication of the judgment in one or more newspapers to be applicable on the analogy of Art. 7 CC (right to one's own name). Moreover, it held Art. 8 Press Act (right to rectification) to be directly applicable.

In relation to the legal basis of the right to personal identity, in the 1985 case the Supreme Court already deduced this right from the overall protection of personality granted by Art. 2 Cost. This relationship was better specified in 1996, as the Court, following scholars' suggestions, confirmed the right to personal identity as being directly based on Art. 2 Cost. and thus held the statutory remedies protecting name, image, copyright, etc. to be directly (no longer analogically) applicable because the relevant statutory provision must be reinterpreted in light of the Constitution.³⁰ Now the right to personal identity is expressly enshrined in the Data Protection Code (Art. 2 DPC).³¹

With regard to recoverable damages, these include non-pecuniary loss (according to the new interpretation of Art. 2059 CC supported by the Supreme Court in 2003).³²

diritto civile e commerciale già diretto da A. Cicu e F. Messineo e continuato da L. Mengoni, IV (2nd edn., Milan: 1982); F. Macioce, *Tutela civile della persona e identità personale* (Padova: 1984); V. Scalisi, 'Identità personale e danno non patrimoniale' (1984) *Riv. dir. civ.* I, 433 at 437; V. Zeno-Zencovich, 'Identità personale', in *Dig. disc. priv. sez. civ.*, IX (Turin: 1993) 294.

²⁹ Cass. 22 Jun. 1985 no. 3769, *Foro it.* 1985, I, 221.

³⁰ Cass. 7 Feb. 1996 no. 978, *Foro it.* 1996, I, 1253.

³¹ On the right to personal identity in the framework of data protection law see S. Rodotà, 'Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali' (1997) *Rivista critica del diritto privato* 583; G. Cassano, 'Il risarcimento del danno da lesione dell'identità personale' (1999) *Dir. inf.* 107.

³² Cass. 31 May 2003 no. 8828; Cass. 31 May 2003 no. 8827; Cass. 12 May 2003 no. 7281; Cass. 12 May 2003, no. 7283, *Foro it.* 2003, I, 2272; see also Corte Cost. 11 Jul. 2003 no. 233, *Foro it.* 2003, I, 2201.

The Netherlands

I. Operative rules

The professor can claim an injunction, rectification and damages for economic and non-economic loss.

II. Descriptive formants

Dutch law recognises a special provision with regard to misleading publicity (Art. 6:194 *BW*). This provision defines the unlawfulness of advertising conduct vis-à-vis consumers and co-competitors. It does not apply in relation to a person whose scientific or professional declarations have been used in a misleading way.

Firstly, the doctor has a claim if the advertisement is a breach of a rule of unwritten law pertaining to proper social conduct and thus is harmful to him. Disregarding the substance of what has been claimed by the tobacco company, the professor has an interest in his opinions not being used for commercial purposes without his consent. The commercial context (Case 1, circumstance (d)) can harm the good reputation of the professor and therefore his personality.

Secondly, it is unlawful to put the sentence in a context that is misleading to the public.

Both grounds can be used by the professor for a claim. He can ask for an injunction against the publication of the advert in the future. He can also ask for rectification with regard to the adverts that have already been published. Moreover, he can sue the tobacco company for both economic and non-economic damages. In relation to the economic damages he has to prove that he suffered economic loss as a consequence of the advert. With regard to the damages for non-economic loss he has to prove that his honour or reputation has been impugned. The damages will be assessed fairly (Art. 6:106 *BW*).

Portugal

I. Operative rules

The doctor may file for an injunction and claim compensation from the tobacco company.

II. Descriptive formants

Although the phrase was authentic and its meaning was not manipulated in any way, there is a difference between the context in which it was said and the one in which it was published. Merely

uttering some words at a scientific conference is not the same thing as publishing the same words, out of their original context, in a commercial advertisement. In the context of a commercial advertisement for 'light' cigarettes, people will probably read this phrase as support for 'light' cigarette smoking. This is contrary to the position of Dr Smith who is a fierce campaigner against smoking any kind of cigarettes, and distorts his personal public image. This advertisement was intentionally meant, and induces the public to conclude that Dr Smith agreed to participate in a campaign for smoking, in a contradictory hypocritical way. This seriously damages his reputation as a doctor and as a fierce campaigner against smoking causes him personal moral suffering. In conclusion, the publication of this statement does have a negative effect on his professional, scientific and personal reputation, since it distorts his public image. Therefore, Dr Smith's right to honour is harmed (Art. 26(1) CRP and Art. 70(1) CC).

In addition, both the commercial use of Dr Smith's words and the reference to him, without his consent, are also unlawful on other legal grounds. As already mentioned in Case 10, the *CPub* considers an advertisement wrongful if it contains words from someone who has not given his/her consent to that use (Art. 7(2), para. (e) *CPub*). Therefore, if Dr Smith has not given his consent, the use of his words in an advertising campaign is unlawful.

Since there is wrongful conduct and damages can be recovered, Dr Smith may file for an injunction to stop the use of his statement (Art. 70(2) CC), and may claim compensation (certainly for non-economic loss, and possibly for economic loss if the harm to his reputation results in him losing his job, clients, research funds or any other economic income) (Arts. 70, 483 and 496 CC).

Scotland

I. Operative rules

Dr Smith may have a claim in defamation and passing off.

II. Descriptive formants

Dr Smith's medically correct statement has been taken out of context for use in (unauthorised) commercial advertising on behalf of the tobacco industry which he is fiercely opposed to. This creates the impression that Dr Smith has both consented to the advert and agrees with its content. Two major issues are raised: firstly, defamation,

i.e. the use of a correct statement in a new context that gives rise to a different innuendo or meaning. Although the statement is correct, its new context puts the statement and its author in a wrong or false light, thus causing actual or potential injury to his personal feelings and professional reputation. Secondly, the claim of passing off, i.e. the commercial appropriation of Dr Smith's personality and reputation for use in a commercial (advertising) context is raised. Passing off is a form of economic tort, with particular prerequisites in relation to its applicability. The laws of both Scotland and England are the same in relation to passing off; the distinctions in relation to defamation have already been pointed out.

The general principles of the law of defamation apply to the situation outlined here. Within the scope of the summary application under s. 7 of the Defamation Act 1996, a judge will decide whether Dr Smith has an arguable case in defamation, i.e. whether he has been lowered in the eyes of the public by the use of a statement likely to cause damage to his professional reputation. If the answer is positive, the case can either proceed to settlement under the *offer of amends* provisions of the 1996 Act or alternatively proceed to trial.

A parallel claim based on the delict of *passing off* can also be considered. Passing off is a remedy based on the notion of injury to personal reputation and injury to commercial goodwill.³³ It allows traders and, to a more limited extent the professional community, to prevent the (mis)appropriation of their reputation, be it through photography, misuse of the company name or goodwill. English authorities clearly indicate that the claim is based solely on the likelihood of confusion in the public eye.³⁴ The court will award injunctions in passing off cases where confusion in the public eye (as to ownership of the trade or good in question) can be proved. This explains the paramount use of passing off as a common law form of prevention of *unfair* or *misleading* advertising or trading.

Unlike the US jurisdictions, there is no independent single tort or category of *appropriation of personality* in either Scots or English law. Nor is there likely to be a pervasive element of privacy in this case.

³³ *Sim v. H.J. Heinz & Co Ltd* [1959] 1 WLR 313.

³⁴ A passing off claim was successful in *Clark v. Associated Newspapers* [1998] RPC 261, where the court granted an injunction against the *Evening Standard* to prevent it from publishing fake imitations of the plaintiff's own publication. The fact that it was an imitation was insufficient to prevent the claim. See now *Irvine v. Talksport Ltd* [2003] EWCA Civ 423.

Dr Smith is an outspoken opponent of the tobacco industry and through the advertisement with which he is now associated there is a new slant on Dr Smith's reputation. English, and indeed Scots authorities are reserved about conceding passing off actions where there is no clear economic reputation at stake. As was set out in Lord Diplock's classic passing off speech in *Warnink v. Tounent*,³⁵ the law requires the following elements to be present in order to constitute a valid cause of action:³⁶

- (1) misrepresentation;
- (2) made by a trader in the course of trade;
- (3) to prospective customers or consumers of goods or services supplied by him;
- (4) foreseeably calculated to injure the business or good will of another trader;
- (5) resulting in actual damage to the business or good will.

This list has since been reduced to a classical trinity³⁷ of

- (a) reputation acquired by pursuer in goods, name or mark;
- (b) misrepresentation by defendant leading to confusion or deception causing;
- (c) damage to plaintiff.³⁸

The courts continue to interpret economic reputation narrowly. There must be goodwill and reputation if a claim is to be met. This causes problems in practice in that the notion of reputation is much broader than goodwill and is not necessarily seen by Scots or English law as linked to a property right in goodwill.³⁹ Drawing the line between personal and commercial reputation is difficult, particularly when dealing with a professional reputation such as Dr Smith's: it is both an economic asset and an aspect of his dignity. The notion of injury to reputation is flexible and certainly in libel law, according to Lord Atkin in *Sim v. Stretch*,⁴⁰ is to be understood as follows: 'Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?'

³⁵ [1979] AC 731.

³⁶ Beverly-Smith, *The Commercial Appropriation of Personality* (Cambridge: 2002) 60.

³⁷ *Ibid.*

³⁸ *Reckit & Coleman Ltd v. Bordan Inc* [1990] 1 WLR 491, 499; *Consorzio del Prosciutto di Parma v. Marks & Spencer plc* [1991] RPC 351, 368.

³⁹ *Anheuser Bush Inc. v. Budwar NP* [1984] FSR 413.

⁴⁰ [1936] 52 TLR 669.

Reputation in *passing off* cases differs markedly from reputation in *defamation* cases. Cases of libel or defamation are actionable *per se* without the need to show that special damage has been caused. Damage to reputation and goodwill in a passing off action is only actionable where there *is or is likely* to be damage. In this respect there is a distinction between reputation and goodwill which needs to be clarified on Dr Smith's behalf. Nineteenth-century English authorities show the difficulties with passing off claims: where physicians were named in connection with advertisements for medical products, the courts refused relief under the tort of passing off. Unless clear economic reputations can be proven, the claim will fail.⁴¹

The more modern authority in *Sim v. H.J. Heinz & Co Ltd*⁴² is an example of an attempt to sue under both defamation and passing off. This case has been discussed in connection with Case 11 and shows the difficulties a pursuer must overcome in order to bring a successful action.

Spain

I. Operative rules

Dr Smith can claim for the protection of his honour and can demand damages for the unlawful interference caused by his association with the publicity of the campaign in favour of light cigarettes.

II. Descriptive formants

As a general principle in democratic societies, science is seen as a common service and a public good and nobody can deprive any citizen of the general knowledge provided by scientific discoveries. In that sense, freedom of speech and information is imposed. The use of such information, however, is limited to the general limits in the scientific community: for example, use for quotation or learned explanation. In this case, Dr Smith's statement has not been published for scientific purposes, but for advertising purposes. Within the meaning of Art. 7.6 LO 1/1982,⁴³ this is lawful if the holder of the right has given his consent. However, that is not the case here.

⁴¹ *Clark v. Freeman* (1848) 11 BEAV 112 (50 REP 759); *Williams v. Hodge* (1887) 4 TLR 175.

⁴² [1959] 1 WLR 313; see also the successful claim in *Irvine v. Talksport Ltd*.

⁴³ According to Art. 7.6 of LO 1/1982, it is an illegitimate interference 'to use the name, voice or image of a person for publicity, commercial or similar purposes'.

Switzerland

I. Operative rules

Because the distribution of this advertisement puts Dr Smith in a false light it violates his personality rights. Thus, he may make use of the remedies provided for by Arts. 28 *et seq.* CC.

II. Descriptive formants

Behaviour or declarations that present an inaccurate image of an individual and make him or her appear in a false light unlawfully infringe on the personality of that individual.⁴⁴ The same is true where quotes are taken out of their original context and reproduced under different circumstances which distort their original meaning.⁴⁵ The quote taken from Dr Smith during a scientific conference has been used in order to serve interests that are the opposite to those which he defends. The advertisement suggests that this doctor, known for being a fervent member of the fight against tobacco, has changed his opinion and now touts the virtues of light cigarettes. As such, the advertisement puts the doctor's quote in a false light and is thereby unlawful.

Thus, the doctor may request a declaratory judgment stating that the infringement is unlawful and an injunction against the further distribution of the advertisement (Art. 28a CC). He may also demand damages for economic harm (Art. 41 CO). However, he will have to establish that he has suffered economic loss and that this was caused by the advertisement. The loss may consist of the doctor's loss of patients. In addition, the doctor could bring a claim for restitution of profits earned (Art. 42, para. 3 CO). Then, he would have to prove that the profits earned by the cigarette company resulted from the use of his quotation. Finally, he could request damages for pain and suffering (Art. 49 CO) to the extent that he can prove that the infringement resulting from the distribution of the advertisement was particularly egregious.

III. Metalegal formants

Not long ago, a Swedish doctor and researcher associated with the tobacco industry was employed by a Swiss university. He worked under various titles for more than twenty-five years and in 2001 he

⁴⁴ R. Vito, *Schweizerisches Haftpflichtrecht* (Zurich: 2002) n. 462.

⁴⁵ *Ibid.*, n. 463.

was denounced by two militant supporters of the anti-tobacco cause and legal proceedings were launched. They revealed the close, secret ties that connected the researcher to a multinational cigarette corporation. For years, these relations had biased the results of his studies on second-hand smoke. On numerous occasions the said researcher had claimed that no link could be established between exposing children to smoke and respiratory illnesses and infections.

Comparative remarks

This case deals less with the boundaries of self-determination in respect of one's own spoken words and more with the authentic presentation of a person in the public domain. A statement made by Dr Smith is used for commercial purposes without his consent. His words are quoted in their true form. Nevertheless, they are taken out of their original context and made to serve an objective (selling cigarettes) which completely contradicts his objectives, opinions and beliefs.

In all private law systems considered, Dr Smith's interest in not being presented in public against his will as a supporter of 'light' cigarettes is held to be worthy of legal protection. He will have at least a claim for damages against the tobacco company (see II below).

I. Legal bases

The answers to this case in the individual legal systems can roughly be systematised according to four models - the defamation model, the personal identity model, the mixed model and the copyright model.

1. The defamation model

In England, Scotland and Ireland, this case is dealt with under the framework of the common law of defamation (see Case 1) and passing off (see Case 10). However, the courts are reserved about allowing passing off actions where there is no clear economic reputation at stake. In this case, the advertisement may have injured Dr Smith's professional reputation, but his interest in not being publicly presented as a supporter of light cigarettes is not primarily commercial. Therefore, Dr Smith's passing off claim will be less likely to succeed than his defamation claim. The defamation requirements are most probably met since the advertisement created the false impression that the doctor had given his consent or that he was in some way endorsing 'light' cigarettes.

This could have lowered him in the opinion of right-thinking people, thus injuring his personal feelings and professional reputation.

Furthermore, in Spain the solution to this case clearly focuses on the law of defamation. The publication of the advertisement will be considered an unlawful infringement of Dr Smith's honour and reputation, giving rise to the civil liability of the tobacco company under the 1982 Act on the protection of one's honour, privacy and image (see Case 1).

2. The personal identity model

In Germany, Italy and Switzerland, the main focus of this case lies in the doctor's legitimate interest not to be put into a false light, regardless of any possible detriment to his honour and reputation. According to this approach, the mere fact that Dr Smith's statement was taken out of its original context, losing its original meaning and giving the false impression that he was endorsing 'light' cigarettes, amounts to a violation of his right to personality which makes the tobacco company liable under the general law of delict.

For cases of this kind, Italian scholars and courts have developed a specific doctrine: the 'right to personal identity'. This right is seen as embedded in the protection of personality under Art. 2 of the Italian Constitution. An infringement of this right occurs when acts, opinions, preferences, qualifications, etc. are attributed to a person who has never committed, expressed or possessed them. In this regard, it is sufficient that a person is associated with something – a product, a political opinion, etc. – which this person does not in fact endorse or favour. If the right to personal identity is violated, its holder may rely on any cause of action protecting one's name, image and copyright: the corresponding legal provisions are to be interpreted in the light of the Italian Constitution so as to cover these kind of cases as well.

3. The mixed model

A combined application of legal instruments protecting honour and reputation on the one hand, and self-determination regarding the use of one's name, words, etc. on the other, characterises the approach of the Austrian, Dutch, Finnish, French, Greek and Portuguese legal systems. In particular, the Austrian, Dutch and French solutions should be remarked upon.

In Austria, unlike Germany and Switzerland, the personal identity approach focusing on one's personality interest not to be portrayed in

a false light has not yet gained ground. In cases such as this, Austrian scholars invoke a plurality of personality rights such as the right to self-determination regarding the use of one's name, the right to one's spoken words, and the right to personal and professional reputation.

In the Netherlands, the liability of the tobacco company is based on the breach of a rule of unwritten law pertaining to proper social conduct, according to the general clause of the law of delict (Art. 6:162 *BW*). Dr Smith may either rely on the violation of his reputation, which also constitutes an injury to his personality, or on the fact that his words were put in a context that is misleading to the public. Both grounds can support his claim.

French law neither acknowledges a general right to personality, nor a right to reputation which goes beyond the scope of the criminal law protection of honour (see Case 1). Nevertheless, in this case the tobacco company will be liable in delict since both the use of Dr Smith's name and scientific reputation for commercial purposes and the distortion of his personality caused by taking his statements out of their original context can be considered a culpable act under the general clause of non-contractual liability (Art. 1382 *C. civ.*).

4. *The copyright model*

In Belgium, the solution of this case focuses on copyright law. Oral expressions of thoughts, lectures and speeches such as Dr Smith's statement will be considered a 'work of literature' in the sense of Art. 8 Copyright Act. Since the tobacco company quoted Dr Smith's words for purposes other than science, education or public debate, according to Arts. 21 and 22 Copyright Act the author's prior consent would have been necessary. Furthermore, Dr Smith can rely on his moral right not to be identified with a commercial product.

II. Remedies

In all legal systems, Dr Smith will be able to claim damages. In the majority of countries, compensation covers both economic and non-economic loss. In Belgium, France and Greece only non-economic loss seems recoverable. In Finland, since no criminal law provision is engaged, damages for pure economic loss can only be awarded under general tort law when there are 'especially weighty reasons for compensation' (see Case 7).

In most legal systems, Dr Smith will also be granted an injunction against the present and future publication of the advertisement. This

is certainly not true for France where the courts are reluctant to award injunctive relief in these kinds of cases.

In Finland, it would make a difference whether or not Dr Smith is acting in the course of his business or as a private person. In the first alternative he will have to claim an injunction before the Market Court, in the second alternative before the civil court.

Besides damages and injunction, in some countries Dr Smith will be entitled to additional remedies. In Greece, Italy and the Netherlands, he may obtain rectification, for example in the form of a press announcement clarifying that the statements contained in the tobacco advertisement do not represent his personal opinion. In Italy, he can also request the publication of the court judgment in one or more newspapers. In Switzerland, he may request a declaratory judgment on the unlawfulness of the advertisement.

19 Case 16: Doctor's non-disclosure of a foetal disease

Case

Bridget was pregnant. She was under the treatment of a doctor who did not inform her that her foetus had a genetic anomaly, which was likely to cause brain damage. Her child was born mentally disabled. If Bridget had known about the anomaly she would have preferred to have undergone a (legal) abortion. Can Bridget sue the doctor for damages for non-economic loss, because he deprived her of the chance to decide whether or not to have the child?

Discussions

Austria

I. Operative rules

Damages in respect of economic loss (additional maintenance costs), as well as in respect of non-economic loss (shock) could be awarded here. However, Bridget will not be compensated for non-economic harm resulting from the mere loss of autonomy.

II. Descriptive formants

Under Austrian law it is unclear whether there is a personal right to family planning¹ the infringement of which gives rise to a claim for damages in tort. As far as the rights to self-determination and free

¹ Cf. C. Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* (Vienna: 2002) 213 et seq.; H. Koziol, *Österreichisches Haftpflichtrecht I* (3rd edn., Vienna: 1997) no. 11/8; F. Bydlinski, 'Das Kind als Schadensursache im Österreichischen Recht', in U. Magnus and J. Spier, *European Tort Law, Liber amicorum for Helmut Koziol* (Frankfurt am Main: 2000) 63.

will are concerned,² claims in tort for compensation are only granted where there is intentional infringement.³

In the present case, however, there is a contractual relationship between Bridget and the doctor. The contract of medical treatment means that there is a duty on the doctor to inform the patient of any health risks (to either the mother or the foetus);⁴ this is, of course, true with respect to genetic anomalies and risks derived therefrom. Failure to inform, therefore, is a breach of contract. As a consequence, Bridget can sue the doctor under contract law, provided that the damage falls within the contract's scope of protection.⁵

In respect of this question, it must be pointed out that in the present case both pecuniary and non-pecuniary consequences follow from the existence of a disabled child, such as the obligation to provide maintenance, the shock that the mother could have suffered after realising that her child is seriously disabled and the psychological burden in caring for a disabled child.

In Austrian legal literature whether the compensation of pecuniary loss implies that a child is equated with damage was subject to much debate.⁶ The OGH held that the obligation to provide maintenance can be separated from the child itself.⁷ Therefore, this qualification of damage does not clash with the principle that human life cannot

² Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* at 215 *et seq.*

³ Cf. § 874 and § 1300 ABGB, § 105 *et seq.* StGB.

⁴ OGH JBl 1999, 593 = RdM 1999/23 (commentary by C. Kopetzki) = RdW 1999, 781 = SZ 72/91.

⁵ Koziol, *Österreichisches Haftpflichtrecht I* nos. 2/26 *et seq.*, 11/15.

⁶ Cf. E. Bernat, 'Unerwünschtes Leben, unerwünschte Geburt und Arzthaftung: der österreichische "case of first impression" vor dem Hintergrund der anglo-amerikanischen Rechtsentwicklung', in E. Bernat, E. Böhler and A. Weilingner, *Zum Recht der Wirtschaft II, Festschrift für Heinz Krejci* (Vienna: 2001) 1041; F. Bydlinski, 'Das Leben als Schaden?' (16.8.1999) *Die Presse* 8 and 'Das Kind als Schadensursache' at 29; S. Engel, 'Verletzung der ärztlichen Aufklärungspflicht - Geburt eines behinderten Kindes als ersatzfähiger Schaden der Eltern' (1999/2000) JAP 131; Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* and 'Arzthaftung infolge unerwünschter Geburt eines Kindes' (1999) *RdM* 163; G.M. Hochhalteringer, 'Stellungnahme zur Begründungsweise des OGH in der Entscheidung "Arzthaftung: Geburt eines behinderten Kindes als Schaden der Eltern"' (2000) JBl 58; R. Rebhahn, 'Schadenersatz wegen der Geburt eines nicht gewünschten Kindes?' (2000) JBl 265; B. Schilcher, 'Weiter so, verehrtes Höchstgericht' (31.7.1999) *Die Presse* 2; G. Wilhelm, 'Die versäumte Abtreibung und die Grenzen juristischen Denkens' (1999) *Ecolex* 593.

⁷ Cf. OGH JBl 1999, 593 = RdM 1999/23 (commentary by C. Kopetzki) = RdW 1999, 781 = SZ 72/91.

be regarded as damage. Consequently, at least the additional financial burden of maintaining a disabled child was held to be restitutable.⁸

It is doubtful whether the same is true in respect of the non-pecuniary harm of the parents that follows from the birth of the disabled child. It seems impossible to separate the non-pecuniary burden of caring for a disabled child from the child itself. As a consequence, a claim for compensation must be rejected,⁹ notwithstanding that the contract may aim to avoid non-pecuniary harm.¹⁰ However, the mother's shock after realising that the child is disabled would be compensated under § 1325 ABGB (pain and suffering).¹¹

Finally, the non-pecuniary loss which follows from being deprived of the chance to decide whether or not to undergo an abortion arises from the mere lack of personal autonomy. This is independent of the decision Bridget would have made if she had been informed.

Since this non-pecuniary loss is not the result of an infringement of the claimant's absolutely protected rights (such as physical integrity¹² which refers to tangible goods in the external sphere of a person), it is doubtful whether it is compensable.

Under Austrian law, compensation for non-pecuniary loss primarily means compensation for pain and suffering in terms of § 1325 ABGB. Accordingly, the OGH regularly limits compensation of non-pecuniary loss to the (few) cases in which it is regulated in express terms.¹³ Such a special regulation concerning non-pecuniary harm resulting from the loss of personal autonomy does not exist in Austrian law.

⁸ *Ibid.*

⁹ Bernat, 'Unerwünschtes Leben' at 1075 (n. 189 referring to the German decision of BGHZ 124, 128); on the contrary, see Koziol, *Österreichisches Haftpflichtrecht I* no. 11/15, who seems to take the possibility of compensation into account; see also A. Fenyves and C. Hirsch, 'Zur Deckung der Ansprüche aus "wrongful life" und "wrongful birth" in der Arzthaftpflichtversicherung' (2000) *RdM* 15.

¹⁰ OGH JBl 1999, 593 = *RdM* 1999/23 (commentary by Ch. Kopetzki) = *RdW* 1999, 781 = *SZ* 72/91.

¹¹ Bernat, 'Unerwünschtes Leben' at 1075 (n. 189); Bydlinski, 'Das Kind als Schadensursache' at 63; Fenyves and Hirsch, 'Zur Deckung der Ansprüche aus "wrongful life" und "wrongful birth"' at 15.

¹² Cf. E. Karner, *Der Ersatz ideeller Schäden bei Körperverletzung* (Vienna: 1999) 79 *et seq.*; Koziol, *Österreichisches Haftpflichtrecht I* nos. 11/7, 11/10.

¹³ The following provisions explicitly compensate non-economic loss: § 1325, § 1328, § 1328a (cf. Cases 5, 8), § 1331 ABGB; §§ 6 *et seq.* MedienG (Cf. Cases 1, 2, 5, 8), § 87 subs. 2 UrhG (cf. Cases 7, 8, 9, 10), § 16 subs. 2 UWG (cf. Case 17).

Following compelling arguments among Austrian scholars,¹⁴ the Supreme Court has recently broadened the range of protected interests:¹⁵ close relatives are awarded compensation for emotional distress resulting from the wrongful death of a family member, even if it does not lead to physical or mental harm according to § 1325 ABGB. In the case of gross negligence or intent they are compensated on the analogy of §§ 1331, 1328, 1329 ABGB and § 213a ASVG.¹⁶ A *minori ad maius*, one can assume that if ‘pure’ non-pecuniary loss (without injury to absolutely protected rights) is compensated in tort law, the more it must be compensated in contract law.¹⁷ On this basis, at least in cases of gross negligence or intent, compensation for the loss of freedom to decide does not seem to be out of reach.

However, it must be emphasised that the Supreme Court’s extension of liability takes place within strict limits. Only close relatives of the injured party can bring a claim for compensation as the harm suffered by them is grave and can be objectively estimated. These limitations keep the floodgates shut.

In respect of the harm to Bridget resulting from the loss of a chance to decide, these preconditions for compensation are not met. She does not suffer grave harm therefrom nor can it be objectively estimated.¹⁸ Her ‘damage’ is not comparable to that of the relatives of a person who is killed. As a consequence, liability for emotional distress resulting from the loss of freedom to decide has to be denied.

III. Metalegal formants

Due to fundamental changes in Austrian jurisprudence that have taken place over recent years, the problem of compensation for ‘pure’ non-pecuniary loss cannot be answered easily and requires a deeper analysis. However, without express provisions concerning a special

¹⁴ Koziol, *Österreichisches Haftpflichtrecht* I nos. 11/6, 11/14; P. Barth, ‘Hat der Patient bei eigenmächtigen medizinischen Eingriffen Anspruch auf Ersatz seines Körper- und Gesundheitsschadens?’ (1999) *RdM* 112 *et seq.*; Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* at 191 *et seq.*; E. Karner, commentary on OGH ZVR 2001, 288.

¹⁵ Cf. OGH ASoK 2001, 323 (commentary by L. Stärker) = *ecolex* 2001/235 (commentary by E. Helmich) = *JBl* 2001, 660 = *ZVR* 2001/73 (commentary by E. Karner); T. Schobel, ‘Ersatzfähigkeit reiner Trauerschäden’ (2002) *RdW* 195.

¹⁶ Cf. also Case 11.

¹⁷ F. Bydlinski, ‘Der Ersatz ideellen Schadens als sachliches und methodisches Problem’ (1965) *JBl* 251; Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* at 218; Koziol, *Österreichisches Haftpflichtrecht* I nos. 2/118, 11/13, 11/14.

¹⁸ Hirsch, *Arzthaftung bei fehlgeschlagener Familienplanung* at 218.

personality right to family planning and the legal consequences of its violation, the restrictive character of the Austrian law of compensation will prevail.

Belgium

I. Operative rules

Bridget can sue the doctor for economic loss. The question of compensation for non-economic loss is less certain, but most literature and case law is in favour of the granting of such damages.

II. Descriptive formants

The subject here is the action of the mother *iure proprio*, or the so-called *wrongful birth action*. We will only indirectly address the question of the parent's action (*qualitate qua*) or that of the child itself (*wrongful life action*).

Under Belgian law, there is no doubt that Bridget can bring a wrongful birth action against the doctor, provided that she can prove that the doctor committed a fault by not informing her and that she would have had an abortion had she known about the anomaly.¹⁹

The rights of patients are protected under the Patients Rights Act of 22 August 2002. Art. 7 prescribes that every patient has a right to information in respect of his/her state of health and the presumed ensuing developments. This right to information is not necessarily related to medical treatment. Furthermore, all medical acts require the voluntary and informed consent of the patient. His/her will must be respected at all times.

The right to information and informed consent are thus separate rights, but it is possible that both rights will sometimes overlap in practice.²⁰

There is no doubt that Bridget can claim compensation for economic loss: e.g. the costs of the (monitoring of the) pregnancy, the childbirth and the aftercare, the extra costs caused by the disability, etc.

She can also sue for damages for non-economic loss arising from the loss of the right to family planning.²¹

¹⁹ The first general and comparative study under Belgian law is that of R. Kruithof, 'Schadevergoeding wegens de geboorte van een ongewenst kind' (1986–87) *RW* 2737.

²⁰ See H. Nys, 'Geneeskunde, recht en medisch handelen', in *APR* (Ghent: 2005) 148 *et seq.*; W. Dijckhoffz, 'Het recht op informatie en geïnformeerde toestemming' (2003–04) *T. Gez./Rev. de Santé*.

²¹ Kruithof, 'Schadevergoeding wegens de geboorte van een ongewenst kind'.

Sometimes, it is contested that a parent can claim money for loss (being confronted with a (disabled) child or seeing that (disabled) child suffer). 'A child is a blessing' and the existence of such a child (with a disability) cannot be considered a loss.²² However, this seems to be the minority opinion²³ and conflicts with the acceptance of economic loss.

To put it succinctly, (the disability of) a child can result in loss for the parent; therefore, compensation is not contrary to public policy. Parents have a right to family planning.

Even the French '*anti-Perruche*'-law n° 2002-303 of 4 March 2002 relative aux droits des malades et à la qualité du système de santé,²⁴ passed in the aftermath of the Perruche case,²⁵ explicitly provides for a wrongful birth action. However, it excludes compensation for the extra costs of the disability, whereas in Belgium these costs are compensated.

England

I. Operative rules

It is uncertain whether Bridget can claim in this situation.

II. Descriptive formants

The doctor's failure to inform Bridget of the genetic anomaly is undoubtedly negligent giving rise to a claim in damages. No damages are awarded for having a healthy baby, but damages covering the costs of a disabled baby are encompassed.²⁶ However, can damages be recovered for depriving Bridget of the chance to decide whether or not to have the child? The case of *Rees v. Darlington Memorial Hospital NHS Trust*²⁷ concerned a disabled mother whose failed sterilisation led to her having a baby. She was awarded compensation for not being able to have the family life she had planned. The same principle of choice could be extended to the present circumstances; however, there are differences

²² Civil court Courtrai 3 Jan. 1989, RW 1988-89, 1171.

²³ Indeed more recently for Belgium see Civil court Brussels 7 Jun. 2002, *TBBR* 2002, 483 and on the more liberal approach, see G. Génicot, 'Le dommage constitué par la naissance d'un enfant handicapé' (2002) *TBBR* 79, nos. 10-16. From a comparative point of view, see F. Keuleneer, 'Wrongful birth, Liability and Idemnification: An Uneasy Fit', Case Note on Hoge Raad 21 Feb. 1997, *BVerfG* (Erster Senat) 12 Nov. 1997 and *BVerfG* (Zweiter Senat) 22 Oct. 1997, (1999) 2 *ERPL* 241-56.

²⁴ *JO* n° 54 of 5 Mar. 2002.

²⁵ Cass. fr. 17 Nov. 2000, www.courdecassation.fr.

²⁶ *Macfarlane v. Tayside Health Board* [2000] 2 AC 59.

²⁷ *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

which may make recovery difficult. In *Rees*, the woman had not wanted any children; Bridget's complaint is not that she had a child, but that she was not able to make a fully informed choice whether or not to go ahead with the pregnancy. There would also be the possibility of the defence investigating what her reaction would have been as if it can be shown that she would most likely have continued with the pregnancy then there would be no actionable damage.

Finland

I. Operative rules

There is probably no possibility to sue the doctor for non-economic loss.

II. Descriptive formants

According to s. 5 of the Finnish Act on the Position and Rights of the Patients, a patient has the right to receive all information about his or her health. The doctor's failure to provide information about the foetus can be considered as being contrary to this provision. The question is, thus, whether Bridget has suffered any non-economic loss as a result of being deprived of her right to decide whether or not to give birth to the child. As has been stated in connection with several previous cases, the possibility of obtaining damages for anguish is quite limited. Compensation for anguish is granted according to Ch 5, s. 6 of the Finnish Tort Liability Act if the liberty, peace, honour or private life of a person has been offended through a punishable offence. The Finnish Supreme Court has been rather restrictive in granting damages for anguish without a legal provision²⁸ and therefore it is very unlikely that Bridget would be granted a right to damages for anguish.

III. Metalegal formants

In principle, it is possible to argue that the doctor's omission of crucial information is comparable to an offence against liberty and, consequently, Bridget would have a right to damages for anguish. It is arguable that this situation could be compared to a severe offence against human dignity, although this type of act is not criminalised. After the

²⁸ Routamo & Ståhlberg, *Suomen vahingonkorvausoikeus* (4th edn., Jyväskylä: 2000) 222–3.

amendment of the provision, which took effect on 1 January 2006, this could constitute the right to compensation for anguish.

France

I. Operative rules

Bridget has an action against the doctor who did not inform her of the genetic anomaly which the foetus suffered from, thus depriving her of the opportunity to undergo an abortion.

II. Descriptive formants

It is important to properly set out the terms of debate. This is not simply a case of determining whether the birth of a child without a disability can alone be considered a loss recoverable by its parents (*wrongful birth*),²⁹ or whether the fact that being born disabled can constitute a loss recoverable by the child him- or herself (*wrongful life*).³⁰ The question here is limited to whether a doctor can be held liable for the failure to inform his/her patient, which has deprived that patient of 'the chance' to terminate her pregnancy.

A doctor who does not inform a future mother of an anomaly affecting her foetus and the risk that she may give birth to a disabled child is in breach of contract for failure to properly and fully inform his/her patient. However, the anomaly must have been capable of being discovered during the pregnancy, i.e. the ultrasound tests must have been improperly done or the doctor must have not arranged complementary examinations.³¹ This would constitute a violation of the medical professional's contractual duty of care and his/her duty to fully inform the patient, which leads to the obligation of repairing the harm suffered by the parents because of their child's disability, on the basis of Arts. 1134 and 1147 CC.³² Thus, in French law the parents can indeed bring an action for having lost their 'chance' to have an abortion where a child is born disabled.³³

²⁹ In French law, the existence of a child cannot alone constitute a legally reparable loss to the mother, even if the birth occurs after a failed attempt at an abortion (Cass. civ. 25 Jun. 1991, D. 1991, jur., 566 ; CE 2 Jul. 1982, D. 1984, jur., 425).

³⁰ See below III. Metalegal formants.

³¹ Cass. civ. 16 Jul. 1991, JCP 1992, II, 21947: by not having carried out supplementary examinations which would have enabled them to inform the parents about the risks caused by the pregnancy, the doctors did not fulfil their obligation to inform.

³² Cass. civ. 26 Mar. 1996, D. 1997, jur., 35.

³³ See, e.g., TGI Montpellier 15 Dec. 1989, JCP 1990, II, 21556; Cass. civ. 16 Jun. 1991, JCP 1991, IV, 336; CA Bordeaux 18 sept. 2001 (unpublished): 'the lack of information

Nevertheless, uncertainty remains in relation to the extent of the loss recoverable by the persons who were not properly informed about the risk of giving birth to a disabled child. If the damage to be remedied is the deprivation of the chance to have an abortion, that is a 'chance' to avoid the birth, there can only be partial reparation.³⁴ If, on the other hand, the damage compensated is that of giving birth to and raising a disabled child, then the reparation must be total,³⁵ i.e. it must include all the costs caused by the disability.

In any case, it is certain that Bridget can demand reparation of the non-economic loss she has suffered under French law. Moreover, it does not really matter whether or not she would have had an abortion. Her non-economic loss stems from the fact that the doctor 'denied her a piece of information which would have permitted her to either have recourse to an abortion, or to prepare to give birth to a disabled child', as the *Cour de cassation* held in its decision of 28 November 2001.³⁶

In French law, these questions only raise issues of civil liability, essentially arising from a contractual duty, and do not raise issues concerning the protection of personality rights or interests.

III. Metalegal formants

Even if the case here only concerned the indemnification of the harm to the mother herself, it is nonetheless appropriate to make a statement about the lawsuits brought by parents in the name of their disabled child. The question is whether the doctor's fault in failing to diagnose the prenatal disability, which prevented the mother from exercising her choice to have an abortion, can constitute a loss which

about the risks to the foetus constitutes a fault committed by the doctor in executing the contract concluded with the mother, which prevented her from exercising her choice to have an abortion'.

³⁴ Chartier, *La réparation du préjudice* (Paris: 1996) 14.

³⁵ See, e.g., CE 14 Feb. 1997, JCP 1997, II, 22828, according to which the doctors' fault consisted in falsely assuring the parents that the child would not suffer from a genetic defect and that the pregnancy could be normally carried to full term, and that this fault 'should be regarded as the direct cause of the harm suffered by (the parents) because of their child's infirmity'. Thus, the administrative courts not only awarded compensation for the parents' non-economic loss and 'disrupted life conditions', but also held 'that the particular expenses incurred by the parents because of their child's infirmity, notably for special treatment and education, must equally be taken into account in assessing the economic loss'.

³⁶ Ass. plén. 29 Nov. 2001, D. 2001, IR, 3587.

is recoverable by the child. In the highly publicised *Perruche* case (17 November 2000), the *Cour de cassation* has admitted:

when the faults committed by the doctor and the laboratory in the execution of contracts formed with a pregnant woman have prevented her exercise of the choice of abortion in order to avoid the birth of a disabled child, that child can then demand reparation of the harm resulting from that disability and caused by the faults in question.³⁷

This case law has been confirmed by three judgments from 13 July 2001,³⁸ as well as in the decision of 28 November 2001 cited above. In all of these cases, the disability was attributed to genetic or congenital factors of a sort that the error in prenatal diagnosis committed by the doctor was not in itself the cause of the disability. Nevertheless, for the *Cour de cassation*, finding the doctor liable only required proof of a causal connection between his/her fault and the harm alleged by the child due to the fact that his/her mother was deprived of the possibility to exercise her choice to have an abortion. Thus, the harm suffered by the disabled person is the loss of a chance, namely the right not to be born. This decision, which has caused general pandemonium in moral and ethical terms has led the legislator to intervene. The Act of 4 March 2002 on the rights of the ill and the quality of the health system contains a First Title called 'Solidarity with disabled persons',³⁹ Art. 1 of which excludes the recoverability of damage consisting of being born.

Germany

I. Operative rules

Bridget may claim damages based on both contract law and tort law. However, damages will only be paid for the birth of a disabled child.

³⁷ Ass. plén. 17 Nov. 2000, D. 2001, jur., 316; JCP 2000, II, 10438.

³⁸ Ass. plén. 13 Jul. 2001, D. 2001, jur., 2325; JCP 2001, II, 10601.

³⁹ Art. 1 of this Act notably states that 'nobody can claim loss for the mere fact of having been born. The person born with a disability due to medical fault can obtain reparation of his/her harm when the culpable act directly caused the disability or aggrieved it, or prevented the taking of measures suitable to attenuate it. Once a professional or an institution in the medical sector is held liable vis-à-vis the parents of a child born with a disability which was not assessed during pregnancy because of a manifest fault, the parents can claim compensation on the basis of the loss suffered by them only. This loss will not include the particular expenses caused by the disability during the child's entire life. The compensation of these expenses is a matter of national solidarity'.

The deprivation of the chance to decide whether or not to undergo a legal abortion will not be considered.

II. Descriptive formants

Courts in Germany have been reluctant to accept tort claims due to the violation of personality rights in the area of medical treatment.⁴⁰ In these cases, medical treatment is usually part of a contract and the question of damages has concentrated on the question of whether the birth of an unwanted child ('wrongful life') gives rise to a contractual claim against the doctor who made the false diagnosis. There are a number of decisions in which the *BGH* has granted special damages in cases where a false diagnosis could be proven.⁴¹ Therefore, the doctor is liable to pay the medical and maintenance costs which the unwanted birth causes. Furthermore, the *BGH* has given the mother a claim for non-economic loss on the grounds of § 253(2) *BGB* (formerly § 847 *BGB*) as going through an unwanted pregnancy is seen as equal to a bodily injury by mistreatment.⁴²

There has been debate concerning the question of whether the granting of damages implicitly expresses that the unwanted child is seen as damage *per se*. However, courts have skipped this point by making it clear that the damage is not paid because of the existence of 'wrongful life' but because of the maintenance costs resulting from having to raise a disabled child.⁴³ Therefore, the claim in this case will not be a claim in relation to the personality right of the parents but an ordinary contractual claim combined with a delictual claim on the grounds of bodily injury (§§ 823(1), 251(1), 253(2) *BGB*).

III. Metalegal formants

The right to autonomously decide whether or not to have and raise children is listed among the basic interests of the private life of any individual. The right to family planning has gained special importance in a time where the exact planning of birth and even genetic make-up

⁴⁰ BGHZ 86, 240, 249; 124, 128, 141.

⁴¹ BGH NJW 1995, 1609 and 2407; BGHZ 86, 240; BGH, VersR 1983, 396.

⁴² See BGH NJW 1980, 1452, 1453 (case of BGHZ 76, 249 but these specific remarks were not reported).

⁴³ BGHZ 124, 128, 135; BGH NJW 1995, 1609, NJW 1995, 2407, 2409; NJW 2000, 1782; OLG Düsseldorf NJW 1995, 788, 789; accepted by BVerfG NJW 1998, 519 (1st senate), but see the critique of the 2nd senate in BVerfGE 88, 203 = NJW 1993, 1751; NJW 1998, 523.

has become realistic as a result of recent developments in medical research and treatment. Compared to the modern questions of how to plan children by directly influencing their genetic make-up, the question of whether there is a right to abortion in certain cases has long been an issue. Still, this discussion is restricted to penal law and the matter concerning whether the State may interfere with private decisions in this field. Scholars are divided about the existence of a right to family planning through abortion in private law even in cases where the unborn baby is likely to be born with incurable disabilities.⁴⁴

Greece

I. Operative rules

Bridget probably has the right to claim damages from the doctor who did not inform her about the genetic anomaly of her foetus.

II. Descriptive formants

According to Art. 304 of the Penal Code, termination of pregnancy is lawful when modern means of prenatal diagnosis have shown that there is a serious genetic anomaly of the foetus which will lead to the birth of a handicapped child and the period of gestation has not been more than twenty-four weeks.

Moreover, Art. 10 of Law 2619/1998⁴⁵ entitled 'Personal Life and the Right to be Informed' provides that: '1. All persons have the right of respect to their personal life in connection with information on the state of their health. 2. All persons have the right to be informed of all information related to the state of their health. Nevertheless, the desire of a person who chooses not to be informed should be respected.'

Bridget was deprived by the doctor of the opportunity to decide whether or not to terminate the pregnancy because of a serious genetic anomaly of the foetus. On the basis of the abovementioned legislative provision, the breach of information duty on the part of the doctor can be considered an unlawful act which possibly entitles Bridget to claim for damages.

⁴⁴ Baston-Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrecht* (Tübingen: 1997) 386 with further references; the majority rejects the existence of such a right, see R. Rixecker, *Münchener Kommentar zum BGB* (4th edn., Munich: 2001), § 12 note 121. In favour of such a right W. Lankers, 'Zur Abwälzung von Unterhaltskosten' (1969) *Zeitschrift für das gesamte Familienrecht* 384, 385.

⁴⁵ Law 2619/1998 ratified the Contract of European Council for the Protection of Human Rights and Human Dignity in connection with the applications of biology and medicine.

III. Metalegal formants

Following the passing of Law 2619/1998, there has been a theoretical debate on recognising a legal basis for the right of a patient to be informed about the state of his or her physical health.⁴⁶ The right to private life has been widely used by scholars as a legal basis for a patient's right to information, abortion and euthanasia. Although Art. 10 of Law 2619/1998 expressly connects the patient's right to information with the right to private life (in Greek translated as 'personal life'), this reference to the right to private life does not lead to a positive right to be informed. The recognition of a positive 'right to be informed' for patients should offer a legal basis for a possible claim against the doctor in case of the non-disclosure of information or disclosure of erroneous information to his/her patient.⁴⁷ A possible legal basis for a claim against the doctor is under Art. 57 of the Civil Code. The protection of personality also includes the right to the free development of personality, with its particular aspect of freedom of choice, which is recognised as a positive and active right. This 'freedom of choice' may include the right to abortion and the right to die as sub-rights.⁴⁸

Ireland

I. Operative rules

Bridget cannot sue the doctor for damages for non-economic loss on the grounds that he deprived her of the chance to decide whether or not to have the child. However, she may have a claim in damages for the extra costs associated with raising a disabled child.

II. Descriptive formants

Art. 40.3.3 of the Constitution protects the right to life of the unborn.⁴⁹ However, where the birth of the child represents a real

⁴⁶ See Kanellopoulou-Mpoti, 'The problem of establishing the right of information for patients and the right to abortion on the right of privacy (remarks in relation to Law 2619/1998)' (2000) *Kritiki Epitheorisi* 179-94.

⁴⁷ Androulidakis, *The obligation for information of the patient* (Athens: 1993).

⁴⁸ Kanellopoulou-Mpoti, 'The problem of establishing the right of information for patients' at 193.

⁴⁹ The full text of Art. 40.3.3 provides as follows: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.'

and substantial risk to the life of the mother a legal abortion may be performed in order to protect the mother's life.⁵⁰ This exception was established in *Attorney General v. X*⁵¹ where a fourteen-year-old girl who became pregnant as a result of being raped requested that the Supreme Court lift an injunction which had been granted by the High Court preventing her from travelling in order to undergo an abortion. The majority of the Court lifted the injunction as there was a real and substantial risk that the girl would commit suicide if she was not permitted to have an abortion. Finlay CJ observed that the mother's right to life must be protected in such circumstances stating that:

... the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s 3, sub-s 3 of the Constitution.⁵²

There is no evidence in Bridget's case that her life is in any kind of danger if she gives birth to the baby and, as such, having an abortion in Ireland is not a possibility. This has implications regarding any claim that Bridget may have against the doctor. In order to establish a claim in negligence, she must prove that she was owed a duty of care, that the doctor had acted unreasonably and that this failure to take reasonable care caused the damage.⁵³ It is clear here that the doctor owed Bridget a duty of care and that his failure to disclose the information regarding the foetus was negligent behaviour. However, it is in relation to the last part of her claim that Bridget will have most difficulty. If a defendant is to be liable in negligence, it must be shown that the negligent behaviour caused the damage. To measure causation the courts have adopted the 'but for' test, i.e. the plaintiff must prove that *but for* the defendant's negligence he/she would not have been injured.⁵⁴ Bridget's case would fail on an application of the 'but for' test. It cannot be said that 'but for' the failure of the doctor to inform her of the anomaly she would have avoided the damage as the only way to avoid the damage was through an abortion which was not legally available to her.

⁵⁰ *Attorney General v. X* [1992] 1 IR 1. ⁵¹ *Ibid.*

⁵² *Ibid.* at 53. ⁵³ *Donoghue v. Stevenson* [1932] 1 AC 562.

⁵⁴ *Barnett v. Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

Alternatively, Bridget could argue that the doctor's failure to inform her of the anomaly deprived her of the opportunity of travelling to another jurisdiction in which she could obtain an abortion. However, such an argument is also unlikely to succeed. It is doubtful given the protections offered to the unborn under Art. 40.3.3 that the courts would recognise such a claim as a matter of public policy.⁵⁵ For these reasons it would also be unlikely that Bridget would succeed in a claim where the child was disabled.⁵⁶

Italy

I. Operative rules

Bridget can recover damages (for both economic and non-economic loss) from the doctor.

II. Descriptive formants

Under Italian law⁵⁷ within the first ninety days of pregnancy a woman can undergo a legal abortion if there are foetal anomalies or malformations, however only if these anomalies pose a serious threat to her physical or mental health. After the first ninety days, abortion on the ground of foetal anomalies is only allowed before the foetus has grown so much that it would be able to survive outside of the womb, and only if the anomalies are likely to cause grave danger⁵⁸ to the woman's physical or mental health.

During the last ten years, the Supreme Court seems to have reached a well-established position in 'wrongful-life' cases.⁵⁹ Accordingly, a doctor who intentionally or negligently fails to inform a pregnant woman about possible or existing foetal anomalies or malformations is liable for breach of contract (Art. 1218 CC). The mother (or the father)⁶⁰ of the disabled child can recover damages, providing that the requirements for legal abortion were met at the time of the doctor's failure.

⁵⁵ *McKay v. Essex Area Health Authority* [1982] QB 1166.

⁵⁶ *Macfarlane v. Tayside Health Board* [1999] 3 WLR 1301.

⁵⁷ Arts. 4 and 6 Pregnancy Interruption Act (Legge 22 May 1978, n. 194).

⁵⁸ According to Cass. 24 Mar. 1999 no. 2793, *Danno resp.* 1999, 10, 1033 with commentary by R. De Matteis, a 'grave danger' under Art. 6 Pregnancy Interruption Act is something more than a 'serious threat' under Art. 4 of the same Act.

⁵⁹ Cass. 1 Dec. 1998 no. 12195, *Danno resp.* 1999, 5, 522 with commentary by E. Filograna; Cass. 24 Mar. 1999 no. 2793 (n. 58 above); Cass. 10 May 2002 no. 6735, *Danno resp.* 2002, 11, 1148; Cass. 29 Jul. 2004 no. 14488, *Corriere giur.* 2004, 143; Cass. 20 Oct. 2005 no. 20320, *Foro. it.* 2006, I, 2097.

⁶⁰ As recently decided by Cass. 20 Oct. 2005 no. 20320 (n. 59 above).

Both economic and non-economic loss is recoverable. Economic loss includes *damnum emergens* (e.g. medical expenses, other expenses for the care of a disabled child) and *lucrum cessans* (i.e. the reduction in the mother's income due to the necessity of taking care of a disabled child). Non-economic loss consists of both the psychological shock resulting from the birth of a disabled child and the harm to social and family life (*danno alla vita di relazione*).⁶¹

Non-economic loss is always assessed by making use of the equitable method (Art. 1226 and 2056 CC). In cases such as the present one, the courts also apply this method to quantify economic loss because of the impossibility of exactly assessing future costs and income reductions due to the birth of a disabled child.⁶²

III. Metalegal formants

Since Italian law only allows abortion if it is necessary to protect the mother's health, it could be argued that only the harm to the mother's health should be recoverable. This argument was put forward in 1994 by the *Corte di cassazione* in a case involving an unsuccessful abortion, which resulted in the birth of a perfectly healthy child.⁶³ In 1998, this precedent seems to have been overruled, as the Supreme Court stated that the requirement of grave danger for the woman's health only poses a limit to the woman's right to abortion, and not to the contractual liability of the physician. Accordingly, if the requirements for a legal abortion are met but the woman cannot freely decide on an abortion because of the doctor's contractual breach, she is entitled to damages not only for injury to her health, but also for all other types of harm, including economic loss. However, the latter rule was stated in a case where a disabled child was born and it was confirmed by later judgments all concerning similar cases. Thus, one may wonder whether the Supreme Court will also apply the 1998 rule to cases where an unwanted healthy child is born.

⁶¹ A precise definition of the recoverable damages has been given by Cass. 10 May 2002 no. 6735 (n. 59 above).

⁶² Cass. 10 May 2002 no. 6735 (n. 59 above).

⁶³ Cass. 8 Jul. 1994 no. 6464, Nuova giur. civ. comm. 1995, I, 1111. In this case, the woman did not suffer any physical or psychological harm; on the contrary, she experienced maternity as something positive. She only felt she was harmed by the doctor from an economic point of view, as she had decided to undergo abortion because she was very young and hence not able to support a child. Thus, she sued the doctor to recover the costs of the child's support and education, but was unsuccessful.

The Netherlands

I. Operative rules

Bridget can claim both damages for economic loss (loss of income, costs related to the life of the child, costs related to the delivery of the child) and non-economic loss.

II. Descriptive formants

As he did not inform Bridget about the genetic foetal anomaly, the doctor has breached a duty either in contract or in tort. According to Dutch law, in cases such as these the substance and the consequences of these breaches do not differ.

The result of the doctor's breach of duty towards Bridget⁶⁴ is that she is deprived of the right to prevent the birth of a child with a genetic anomaly, which is a part of her right to self-determination. In medical cases, the right to information which creates the ability to determine one's own life as much as possible, is derived from Arts. 10 and 11 Constitution and from Arts. 7:448 and 450 BW.⁶⁵

If a doctor breaches his/her duty to provide his/her patient with information which is relevant in relation to that person's possibility to make choices, he/she is liable for the damage that has been caused by the breach. The patient has to prove the causal relation between the damage and the breach of duty (see Case 1). If the duty is to provide the patient with information so that the patient can make a deliberate, well-informed choice, the patient has to make it clear that he/she would have made another choice provided that he/she had been given the information. In this case, Bridget has to prove that she would have decided to undergo a legal abortion. The likelihood of the position that one would have made another choice depends on circumstances such as the severity of the disability and the chance that the risk of the disability will be realised.

If Bridget manages to prove that she would have undergone a legal abortion if she had been given the information, she is entitled to both damages for economic and non-economic loss.

⁶⁴ In Dutch case law and doctrine, a duty towards the child has also been recognised: Court of Appeal The Hague, 26 Mar. 2003, C00/564; C.H. Sieburgh, 'Het zijn en het niet. De beoordeling in rechte van de gevolgen van een niet-beoogde conceptie of geboorte', in S.C.J.J. Kortmann and B.C.J. Hamel (eds.), *Wrongful Birth en Wrongful Life* (Deventer: 2003) 65–92; Procureur General Hartkamp, in his Conclusion of 5 Nov. 2004, C03/206HR.

⁶⁵ HR 23 Nov. 2001, NJ 2002, 387.

The loss of income (she has to prove that she would have had (more) income from employment if she would not have given birth) and the costs related to the life of the child are both to be regarded as economic loss. Furthermore, Bridget has a claim for costs related to the delivery of the child.

Only if Art. 6:106 *BW* applies can Bridget obtain damages for non-economic loss. In this case she can argue that the pregnancy and the delivery cause physical injury and that she is entitled to compensation for non-economic harm related to this physical injury. A case where a mother gave birth by means of caesarean section was regarded as a physical injury and the mother was entitled to damages for both economic and non-economic loss.⁶⁶ Another possible ground for obtaining damages for non-economic loss is the 'otherwise affliction of person' principle. The fact that Bridget was not given the relevant information to make a well-informed decision about keeping the baby is to be regarded as an infringement of a right of personality which entitles her to compensation of damages for non-economic loss.⁶⁷

In the well-known *Kelly* case,⁶⁸ the Dutch Supreme Court held that the provider of care (a midwife) was not only liable towards the mother of the disabled child but also towards the father and the child itself.

During the pregnancy check-ups, Kelly's parents informed the midwife that the father's nephew had a severe disability. The midwife assured the parents that it was not necessary to have prenatal screening (or to consult a geneticist) since the parents already had a healthy child. When Kelly was born, it was clear that she suffered from the same disability as her cousin.

According to experts, the information regarding the disability in the family given to the midwife should have been a reason for a reasonably competent midwife to offer the parents the possibility of prenatal screening and/or to consult a geneticist.

If the midwife would have done so, the geneticist would have informed the parents about the risk of having a child with the same disability as the father's nephew. In that situation, the parents would have been well-informed and would have been able to choose to undergo prenatal testing. If that testing would have revealed that Kelly had the same genetic disorder as her cousin, her parents would have

⁶⁶ HR 9 Aug. 2002, C00/288 HR, LJN: AE2/17.

⁶⁷ Advocat General Spier, in his Conclusion in HR 9 Aug. 2002, C00/288 HR, LJN: AE2/17, who refers to other authors.

⁶⁸ HR 18 Mar. 2005, C03/206 HR, RvdW 2005, 42 (*Kelly*).

had the opportunity to choose whether they would like to continue the pregnancy or to terminate it (they argue that they would have chosen to terminate the pregnancy, which would have been legally possible in the Netherlands in the given circumstances).

In this case, the duty that has been breached by the midwife is the duty to provide the parents with sufficient information to make well-informed decisions regarding whether or not they would like to have chosen to undergo prenatal testing.

Given the fact that a duty has been breached, the questions are (a) to whom has the duty been breached; (b) has loss been suffered and/or is it repairable; and (c) does a relevant causal relationship exist between the breach of duty and the loss?

The answers to these questions are closely connected. The solution chosen by the Supreme Court in the *Kelly* case is that the midwife not only breached a duty to the mother (based on the contract) but also to the father and the child.

The breach of duty to the father is extra-contractual (no contract had been concluded between the midwife and the father). The midwife's duty to the father is inspired by her duty to the mother, since the interests of the father are most closely related to the substance of the contract between the midwife and the mother. Therefore, the midwife breached a duty to the father imposed by a rule of unwritten law pertaining to proper social conduct (Art. 6:162, para. 2).

Although in general it is possible to breach a duty to an unborn child (for instance through intra-uterine malpractice), the question is whether in this case the child can derive a breach of duty to itself from the breach of duty to its parents. The child has no right to its own non-existence.⁶⁹ Therefore, the duty to the child is derived from the duty to correctly and adequately inform its parents. Since parents are supposed to want to obtain information that will protect the interest of their child in a way which they consider to be the best for their child, the doctor has a duty to correctly and adequately inform the child. The breach of the duty to the parents implied a breach of an extra-contractual duty to the child.⁷⁰

⁶⁹ See for a different opinion on that aspect see Van Kooten and Wattendorff, 'Het belang niet geboren te worden', in L. Timmerman, H. van Kooten, L. Strikwerda *et al.*, *Hartkampvarianties* (Deventer: 2006) and T. Hartlief, 'Hollandse toestanden: de Hoge Raad over "wrongful life"' (2005) 22 *Nederlands Tijdschrift voor Burgerlijk Recht* 232 *et seq.*

⁷⁰ Although it is technically possible to base a duty on contract (either when the parent concluded a contract with the midwife in favour of their child or when the

In relation to damages, the parents are entitled to damages for economic loss (the costs of raising the child). With regard to damages for non-economic loss, the mother has a claim (Art. 6:106, para. 1(b)) for the infringement of her fundamental right to self-determination. The father has a claim for the same reason. In addition to this ground for non-economic damages it is possible that the parents will suffer mental harm on being confronted with a disabled child. If they want compensation for this type of harm they have to prove that they actually suffered relevant mental harm (which can for instance be proved by the fact that they need to see a psychiatrist).

The harm suffered by Kelly is a more complicated issue. Since damages are often calculated by comparing the situation with and without the breach of duty, the situations to be compared would be the situation where the disabled child exists and the situation where it does not exist at all, since it is factually impossible that the child would have existed without the disability. The problem is that by granting the child costs for its entire life, the judge seems to imply that it has a right to its own non-existence. Nevertheless, the Supreme Court granted the child its own claim (in case her parents die and are no longer able to claim the costs of raising her). It has to be mentioned here that the disability of the child in this case is so severe that it is hard to imagine how there could be costs related to the life of the child that are not related to its disability.

Finally, the causal relationship between the breach of duty and loss concerning the child's claim is questionable for reasons that are comparable with the question regarding the compensation of its loss. Since the doctor's breach of duty did not actually worsen the child's disability, he/she did not cause the harm. This argument is paralysed by mere reference to the possibility of liability for loss caused by omissions in general.⁷¹ The other argument concerning the causal relationship is that if a causal relationship were accepted it factually implies that the child has the right not to exist. Presupposing that a situation in which the child would have existed without a disability is technically impossible, it is unacceptable that for that reason the existing duty towards the child would be of no effect.⁷² Although the Supreme Court did not

contract has to be interpreted as protecting both the interests of the parents and the unborn child (see Sieburgh, 'Het zijn en het niet' at 85-91), in the given case the Supreme Court based the duty towards the child on tort.

⁷¹ Asser and Hartkamp, *Asser's handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Verbintenissenrecht. De verbintenis in het algemeen*, 4-I (Deventer: 2004) no. 438.

⁷² C.H. Sieburgh, 'Schadevergoeding én leven, Compositie met rood, geel en blauw' (2005) *Weekblad voor Privaatrecht, Notariaat en Registratie* 6637, 755-62.

explicitly explain how the causal relationship is constructed, it holds the midwife liable for the loss suffered by the child due to the breach of duty, explicitly considering that it does not have a right to its own non-existence. Moreover, the Supreme Court has considered several times that granting the claim of the child does not mean that the life of the child is considered to be of less value. The mere aim of granting the claim is to compensate the child for life costs.

Portugal

I. Operative rules

Bridget is entitled to sue the doctor for breach of the medical duty to inform, and to claim compensation for economic and non-economic loss.

II. Descriptive formants

Art. 142(1) *CP*, last amended by Act no. 16/2007 of 17 April, sets out five causes of justification which make abortions not criminally punishable. These include abortions within the initial ten weeks of pregnancy by choice of the patient, abortions within the initial twenty-four weeks of pregnancy when there are sound grounds to foresee that the child will suffer an incurable grave illness or congenital malformation, and abortions of non-viable foetus in any moment of the pregnancy.

These exceptions to the criminal wrongfulness of abortion strike a balance between the constitutionally protected prenatal life and the constitutionally protected rights of pregnant women, such as their right to life, health, honour, reputation, dignity and conscious maternity. Act no. 16/2007 imposes on the National Health Service (*Serviço Nacional de Saúde*) the obligation to guarantee pregnant women the possibility of carrying out an abortion under the conditions legally established (Arts. 2 and 3).

The Medical Ethics Code (*Código Deontológico, CD*) states that doctors should clarify the diagnosis or medical treatment he/she intends to use to the patient, his/her family or whoever legally represents him/her (Art. 38(1)). In addition, doctors should also reveal any prognostic or diagnostic information to the patient, except if the doctor believes, for important reasons, that this should not be done (Art. 40(1)). Therefore, doctors have the duty to inform pregnant patients about any special condition or foetal deficiency whenever they know about it, and also of their prospects, in accordance with medical science and *legis artis*. In

this case, the doctor should have informed Bridget of the genetic foetal anomaly as soon as he knew about it.

Then, Bridget would have had the opportunity to undergo a legal abortion. In depriving Bridget of the possibility to undergo an abortion for a genetically abnormal foetus, the doctor violated his duty of informing her, thereby harming her right to conscious maternity. Moreover, by not informing Bridget about the genetic foetal anomaly, the doctor also committed a disciplinary infraction and can therefore be sanctioned by the Medical Doctors Council.

In conclusion, Bridget can sue the doctor for violation of his duty to inform her of the prenatal prognostic/diagnostic information and the consequent violation of her rights to honour, reputation, dignity and conscious maternity, thereby claiming compensation for economic and non-economic loss. If there was a contract for the provision of services between Bridget and the doctor or the clinic/hospital where he worked (private medical care), the doctor and/or the clinic/hospital are presumably at fault and the provisions which can underlie the claim are Arts. 798 and 799 CC. If the medical service was provided by a public hospital/service, then Bridget would have a claim in tort based on Arts. 70(1), 483 and 496 CC.

Scotland

I. Operative rules

The outcome of this case is uncertain.

II. Descriptive formants

This question raises the issue of what has been referred to as a 'wrongful birth' case, which gives rise to issues governed in England (but not in Scotland) by the Congenital Disabilities Act 1976.⁷³ The authorities in both Scots and English law generally avoid use of the term 'wrongful'. The issue here addresses medical negligence through the failure to correctly diagnose and inform the patient thereafter, and furthermore, the extent to which this failure breaches relations inherently confidential.

⁷³ Congenital Disabilities (Civil Liability) Act 1976, Ch. 28. S. 1(2)(a) covers wrongful birth situations where a doctor negligently advises parents about the risk of a future child inheriting a genetic disorder, and a child is conceived on the basis of this information and born disabled. The categories of *in utero* damage now extend to disabilities arising from the selection or storage of embryos during fertilisation treatment, see Human Fertilisation and Embryology Act 1990. The latter applies in Scotland.

Breach of confidentiality in this context relates to the failure to create a basis for personal informational autonomy in the sense of being placed in an informed position so as to decide whether or not to give birth to the child. Bridget has a right to a healthy family life, as part of her rights under Art. 8 ECHR. The patient-doctor relationship is of a specific confidential nature and Scots law has traditionally recognised the category of breach of confidence at least. Congenital abnormality is a ground for the termination of pregnancy under s. 1(1)(d) of the Abortion Act 1967. It appears that there is potential for the development of the law here.

The intricacies of the National Health Service (NHS) result in claims against the medical profession being made under the heading of negligence and not contract.⁷⁴ Unlike continental case law, there is a lack of reference in the decisions to any contractual notion of performance or remedy *ad quem*.

Paradoxically, in the face of negligently performed sterilisation operations the Scottish and English courts are willing to recognise that there has been personal injury and wrongdoing or negligence. Nevertheless, they are conscious of the problem that a wrongdoing may go without a remedy, treating the question of damages as a separate issue. Although not explicitly referred to in so many words, birth (and life) is not an injury, thus alleviating the courts of the need to quantify life in the form of damages. Interestingly, great attention and parallels are sought in relation to what is otherwise seen in tort law as consequential loss of unwanted or 'uninformed' motherhood in this situation.⁷⁵

The predominant Scottish authority relates to *wrongful conception*. Here, the Scottish courts have been willing to award damages or solatium for the parental distress caused by an unwanted pregnancy.⁷⁶ Case

⁷⁴ Considerations relating to private medicine are not addressed here, but it is submitted that even in relation to this the issue will revolve around delict/negligence and not around contract.

⁷⁵ *MacFarlane v. Tayside Health Authority* per Lord Hope: 'The fact that pregnancy and childbirth involve changes to the body which may cause in varying degrees discomfort, distress and pain, solatium is due for the pain and suffering which was experienced during that period. And the fact that these consequences flow naturally from the negligently caused conception which has preceded them does not remove them from a proper scope of the award.'

⁷⁶ *Allan v. Greater Glasgow Health Board* 1998 SLT 580 judgment of 25 Nov. 1993, no general restriction or policy reasons not to make such an award in Scots law, therefore damages awarded for pain and distress of pregnancy and birth (Lord

law to date was reviewed in the House of Lords appeal in a Scottish case, *McFarlane v. Tayside Health Authority* in 1999.⁷⁷ In that case, the Lords rejected any claim for wrongful birth but did allow a conventional (or low) award to be fixed by the Court of Session for pain and suffering, however not for the costs of raising the child. In reaching their conclusion, the Lords went to great lengths to compare the legal position of child and mother in a wrongful life situation on a comparative basis.⁷⁸

Since that decision, English authorities have shifted the focus from the policy-weighted arguments against awards for wrongful conception or birth where these relate to the costs of upbringing as consequential loss in cases involving disabilities. The two English cases, *Parkinson v. St James and Seacroft University Hospital*⁷⁹ and *Rees v. Darlington Memorial Hospital NHS Trust*⁸⁰ necessitated a reassessment of the issue where either the child born is disabled or the mother herself is disabled. Both of these decisions mark cautious departures from the general rule against maintenance damages to only allow them where there are such special circumstances.⁸¹ *McFarlane* has only been distinguished and neither departed from nor overruled.

This cautionary approach applies equally to *wrongful life* actions, i.e. actions brought by the child him- or herself. There is only pre-HRA English authority on this point. The traditional position was adopted in *McKay v. Essex Area Health Authority*,⁸² a case which relates exclusively to disabilities which arose through medical negligence in the failure to diagnose rubella.⁸³

The reasons for the rejection of the wrongful life action have been discussed in full elsewhere. Firstly, the prevailing view is that ‘to damage is to make worse, not to make simpliciter’.⁸⁴ In other words, there

Cameron); the Outer House rejected the claim for damages in *McFarlane* 1997 SLT 211 but this was adjusted by the Second Division which recognised a claim for damages where *damnum* has resulted from *iniuria*, 1998 SLT 308. In the final decision of the House of Lords in *McFarlane*, see above.

⁷⁷ *McFarlane v. Tayside Health Authority*.

⁷⁸ *Ibid.*, particularly the speeches of Lord Slynn and Lord Hope.

⁷⁹ [2002] QB 266. ⁸⁰ [2003] UKHL 52.

⁸¹ This was the position taken earlier in England in *Emeh v. Kensington AHA* [1984] 3 All ER 1044.

⁸² [1982] QB 1166.

⁸³ B.S. Markesinis and S.F. Deakin, *Tort Law* (3rd edn., Oxford: 1994) 251–7.

⁸⁴ *Ibid.* at 255. The pervading argument against wrongful life claims appears to be that a decision on abortion would thereafter fall within the doctor’s duty of care and place a further duty on the doctor, instead of allocating it to the private sphere.

have been no external influences leading to the genetic abnormality. Secondly, British courts clearly shy away from regarding life, whether healthy or not, as an injury. This is a matter of legal policy from which the judges are not willing to depart and which was examined in detail in *Rees* in the context of wrongful birth.

The one area which still requires development is the right to family life in terms of Art. 8 ECHR, in conjunction with breach of confidentiality as an inherent part of that right.⁸⁵ Scots law continues to operate the concept of personal wrongdoing within the category of negligence.

To establish liability by a doctor where departure from normal practice is alleged, three facts require to be established. First of all, it must be proved that there is a usual normal practice. Secondly, it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance), it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.⁸⁶

A negligence claim would stand or fail simply on the basis of what the professional standard is seen to be.⁸⁷ However, this being said, wrongful conception actions in Scots law brought by the mother remain permissible and particularly so since *McFarlane*.⁸⁸ The HRA could contribute to the development of the law here by allowing an action for breach of confidence where the patient has not been informed of the likelihood of disorder.

III. Metalegal formants

Scots law may well allow a claim for breach of confidentiality where there is a clear doctor-patient relationship of confidentiality. In such a case, it has been stated with authority that a claim for *actio iniuriarum* could be admissible.⁸⁹ Despite the lack of authority, the relevance of the right to a (healthy) family life in the context of Art. 8 ECHR deserves to be reflected in future case law. It is submitted that *McKay and Essex* would be viewed nowadays as wrongful birth on a par with

⁸⁵ Markesinis and Deakin, *Tort Law*, 257.

⁸⁶ *Hunter v. Hanley* 1955 SC 200 at 206, per Lord Clyde.

⁸⁷ *Whitehouse v. Jordan* [1981] 1 All ER 267 is still looked upon as the general approach.

⁸⁸ See J. Blackie, in E. Deutsch and H.L. Schreiber, *Medical Responsibility in Western Europe* (Berlin: 1985) 568-94.

⁸⁹ See Stair, *Memorial Encyclopaedia*, Law Society of Scotland (Edinburgh: 1996), Vol. 14, para. 1131.

the exceptional circumstances outlined in *Rees*, giving rise to an action on the basis of the case.⁹⁰

Spain

I. Operative rules

Bridget is entitled to receive compensation because the doctor did not inform her about the foetal anomalies. Compensation will be calculated according to the loss that the anomalies cause the mother. The injured party will be able to claim for non-contractual liability and will obtain damages for any loss she has suffered and any loss she thinks she may suffer in the future.

Spanish tort law does not recognise general compensation in favour of a child born with physical or psychiatric anomalies. Life is always better than death.

II. Descriptive formants

Under Spanish law, wrongful conception cases are decided according to the general liability rules. This is an important difference with mainstream US case law (*Roe v. Wade*) in which the foundation of the right to avoid pregnancy or to have an abortion is one of the dimensions of the woman's right to privacy. In Spain, when faced with these cases, lawyers and courts argue about the loss caused to the wishes of the parents by the pregnancy. Compensation for this loss is to be found in the general clause of Art. 1902 CC (liability for negligence, *alterum non laedere*).

Civil courts decisions clearly distinguish two types of cases:

- (1) Cases involving so-called wrongful conception: those in which the failure of birth-control measures results in the birth of a child.⁹¹ In these cases, courts refuse compensation whenever it is demonstrated that there was no medical negligence hindering the birth-control technique.
- (2) Cases of wrongful birth, such as the proposed one here. In this type of case, courts recognise the necessity for compensation if it is shown that the child's anomalies amount to economic loss for the family and non-economic loss for the parents.⁹²

⁹⁰ See above on liability under the Human Fertilisation and Embryology Act 1990.

⁹¹ The leading paper on this matter in Spanish doctrine is M. Martín Casals and J. Solé Feliu, 'Anticoncepciones fallidas e hijos no previstos' (2001) 3 *InDret* at www.indret.com.

⁹² The leading case is STS, 6 Jun. 1997 (RJ 4610). In this case, the mother of a child born with Downs Syndrome claimed €300,506 from the doctors and the

It is important to point out that there is no general rule in Spanish law to receive compensation in cases where there is no medical malpractice but the birth is subsequently not desired.⁹³ The birth of a new human life cannot be considered as harm in itself.

Therefore, compensation should be based on the existence of economic or non-economic damage caused to the parents of children born with anomalies which were not detected during the pregnancy.

Switzerland

I. Operative rules

The Swiss Federal Court has not yet dealt with a case such as this one. In the current state of the law, the Federal Court would probably reject the mother's claim against the doctor for non-economic loss.

II. Descriptive formants

The issues surrounding the birth of an unwanted child, whether disabled or healthy, are numerous and sensitive. Other than in a contractual context, they all involve a discussion of personality rights. The question of whether the parents suffer compensable economic loss on the one hand, and whether they may be awarded damages for non-economic loss on the other hand, are disputed. These problems specifically arise in cases of failed sterilisation or failed abortion. They also surface in cases where the foetus' state of health is misdiagnosed, as in this case, which led the mother to have a baby born physically impaired.⁹⁴

Public Hospital of Valencia that had made a mistake in their prenatal tests ('amniocentesis') and told the mother that the child was perfectly normal, when after the birth it was clear that child was severely ill. The mother alleged that if she had known about the disability before the twenty-two week gestation period that the Spanish Criminal Code (Art. 417) sets as a limit to have an abortion in the case of a malformation of the foetus, she would have had an abortion. The claimant took this particular test twice, and on both occasions the test was unsuccessful and the medical team did not say to her that it was better to repeat it. When the foetal abnormality was finally detected, the legal term for an abortion had already expired. The case was finally resolved by the Spanish Supreme Court decision 6 Jun. 1997, which ordered the medical team, the hospital and the Spanish Public Health Service to pay damages to the claimant. See P. Salvador Coderch, 'Aborto y síndrome de Down' (19 Jun. 1997) *La Vanguardia*. See also J.M. Bustos Pueche, 'Un caso de voluntarismo judicial, la sentencia del Tribunal Supremo de 6 de junio de 1997' (19 Jun. 1997) *Revista La Ley*, and G. Díez-Picazo Giménez, 'La imposibilidad de abortar: un Nuevo caso de responsabilidad civil' (15 Jun. 1998) *Revista Jurídica La Ley*.
⁹³ See STS, 5 Jun. 1998 (RJ 4276).

⁹⁴ On this subject, see T.M. Mannsdorfer, *Pränatale Schädigung, Ausservertragliche Ansprüche pränatal geschädigter Personen* (Fribourg: 2000).

1. *The state of case law*

The judgments rendered by the courts to date deal with this hypothesis, yet none of them have identical facts to those of the case at hand.

At a local level, in a case involving a failed sterilisation, the District Court of Arbon awarded the mother both compensatory damages (for lost income as she was prevented from working) and damages for pain and suffering resulting from her pregnancy and the second sterilisation operation that she had to undergo.⁹⁵ By contrast, the Civil Court and the Court of Appeal of the region of Basel-Stadt rejected the award of any compensation in a case concerning a failed abortion.⁹⁶ Recently, the administrative court of Berne left a similar issue undecided by focusing on the absence of wrongdoing on the doctor's part.⁹⁷

In the current leading case, the Federal Court clarified the issue surrounding expenses incurred by the parents of an unwanted – but healthy – child: the doctor who omitted to perform a contractually stipulated sterilisation was held liable for the costs arising from the birth of the child (costs of education). The Federal Court stressed that the damages must be awarded regardless of the parent's economic situation and whether the child is born healthy or not.⁹⁸ Unfortunately, the Federal Court was not requested to rule on the issue of non-economic loss. The regional court had awarded the mother 5,000 CHF under this heading, but the doctor did not appeal this part of the judgment.⁹⁹

2. *Solutions suggested by authors and our suggestions*

Authors are divided on the question of whether and under what circumstances damages should be awarded to a child's parents.¹⁰⁰ As far as economic loss is concerned, these debates are now largely obsolete as the Federal Court discussed most of the issues in its recent judgment and rejected all of the authors' objections directed against a parents'

⁹⁵ Judgment of the *Bezirksgericht* of Arbon, in RJ n. 379.

⁹⁶ BJM 1998, p. 131 and BJM 2000, p. 306.

⁹⁷ BVR 2004, p. 289.

⁹⁸ ATF/BGE 132 III 359, c. 4.6 and 4.8. ⁹⁹ *Ibid.* at p. 361.

¹⁰⁰ K. Oftinger and E. W. Stark, *Schweizerisches Haftpflichtrecht, Allgemeiner Teil*, Vol. I (5th edn., Zurich: 1995) § 2 n. 54; W. Fellmann, 'Schadenersatzforderung für den Unterhalt eines unerwünschten Kindes' (1987) *Zeitschrift des Bernischen Juristenvereins* 383; Mannsdorfer, *Pränatale Schädigung*, n. 977 and n. 1051; *ibid.*, 'Haftung für pränatale Schädigung des Kindes – Grundzüge, Wrongful Life und Tendenzen' (2001) *Zeitschrift des Bernischen Juristenvereins* 621 *et seq.*; R. Vito, *Schweizerisches Haftpflichtrecht* (Zurich: 2002) n. 112 and n. 773; R. Thür, *Schadenersatz bei durchkreuzter Familienplanung: unter Berücksichtigung der Rechtsprechung in Deutschland, England und den USA* (Zurich: 1996) 67 *et seq.*

claim for damages.¹⁰¹ In turn, the question remains open as to whether compensation for non-economic loss should be awarded. In fact, some regional courts have expressly refused to award damages for pain and suffering, while others recognise the existence of a claim.¹⁰²

Damages for pain and suffering according to Art. 49 CO are subject to several conditions: infringement of a personality interest, fault, pain and a causal link between pain and fault. In the case at hand, it would have to be proved that the doctor was at fault, in other words that a 'reasonable' doctor placed in the same circumstances would have noticed the foetal anomaly and informed the mother. The doctor's omission would be considered as the cause of the birth of a disabled child. In our opinion, the infringement of a personality interest would be seen in the fact that the mother was deprived of the right to choose an abortion. Since Swiss law recognises the mother's right to self-determination during the first three months and even after that period under certain circumstances, only she can decide whether she wishes to undergo an abortion or to give birth to and take care of a disabled child. As already mentioned before, damages could also be seen as an award for the bodily and mental harm suffered by the mother in the case of a psychological shock based on Art. 47 CO.¹⁰³

According to Art. 49 CO, 'when the injury and the omission are particularly grave' the judge will allow 'general pecuniary compensation'. In the case at hand, the disabled child's mother may undoubtedly suffer a grave and serious injury. This could equally apply to cases of failed sterilisation. Here again, no *a priori* distinction should be made between a disabled child and a healthy but unwanted child.

However, given how difficult it is to evaluate a proper award, the courts may be tempted to consider that the existence of the child makes up for the pain of the unwanted birth. Regarding economic loss, the Federal Court has refused to balance the parents' educational costs against the 'joys of parenthood', with the argument that an economic loss cannot be compensated by immaterial advantages.¹⁰⁴ This argument does not apply to damages for pain and suffering. Therefore, one could very well imagine that the judge might consider the positive impact of the child's existence for the parents, at the very least to evaluate the

¹⁰¹ ATF/BGE 132 III 359.

¹⁰² Court of Appeal of the region of Basel-Stadt, in BJM 2000, p. 306 c. 3. District Court of Arbon, in RJ n. 379; ATF/BGE 132 III 359, p. 361.

¹⁰³ F. Werro, *La responsabilité civile* (Berne: 2005) n. 72.

¹⁰⁴ ATF/BGE 132 III 359, c. 4.8.

amount of compensation. This could even lead to the exclusion of any damages depending on the circumstances of the case.

Comparative remarks

Right from the outset it is important to properly define the subject of this case, which belongs to the broader context of medical law. It deals with medical treatment undertaken in a doctor-patient relationship. However, the focus is on a narrow aspect of this type of medical law: *the right to self-determination of the patient*.

This case is embedded in the widely discussed subjects of wrongful conception (pregnancy), wrongful birth and wrongful life. All these problems have been engaged in most of the national reports. Nevertheless, this case does *not* cover these problems. It is *not* a wrongful conception case, i.e. parents claiming maintenance costs for an unwanted child. For this type of case the terms 'right not to have children' or 'right to family planning' are also used. It is *not* a wrongful birth case, i.e. where parents claim costs for raising a disabled child which would have been aborted if the doctor had provided the information. Some legal systems such as Germany grant monetary compensation in both types of cases. In most countries, damages are awarded in the second case to a different extent. Finally, it is definitely *not* a wrongful life case, i.e. the disabled child suing him- or herself for special and general damages.

This case only raises the question whether a pregnant woman has a legally protected right to decide whether to undergo a (legal) abortion or not; and whether the violation of this right to self-determination by negligently not disclosing the relevant information (here: genetic foetal anomaly) to make such a decision demands monetary compensation (general damages).

I. Prevalent solution: no claim

Most national legal systems do not (yet) identify the pregnant woman's right to self-determination as an independent issue in the wrongful birth case scenarios. The monetary costs of raising the disabled child are put first; in addition compensation for the pain and suffering caused by the unwanted birth of a disabled child may be awarded. That is the law in Austria, Finland, Germany, Ireland, Italy and Spain.

II. Legal systems allowing the woman's claim

There are four remarkable national exceptions to the predominant rule of non-acknowledgment of the woman's interest in self-determination: Belgium, France, the Netherlands and Portugal.

The personality right aspect of this case has been precisely worked out in the famous *Kelly* case by the Dutch Hoge Raad in 2005.¹⁰⁵ The court ruled that both parents had been harmed by an infringement of their right to self-determination and were therefore entitled to general damages.

In the 1980s, in cases of this kind, Belgian scholars already recognised the parents' claim for compensation of non-economic loss on the basis of a violation of their right to family planning. This has now become the prevalent opinion in Belgium.

In France, after a judgment of the *Cour de cassation* in 2001 a pregnant woman can now recover non-economic damages for having been deprived of the chance to undergo a legal abortion (*perte d'une chance*). This claim is based on breach of contract. It leads to regular contractual liability; questions of autonomy rights are not raised.

In Portugal, the doctor's failure to disclose the information is perceived as a kind of moral injury and violates the woman's rights to dignity and personality (honour, reputation, and conscious maternity). The woman's claim is based in tort.

In all four countries where the deprivation of the chance to determine family planning is acknowledged as a cause of action for general damages, the economic costs for raising the disabled child are also recoverable provided Bridget proves that she would have decided in favour of an abortion.

III. Legal systems where the woman's claim could possibly be successful

In England and especially in Scotland, a court would possibly allow Bridget's claim on the basis of an infringement of her interest in family planning, acknowledged in *Rees v. Darlington Memorial Hospital NHS Trust*.¹⁰⁶ In the *Rees* case, a disabled woman was awarded compensation for not being able to have the family life she had planned, since a failed sterilisation led her to having a baby. However, the factual differences

¹⁰⁵ HR, 18 Mar. 2005, *RvdW* 2005, 42.

¹⁰⁶ *Rees v. Darlington Memorial Hospital NHS Trust*.

between *Rees* and the present case make the likelihood of Bridget's claim being successful uncertain.

In Greece and Switzerland there is neither case law nor established doctrine on this issue. However, both the Greek and the Swiss reports plead for the acknowledgment of Bridget's claim on the basis of the protection of personality rights by the law of delict. In Greece, the legal basis would be Art. 57 of the Civil Code: a particular aspect of the right of free development of personality is freedom of choice, which might include the right to an abortion. According to the Swiss report, the present case clearly falls under Art. 28 ZGB (infringement of personality), since Bridget was deprived of her right to choose an abortion. Swiss law recognises the mother's right to self-determination during the first three months of pregnancy and even after that period under certain circumstances.

20 Case 17: WAF – A gang of incompetents?

Case

In an interview about environmental protection, Howard, the president of a chemical company, accused the association ‘World Animal Fund’ (WAF) of being a ‘gang of incompetents who were taking advantage of people’s credulity and using member contributions for mysterious purposes’. Can the WAF sue Howard for damages?

Discussions

Austria

I. Operative rules

The legal entity WAF has the legal standing to sue. Compensation would only be awarded for economic loss.

II. Descriptive formants

The crucial point in this case is the question whether a legal entity can be defamed in the sense of § 1330 ABGB, subs. 1. According to the OGH and to some legal writers,¹ the ‘insultability’ (*‘Beleidigungsfähigkeit’*), and thus the right of action, stems from § 26 ABGB which sets out that legal persons have the same rights as natural ones. Comparable things should be dealt with comparably; consequently, a legal person unjustly labelled a ‘gang of incompetents’ suffers harm to its reputation since its social standing is tarnished by such an ‘attack’.² Korn and

¹ See OGH MR 1988, 194 (‘Camel’); MR 1997, 83; MR 2000, 22 *et al.*; R. Reischauer in P. Rummel, *Kommentar zum ABGB II/2b* (3rd edn., Vienna: 2004) § 1330 no. 23b.

² See OGH MR 1997, 83.

Neumayer³ are the foremost critics of such a right, but fail to state a basis for their opinion.

If, on the other hand, the claim is based on § 1330, subs. 2 ABGB – under which ‘economic reputation’⁴ (reflected in one’s creditworthiness, earnings and advancement in profession) is protected against the dissemination of facts which do not correspond to the truth – the standing to sue is not questioned as the business reputation of legal entities must be protected in any event.

The WAF is an association according to § 1 *Vereinsgesetz*⁵ (law governing associations) and thereby a legal person with corresponding legal rights. The ‘WAF’ is not established for profit, however in order to realise the goals of its charter it has to act like a profit-minded business enterprise. Therefore, the WAF may suffer economic loss, either resulting from the loss of its creditworthiness or resulting from the reduction of its earning potential.

Beyond that, it is conceivable that legal persons can also suffer non-economic loss. Of course, one cannot speak of ‘emotional distress’ in this case, but of non-economic harm, e.g. the impairment of ‘social esteem’, of ‘good will’ (commercial value, ‘*Marktwert*’) or of competitiveness.⁶ Yet, even this damage will materialise in the end – a problem which leads to the fundamentally blurred distinction between economic and non-economic loss. However, under § 1330 ABGB only economic loss can be compensated.

Since Howard makes his accusation in the course of an interview, § 6 *MedienG* is likely to apply. Nevertheless, this regulation cannot provide a basis for a claim as only natural persons have legal standing to sue under its provisions.

§ 7 and § 16 *UWG* (*Gesetz gegen den unlauteren Wettbewerb*, Unfair Competition Act) are not implicated because the present case does not raise the question of market competition.

³ G. Korn and H. Neumayer, *Persönlichkeitsschutz im Zivil- und Wettbewerbsrecht* (Vienna: 1991) 50 *et seq.*

⁴ See Case 1.

⁵ Cf. T. Höhne, G. Jöchl and A. Lummersdorfer, *Das Recht der Vereine* (Vienna: 1997).

⁶ Compare the discussion surrounding § 16 *UWG* (Unfair Competition Act, *UWG*): the Supreme Court awards damages for non-economic loss under § 16 subs. 2 *UWG*, not only to natural persons but also legal persons. Thus, the Court accepts the existence of non-pecuniary loss even if legal persons are concerned. This point of view is rejected within legal scholarship to a great extent. See OGH MR 1996, 74 = ÖBl 1996, 134; F. Mahr, ‘Der immaterielle Schaden der juristischen Person im Wettbewerbsrecht’ (1994) *WBL* 69; P. Rummel, ‘Zur Verbesserung des schadenersatzrechtlichen Schutzes gegen unlauteren Wettbewerb’ (1971) *JBl* 385.

Belgium

I. Operative rules

The WAF can bring an action against Howard.

II. Descriptive formants

The president (or another competent organ) of the WAF can sue for damages on behalf of the association. In that sense, legal bodies are holders of rights and duties. Consequently, they are protected by personality rights.⁷

In the context of a legal body's 'right to standing and reputation', Howard tarnishes the prestige and credibility of the WAF. The president can sue for damages for the resulting economic loss which may consist of a loss of members and membership fees. The president can also sue for emotional damages on the ground of defamation.⁸

England

I. Operative rules

The WAF may have a claim against Howard in defamation if a class of persons can be identified.

II. Descriptive formants

Generally speaking, the defamation of a class of persons is not actionable as the words cannot be said to be published of a particular claimant.⁹ However, much depends upon the size of the class, the generality of the charge and the excessiveness of the accusation. The claim here seems to refer to the central management of the WAF and as this is a limited group probably comprised of trustees and directors or managers it may be taken to refer to every member of this group and thus these members might be able to sue.¹⁰ The very vagueness of the accusation (testified by the difficulty in associating the statements made to the persons they are made about) may help Howard avoid liability if the persons he is accusing cannot be defined. It is not the members he

⁷ In general see G. L. Ballon, 'De persoonlijkheidsrechten van de rechtspersoon', in *Liber amicorum Jan Ronse* (Brussels: 1986) 127–46.

⁸ E. Guldix, 'Algemene systematische beschouwingen over het persoonlijkheidsrecht op de eigen afbeelding' (1980–81) *RW* 1161–1192 n° 121.

⁹ *Knupffer v. London Express Newspaper Ltd* [1944] AC 116, at 124 (per Lord Porter).

¹⁰ See *Foxcroft v. Lacey* (1613) Hob 89; *Browne v. D.C. Thomson & Co* (1912) SC 359; *Aspro Travel Ltd v. Owners Abroad Group plc* [1995] 4 All ER 728.

is accusing as he says they are being taken advantage of, but can the actual persons he is blaming be identified? Howard seems to be tarring them all with the same brush, thus if they can be identified as a class then there would possibly be a claim.

Finland

I. Operative rules

The WAF might be able to sue for damages.

II. Descriptive formants

The reform of the Finnish Penal Code on 1 October 2000 ensured important changes in the legal landscape.¹¹ The honour and reputation of a legal person is not protected by the same provisions as the honour and reputation of natural persons. The scope of Ch. 24, s. 9 of the Finnish Penal Code does not extend to legal persons.¹² As such, the defamation provisions in the Finnish Penal Code are not applicable.

However, to some extent the WAF can be considered a trader and the statement made by the president of the chemical company can be considered part of the business activity of that company. Therefore, it is not impossible that the Finnish Act on Unfair Business Practices could be applicable and the statement considered as unfair business practice. If this is the situation, the Market Court can grant an injunction against the chemical company which expressed discrediting information about the WAF.

As was described in Case 7, the violation of the provisions of the Act on Unfair Business Practices can constitute grounds for compensation if the act is considered to fulfil the criterion of especially weighty reasons for compensation. Therefore, the WAF could also sue for damages for pure economic loss at a local court. It is not possible for the WAF to obtain damages for non-economic loss.

France

I. Operative rules

The WAF can, in principle, bring an action for defamation against Howard, but it is not certain that its claim for damages will succeed.

¹¹ See Tiilikka, *Päätoimittajan vahingonkorvausvastuu*, unpublished licentiate (master's) thesis (Helsinki: 2000) 237–9.

¹² Government Bill 184/1999 p. 35 and Tiilikka, *Sananvapaus ja yksilön suoja – LehtiArtikkelin aiheuttaman kärsimyksen korvaaminen* (Vantaa: 2007) 534.

II. Descriptive formants

Although the notion of honour, due to its moral connotation, does not really correspond to legal persons, nevertheless the latter have a reputation to protect.¹³ Thus, it is admitted that an entity enjoying legal capacity, whether for profit or not, enjoys the same rights as a natural person to defend their reputation and to obtain recovery of any loss suffered. Accordingly, half a century ago the *Cour de cassation* held that legal persons can bring an action for defamation¹⁴ and may exercise the right of reply.¹⁵ The French courts have since had the opportunity to sanction ‘injuries to the professional reputation of a company which by their nature question the respectability of the company’.¹⁶ Once defamation has been found, the case law requires the instigator thereof ‘to repair the commercial and moral damage of the defamed merchant’.¹⁷ In relation to legal persons exercising a commercial activity, such as corporations, the loss suffered from the damage to reputation is usually economic, essentially that of a loss of clients.¹⁸ In cases involving non-profit organisations having legal personality, for example associations, the loss is purely non-economic in principle. However, one may argue that the injury to their reputation and their credibility has, as a consequence, a reduction in the number of donations and memberships (and membership fees), and thus constitutes economic loss. Therefore, in this case the WAF could argue that Howard’s statements have caused both economic and non-economic loss to the association.

Thus, if the principle of protection of the reputation of legal persons is well established in French law, it remains to be examined whether Howard’s statements in fact constitute the criminal offence of defamation. The *Cour de cassation* has in fact held in quite an old decision that ‘if a commercial enterprise can (...) obtain reparation of the injury to its professional reputation, which might be caused by defamatory

¹³ Petit, ‘Les droits de la personnalité confrontés au particularisme des personnes morales’ (1998) 117 *Dalloz Affaires* 828; Wester-Ouisse, ‘Le préjudice moral des personnes morales’ (2003) I *JCP* 145.

¹⁴ Cass. crim. 12 Jun. 1956, D. 1956, jur., 577: the legal text which punishes defamation ‘specifies that the allegation or imputation must concern a person or body and is applicable to natural persons as well as to entities’.

¹⁵ Cass. crim. 6 Nov. 1956, *JCP* 1957, II, 9723: ‘A natural or legal person mentioned in a press article is entitled to decide whether to make use of his/her/its right of reply, and the form in which he/she/it intends to exercise the latter’.

¹⁶ CA Paris 3 Nov. 1983, *Gaz. Pal.* 1983, 2, somm., 425.

¹⁷ CA Paris 12 Oct. 1989, D. 1989, IR, 292.

¹⁸ Beignier, *L’honneur et le droit* (Paris: 1995) 244.

imputations or allegations, it is necessary that (these) concern facts sufficiently precise to be susceptible of legal proof'.¹⁹ In the instant case, the statement 'a gang of incompetents' is more of an insult than defamation in so far as it is not a question of the imputation of a definite fact. On the other hand, the allegation of the donors' abuse of confidence and the misuse of contributions for mysterious purposes may be held to be defamatory.

The WAF can thus bring an action before a criminal court to have Howard convicted. In addition, in the framework of the 'civil action' they can bring an action to obtain damages recovering both the non-economic and the economic loss suffered by the association. Such an action, however, presupposes that the conditions set out by the Freedom of the Press Act 1881 for the validity of procedures, notably the extremely brief prescription period of only three months and the respect of a very strict formalism (see Case 1) be fulfilled. Even if these preconditions are fulfilled, the claim for damages brought by the WAF against Howard could still fail on the ground that the injury to reputation thus perpetuated is justified by Howard's interest to inform the public about the misuse of funds by a group appealing to the public's generosity.

In relation to the action for reparation before the civil court on the basis of the rules of tort liability, such an action is now denied to victims of the 'abuse of the freedom of expression provided for and punished by the Act of 29 July 1881'.²⁰ Consequently, the WAF cannot claim before the civil courts under the conditions of general private law in order to escape from the procedural restrictions encompassed in the 1881 Act.

Germany

I. Operative rules

The WAF may claim damages for economic loss, if there is any. However, damages for non-economic loss cannot be claimed by the WAF.

II. Descriptive formants

This case raises the question of whether organisations such as the WAF have a right to honour and reputation. The general view is that organisations do enjoy the protection of all interests required by them in order to fulfil their organisational aims and functions. Some scholars speak in this sense of a non-economic right to social acknowledgment

¹⁹ Cass. crim. 22 Mar. 1966, JCP 1967, II, 15067.

²⁰ Cass. Ass. Plen. 12 Jul. 2000, D. 2000, somm., 463. See above Case 1.

(‘Sozialgeltung’).²¹ This right is given to commercial companies,²² as well as to non-profit organisations.²³ Therefore, the WAF has a valid interest in protecting its reputation.

Courts regularly assume that the right falls under § 823(1) BGB. However, organisations do not enjoy the same intensive protection as natural persons do. As organisations act in public and try to reach their aims in publicly recognised ways, they have to show greater tolerance towards criticism than natural persons.²⁴ What they do not have to accept, however, is the false allegation of facts, as well as humiliating critique (‘Schmähekritik’). Therefore, both the allegation of using contributions for mysterious purposes and the harsh criticism in being termed ‘a gang of incompetents’ are *prima facie* unlawful.

The accusations may be legitimated by the right to free expression (Art. 5(1) GG). However, this would require that Howard wishes to communicate a matter of public interest. A merely humiliating critique is *prima facie* unlawful in two ways. First of all, the allegation of unproven and possibly false facts is not legitimate if public concern is not at the basis of the defendant’s allegation. Secondly, unmotivated disparagements are not an exercise of the right to free expression *per se*. Therefore, Howard will have to prove that he is motivated by a substantial concern regarding the activities of the WAF. Usually, when the comment addresses a non-profit organisation’s core social and political activities, such a public concern can be presumed. Therefore, the accusation of being a ‘gang of incompetents’ will be a legitimate opinion, along with the comment that the organisation is taking advantage of people’s credulity. If the allegation consists of facts, courts are more restrictive. Howard will have to make a minimum effort to research whether his allegation is based on some substance.²⁵ The amount of effort expected varies according

²¹ G. Wronka, *Das Persönlichkeitsrecht juristischer Personen* (Dissertation, Bonn: 1972) 97.

²² BGHZ 78, 24 – *Medizin-Syndikat I* (partnership); BGHZ 98, 94 – *BMW* (public corporation); BGH NJW 1994, 1281 – *Heberger Bau* (close corporation); OLG Hamburg ZUM-RD 2009, 200 (movie on pharmaceutical company which distributed the *CounterGAN* drug in the 1960s).

²³ BGH NJW 1971, 1655 (trade union); BGH NJW 1974, 1762 (political association); OLG München NJW-RR 1997, 724 (scientific organisation).

²⁴ BVerfG NJW 1999, 2358, 2359 (Greenpeace accusations against the CEO of a chemical company), BGH NJW 1994, 124 (Greenpeace case); BGH NJW 1987, 2225, 2227 (press allegations against a chemical company); OLG München ZUM 1995, 42, 47 (fierce criticism among television broadcasting companies).

²⁵ BGHZ 68, 331 = NJW 1977, 1288, 1289; BGHZ 132, 13 = NJW 1996, 1131, 1134; BGH NJW 1997, 1148, 1149.

to the interest concerned.²⁶ While the press has to show professional care, individuals will be treated with more generosity. This is also because individuals often act on behalf of their own interests, lack impartiality and will be treated with less credulity than press allegations. Nevertheless, this changes if the individual speaks on behalf of a company or another organisation.²⁷

The core of the allegation in this case refers to a form of corruption. For a non-profit organisation this is a strong reproach and thus this mere allegation, without any given or proven facts, will not be considered as legitimate under the right to freedom of expression and § 193 *StGB*. Therefore, the WAF will have grounds for an injunction with respect to this allegation.

The WAF may also sue for the compensation of any economic loss which they have suffered as a result of the allegation. However, proving loss will be difficult as it entails proving the defendant's behaviour caused that exact amount of loss. Courts are generally unwilling to accept a claim for compensation of non-economic loss with respect to companies and organisations.²⁸ Damages for non-economic loss are generally limited to natural persons and to situations in which the damage done cannot be repaired in any other way other than through a sum of money. In respect of non-profit organisations, however, the *BGH* has made an exception to this rule, provided the loss cannot be remedied in any other form.²⁹ Nevertheless, the WAF has plenty of opportunities to disseminate the news of an injunction obtained in a court trial so that additional relief for non-monetary loss is not necessary. Therefore, the WAF will have no claim in this respect.

Greece

I. Operative rules

The WAF has a claim against Howard for the compensation of non-economic loss.

²⁶ BGHZ 31, 308, 313; BGHZ 68, 331= NJW 1977, 1288, 1289.

²⁷ BGH NJW 1997, 3302 (head of an association to protect the record industry against bootleg copies criticises a coffee house chain for distributing unlicensed CDs).

²⁸ BGHZ 78, 24, 28 (private partnership); OLG Stuttgart MDR 1979, 671 f.; D. Klippel, 'Der zivilrechtliche Persönlichkeitsschutz in Verbänden' (1988) *JZ* 625, 635. But see BGHZ 78, 274, 280 = NJW 1981, 675, 676 - scientology: non-pecuniary damages not generally excluded; OLG Stuttgart, NJW-RR 1993, 733.

²⁹ BGH NJW 1981, 675, 676 (for a religious organisation).

II. Descriptive formants

The personality right (Arts. 57, 59 CC) grants protection to both natural and legal persons. Legal persons can also be unlawfully injured in their personality in relation to faith, reputation and professional activity.³⁰ A legal person has the right to claim compensation for non-economic loss, which is freely determined by the discretionary power of the court, taking the type and gravity of the insult, the conditions in which the injury took place, the wrongdoer's degree of fault and the financial state of both the injured party and wrongdoer into account.

Freedom of opinion is a recognised principle in Greek law. Still, when an opinion has an objectively strong defamatory character, bearing in mind the whole content of the interview, and is knowingly expressed in public in order to offend someone's honour and reputation, it is an act of defamation within the meaning of Art. 361 PC.

Ireland

I. Operative rules

It is possible that both the WAF and individual members of the organisation could bring an action in defamation against Howard.

II. Descriptive formants

Defamation not only offers protection to natural persons but also to legal persons including friendly societies.³¹ However, the WAF would have to be considered a distinct legal personality if it is to bring an action in its own right. Thus, if the WAF is an unincorporated association it could not bring an action.³² As outlined in the English report, individual members of the association could bring an action in defamation but it might be difficult for them to establish that they had been sufficiently identified by the offending statement. If the group which forms the association is considered small enough then an action may exist.³³

Italy

I. Operative rules

The WAF can recover damages from Howard.

³⁰ See Court of Athens Decision 3058/2003, Supreme Court (Areopag) 75/1998.

³¹ *Irish People's Assurance Society v. City of Dublin Assurance Co Ltd* [1929] IR 25.

³² *London Association for the Protection of Trade v. Greenlands Ltd* [1916] AC 15.

³³ *Duffy v. News Group Newspapers Ltd* [1994] 3 IR 63.

II. Descriptive formants

Undisputedly, under Italian law not only individuals, but also non-profit organisations and corporations have personality rights. Many decisions are reported concerning the rights of groups to name, personal identity, or reputation.³⁴ Since the enactment of the Data Protection Code, organisations also have recourse to remedies aimed at the protection of privacy and personal data (see Art. 4(1), *b, i* DPC).³⁵ Scholars agree that personality rights can be extended to groups, but the theoretical foundation of this solution is strongly debated.³⁶

It is quite clear from the facts of the case that Howard committed a tort (and a crime³⁷) of defamation against the WAF. The association's interest in reputation has been violated.³⁸ In addition, one could argue that not only the association, but also the members of its executive board have been defamed (the purpose of member contributions usually depends on the decisions of the board: one would need to know more about the exact content of the interview).³⁹

The association can sue Howard for damages. According to Art. 2043 CC, the WAF can recover economic losses (foregone funds and contributions, suspended projects, etc.). The association can also recover non-economic losses (Art. 2059 CC). Many Italian Supreme Court decisions have recognised the possibility for associations, States and even corporations to recover non-pecuniary damages.⁴⁰ The theoretical basis of this solution is the distinction between pain and suffering and the

³⁴ See for an accurate analysis of the most important decisions, A. Fusaro, *I diritti della personalità dei soggetti collettivi* (Padova: 2002).

³⁵ See G. Alpa, 'Aspetti della disciplina sui dati personali riguardanti gli enti e l'attività economica' (1998) *Riv. trim. dir. proc. civ.*, 713 *et seq.*; A. Fici and G. Resta, 'La tutela dei dati degli enti collettivi: aspetti problematici', in R. Pardolesi (ed.), *Diritto alla riservatezza e circolazione dei dati personali*, Vol. II (Milan: 2003) 375 *et seq.*

³⁶ See A. Zoppini, 'I diritti della personalità delle persone giuridiche (e dei gruppi organizzati)' (2002) *Riv. dir. civ.* I, 851 *et seq.*; V. Zeno-Zencovich, 'Personalità (diritti della)', in *Dig. disc. priv., sez. civ. XIII* (Turin: 1995) 440.

³⁷ See Art. 594 *et seq.* CP.

³⁸ See on the right to honour and reputation of groups, A. Fusaro, *I diritti della personalità dei soggetti collettivi* at 62 *et seq.*

³⁹ See on this point A. Fusaro, *I diritti della personalità dei soggetti collettivi* at 92.

⁴⁰ See Cass. 8 Jun. 2005 no. 12015; Cass. 30 Aug. 2005 no. 17500, *Danno e resp.* 2006, 153; Cass. 16 Jul. 2004 no. 13163; Cass. 21 Jul. 2004 no. 13504, *Dir. prat. soc.* 2004, 60; Cass. 2 Aug. 2002 no. 11573, *Giust. civ.* 2002, I, 3063; Cass. 2 Aug. 2002 no. 11592; Cass. 2 Aug. 2002 no. 11600, *Foro it.* 2003, I, 838; Cass. 3 Mar. 2000 no. 2367, *Danno e resp.* 2000, 490; Cass. 5 Dec. 1992, no. 12951, *Dir. inf.* 1993, 373; Cass. 10 May 1991 no. 7642, *Giust. civ.* 1991, I, 1955. See, on this issue M. V. De Giorgi, 'Risarcimento

general category of non-pecuniary loss. Even though an association cannot suffer, it can recover compensation for damage arising from the violation of a ‘non patrimonial’ right, such as the right to reputation or personal identity.⁴¹

The judge has a discretionary power in assessing this kind of loss (Arts. 1226–2056 CC).

The Netherlands

I. Operative rules

If Howard’s allegations against the WAF are unlawful, the WAF can claim damages for economic and non-economic loss.

II. Descriptive formants

In the first place we have to answer the question whether or not the WAF has its own right to personality or privacy. According to Dutch law, it is not impossible for a legal person to have a right to privacy.⁴² Nevertheless, there is hardly any case law on a legal person’s right of personality.

Assuming that, in principle, the WAF is entitled to invoke its right to privacy, this right has to be balanced against Howard’s right to freedom of expression. The commercial character of the interview is among the many circumstances that can be involved (see Case 1). If Howard used his right to free speech for his own (financial/commercial) interest⁴³ and/or if his statements coincide with the commercial interest of the WAF,⁴⁴ the interest of the WAF in its personality right can outweigh Howard’s interest to free speech. If this is the case, the allegations by Howard are damaging to the WAF. The WAF can claim damages for economic and non-economic loss. Loss of income due to loss of members and a reduction in donations can be included under economic damages. Non-economic harm can be the result of injury to the honour or reputation of the WAF or another affliction of its person.

del danno morale *ex lege* Pinto alle persone giuridiche per le sofferenze patite dai componenti’ (2006) *Resp. civ.* 281.

⁴¹ See Cass. 3 Mar. 2000 no. 2367, *Danno e resp.* 2000, 490; Cass. 5 Dec. 1992 no. 12951, *Dir. inf.* 1993, 373.

⁴² *Parlementaire Geschiedenis* Boek 6, p. 380; ECJ 23 Sept. 1986, NJ 1988, 380; HR 15 Dec. 1992, NJ 1993, 550; Schuijt, *Losbladige Onrechtmatige Daad*, Hoofdstuk VII, (Deventer: 2000) no. 102; Lindenbergh, *Losbladige Schadevergoeding*, aant. 11 bij art. 6:106 BW (Deventer: 2005).

⁴³ Schuijt, *Losbladige Onrechtmatige Daad* no. 91. ⁴⁴ *Ibid.* no. 31.

Portugal

I. Operative rules

The WAF can sue Howard for damages.

II. Descriptive formants

All considerations regarding the right to honour and the crime of defamation explained in Case 1 are, *mutatis mutandis*, applicable to the present case. The main differences between these two cases are:

- the characteristics of the wrongdoer (in Case 1 it is a journalist and in this case a president of a company);
- the characteristics of the offended (in Case 1 it is an individual and in this case a moral person).

The offence itself remains the same: wrongful damage caused to the honour and reputation of a person (be they natural or legal) and the criminal offence of defamation. The specific considerations regarding the journalist's duties and rights are not applicable to Howard of course.

Being termed 'a gang of incompetents who were taking advantage of people's credulity and using member contributions for mysterious purposes' is objectively offensive regardless of the circumstances. The WAF is a legal person (*'pessoa colectiva'*), but that does not represent any obstacle under Portuguese law, which has long recognised that legal persons can avail of all the rights and duties necessary or convenient for the accomplishment of their aims, only excluding those which are forbidden by law or inseparable from individuals (Art. 160 CC). In addition, although Art. 70 CC expressly restricts personality rights to individuals, Art. 484 CC extends compensation for offences to the reputation of legal persons. In addition, for a long period of time, Portuguese courts and doctrine have been unanimous in declaring that legal persons hold all personality rights which are compatible with their condition, i.e. all personality rights which are not necessarily connected to individuals.⁴⁵ Thus, the WAF is entitled to compensation.

⁴⁵ As far as civil wrongful acts are concerned, STJ 15.06.1994 declares as undisputed that legal persons are holders of at least some personality rights, such as the right to name and honour; as far as criminal offences are concerned, one can mention decisions STJ 24.02.1960 (which concerns a crime of defamation and states that moral persons have the right to name, honourific distinctions, honour and reputation) and STJ 16.11.1989 (which declares that moral persons hold all personality rights, except those inherent to individuals, therefore moral persons can be the object of a crime of insult).

According to Art. 180(2) CP, as a defence Howard shall have to prove that what he said is true (*exceptio veritatis*), and that it is of relevant public interest.⁴⁶ His liability will also be excluded if he proves that he had good, solid reasons to believe, *bona fides*, that what he said was true.⁴⁷ If he succeeds in proving this, he will escape liability.

Scotland

I. Operative rules

The organisation may have a claim.

II. Descriptive formants

A case of corporate defamation is traditionally seen as impossible, given that corporations have no method of demonstrating feelings that they cannot measure. They do, however, have trading reputations that can be easily lost. Technically, if it can be shown that WAF (through its director) has lost its trading reputation, then a claim could be considered. Reference is made here to the case of two individuals who were found liable to McDonalds for defamation⁴⁸ before the English courts. After distributing leaflets designed to inform the public of the culinary and nutritional content of McDonald's food, both individuals were, on proof of damage to McDonald's reputation, ordered to pay compensation.

The success of such a claim will be based solely on the question of whether the WAF can establish a loss in subscription to its projects as a result of Howard's comments. The fact that the WAF is not a corporation, but rather a trust (or charity) and primarily non-commercial reduces the chances of a successful claim.

Spain

I. Operative rules

The WAF can claim damages from Howard.

II. Descriptive formants

As a matter of principle, only information that is true can be protected by LO 1/1982. Art. 7.7 of LO 1/1982 declares that it is always an

⁴⁶ STJ 26.09.2000: save when a public interest is at stake and takes precedence over the right to good name and reputation, provided that it is always done in such a manner as not to go beyond what is required for the disclosure.

⁴⁷ For more extensive considerations on the *exceptio veritatis* defence, please see Case 1.

⁴⁸ *McDonalds v. Steel*, Independent, 10 May 1999.

unlawful interference: 'to impute facts or spread value judgments through actions or expressions damaging the dignity of a person, lessening their reputation or attempting to lessen respect for them.'

The problems of distinguishing deliberately false information from that which could be true have forced the Spanish Courts to distinguish between true information and truthful information.

Art. 7.7 reveals the difficulty in drawing the line between the freedom of speech and the right of information and the protection of honour, reputation and privacy to a greater extent. Freedom of speech will never be able to justify the attribution of facts to a person, which imply that he or she is unworthy of his or her reputation. There are a lot of Spanish Supreme Court decisions which relate to this.⁴⁹ Organic Law and the Spanish Supreme Court have not hesitated to affirm the illegitimacy of untruthful information.

In the same way, the doctrine of the Spanish Constitutional Court requires a distinction between true information and truthful information. The Spanish Constitutional Court does not demand reality, i.e. the scientific and empirically true, in the news or in public statements; however, the truthful is always required. STC 6/1988 of 21 January⁵⁰ affirms that erroneous statements are unavoidable in a free debate and if the truth were demanded as a condition for the exercise of the right to free speech and the right to information, the application of these two rights would then be meaningless in a democratic society.

If law requires the guarantee of truth in all public statements, then, as stated by the Spanish Constitutional Court, the only constitutional guarantee would be silence. If an investigation is undertaken on the part of the informant and the facts and the investigatory task and the differences between the two are confirmed, the information is truthful, although it cannot reflect the material truth.

When the Spanish Constitution requires the information to be truthful it is not depriving protection to information that can be erroneous, or simply not tested, but rather it is establishing a specific duty of diligence on the informant who has the obligation to contrast the facts that he or she presents as information with objective data. Whoever acts with contempt concerning the way in which to discover

⁴⁹ Among the more recent, see STS, 26 Apr. 1990 (RJ 3434); STS, 25 Mar. 1991 (RJ 2441) and STS, 4 Nov. 1992 (RJ 9199).

⁵⁰ RTC 6.

the truth shall not have any constitutional protection. The Spanish Constitution does not protect a negligent informant. The error, not the false information, is protected. The Constitution does not offer protection to negligent behaviour, even less so to mere gossip or speculation. Nevertheless, this classification aids correct and general information, even in the cases where the facts are not completely exact. According to these principles, the responsibility of the informant, or in a more general form, of the communicator is responsibility for fault and blameworthiness.

However, we must remark on two aspects:

- (1) Truthfulness constitutes a limitation to the freedom of information, but not to the freedom of speech which has a greater scope since opinions or ideas must not be true or false, it is enough that its own nature concerns opinions and implications that could not be verified by any objective test.
- (2) Information which is objectively false but diligently obtained cannot provide the injured person with a right to compensation, but it can cause other judicial measures of protection for the right to honour or privacy like, for example, an injunction.

With these principles, the Organic Law and the Spanish Courts, mainly the Constitutional Court, have established the basis that allows distinguishing information from critics or public debate. Therefore, the courts pretend to distinguish the protection granted to the journalistic information from that which is dispensed to mere opinions.

III. Metalegal formants

Due to the problems in applying the principles of responsibility for fault to the task of obtaining and disseminating the information, some authors have proposed the application of the strict liability to this task. In this way, Pantaleón intends to apply the principles of liability for defective products and the test of the standing of the law defence to all journalists who provide truthful information.⁵¹ In Spain, and mainly in the United States, the purpose has the obstacle of the doctrine established by *New York Times v. Sullivan* in 1964.⁵²

However, the distinction between truthful information and true information does not allow the protection of mere insult. The Spanish

⁵¹ F. Pantaleón, 'La constitución, el derecho al honor y unos abrigos' (1996) *Revista Derecho Privado y Constitución* 10.

⁵² 376 US 254 (1964).

Constitution protects what is said and how it is said. There is an applicable limit to the freedom of information and to the freedom of speech. If the information is truthful and is obtained with diligence and care it is acceptable. If there are insults accompanying it this can result in an unlawful interference with the information. A right to insult neighbours does not exist in the Spanish Constitution. The general rule is that although the information is truthful (even objectively and absolute true), its presentation as an attack to dignity causes the right to honour to prevail over freedom of information and, naturally, over freedom of speech.⁵³

All of the related principles are applied to the professional prestige or reputation of persons. In numerous cases, jurisprudence has understood professional prestige to be part of honour protected by Organic Law.⁵⁴ This statement allows the examination of the second of the questions related to this case: the Act legitimating an association, a non-governmental organisation in this case, to protect its own honour and, of concern here, its professional prestige.

The constitutional doctrine that extends the protection of the right to honour to associations has its origin in Spanish case law in the famous case of *Violeta Friedman v. León D.* Mrs Friedman was a survivor of the Nazi extermination camp in Auschwitz, where most of her family members were killed. León D., who had commanded the SS troops in Belgium, declared in an interview in a Spanish journal that Jews were a plague and he questioned the real existence of the Holocaust. Mrs Friedman's claim against León D. was denied by civil judges and by the Spanish Supreme Court. Finally, the Spanish Constitutional Court considered the claim and ordered León D. to pay a huge sum of money to Mrs Friedman. The Constitutional Court decided the case in the *STC 214/1991* of November 11,⁵⁵ and it ordered Mr León D. and the journal that had published its statements to compensate Mrs Friedman and to rectify the published information. In the case, the Tribunal affirmed that it is also possible to appreciate that there is damage to the honour of the plaintiff when, even the information is related to a collection or a group, the group does not have any personality, and therefore, it cannot fight in order to achieve the protection of the interest related to the group itself.

⁵³ See, paradigmatically, *STS*, 17 Mar. 2000 (RJ 2017).

⁵⁴ *STS*, 11 Feb. 1992 (RJ 975), and *STS*, 5 Feb. 2000 (RJ 251).

⁵⁵ *RTC* 214.

Switzerland

I. Operative rules

Howard's words constitute an unlawful infringement of the WAF's right to its reputation, more specifically its economic, social, and professional esteem. The WAF may claim damages for economic loss as well as for pain and suffering.

II. Descriptive formants

Whether Howard's declaration infringes on the rights of the entity targeted depends on whether an organisation like the WAF benefits from the protection of Art. 28 *et seq.* CC. Under Swiss law, it is recognised that a legal person may possess some personality rights, to the extent that these do not extend to the natural attributes of human individuals.⁵⁶ Only the rights protecting social personality, traditionally including the right to one's reputation,⁵⁷ are likely to come into play. This category includes the social, economic, and professional reputation of the natural or legal person concerned.

The average citizen's point of view and other objective criteria must be considered to determine whether Howard's accusation is likely to diminish the esteem of the WAF. According to case law, the esteem enjoyed by a (legal) person is more easily affected by an infringement where an individual's private or professional behaviour is called into question, rather than through the revelation or criticism of his or her (or its) political opinions.⁵⁸ One may also consider the fact that, in the present case, the accusation comes from the president of a chemical company and that very often such organisations have opposing interests to those of environmentalist organisations. Thus, Howard's declaration must be taken with a pinch of salt.

The WAF's interest in respect of its professional and economic reputation must be balanced against Howard's freedom of opinion, as well as the interest of the public in being informed. Declarations of this kind, which amount to accusing the WAF of fraud, are likely to discredit the WAF and discourage citizens from giving donations. An analysis of competing interests suggests that the accusation is sufficiently

⁵⁶ ATF/BGE 121 III 168 c. 3a, JdT 1996 I 52; ATF/BGE 108 II 242 c. 6, JdT 1984 I 66. P. Tercier, *Le nouveau droit de la personnalité* (Zurich: 1984) n. 520 *et seq.*

⁵⁷ H. Deschenaux and P.-H. Steinauer, *Personnes physiques et tutelle* (4th edn., Berne: 2001) 163, n. 523.

⁵⁸ ATF/BGE 105 II 161 c.2.

serious to be considered an unlawful infringement of the social, economic, and professional reputation of the WAF. It is not, in fact, insignificant to accuse a legal person of profiting from the naivety or the credulity of its members in order to take their money, which will then be used for mysterious purposes. The Federal Court has held that an article entitled ‘These profits without work must cease’, implying that some architects were making money by speculating on real estate and transferring the cost to future tenants, infringed their reputations.⁵⁹ In that case, the article had created the impression that these two professionals were exploiting weak people in order to unduly increase their profits. The Federal Court has also held that an article severely criticising the Raelian sect and presenting its leader as a crook violated personality rights.⁶⁰ As the term ‘crook’ may be understood by the average reader in its criminal sense, the infringement was considered as needlessly hurtful and thus unlawful.

In the present case, the WAF has several claims available (Art. 28a CC). It may demand a declaratory judgment recognising the unlawful infringement of its reputation (Art. 28a, para. 1(3) CC) and claim damages (Art. 28a, para. 3 CC and Art. 41 *et seq.* CO), to the extent that the WAF can prove the existence of loss. Loss may consist of losing contributions following Howard’s accusation. The WAF will have the burden of proving the causal link between the accusation and the resulting harm.

Can the WAF recover for pain and suffering? This question is the subject of controversy. Some authors deny the ability of legal persons to claim for pain and suffering because they cannot feel pain.⁶¹ Thus, they do not see how awarding such damages could ease any suffering. Legal persons do not, according to these authors, have access to the subjective dimension of pain and suffering necessary to know physical or psychological pain.

The Federal Court comes to the opposite conclusion.⁶² Thus, it holds that awarding damages for pain and suffering is justified ‘even if the

⁵⁹ ATF/BGE 103 II 161 c.1, SJ 1978, p. 222.

⁶⁰ Judgment of the Swiss Federal Court, 5C.252/2001 c. 2.

⁶¹ F. Riklin, *Der Schutz der Persönlichkeit gegenüber Eingriffen durch Radio und Fernsehen nach schweizerischem Privatrecht* (Fribourg: 1968) 298; H. -R. Staiger, *Genugtuungsansprüche gegen Massenmedien* (Zurich: 1971), p. 82; P. Tercier, *Le nouveau droit de la personnalité* n. 2041.

⁶² H. Oser and W. Schönenberger, *Zürcher Kommentar, Art. 1–429 OR*, Vol. V 1 (2nd edn., Zurich: 1929) ad Art. 49 CO n. 17; R. Schumacher, *Die Presseäußerung als Verletzung der*

victim is absolutely incapable of being conscious of its state and of affording any importance to the money',⁶³ which is the case for a legal person, since it cannot subjectively perceive an infringement or its remedy. The Federal Court even goes as far as to say that 'it matters little that this goal [namely, compensating pain suffered with a sum of money] cannot be attained where the victim is incapable of appreciating the value of the money. However, the judge fixes the sum awarded by taking into account the subjective consequences of the harm and specifically the intensity of the suffering and the pain experienced.⁶⁴ This last remark explains why legal persons are satisfied to settle on a symbolic award of damages or damages granted to a third party.⁶⁵ In conclusion, the WAF has the right to claim damages for pain and suffering.

III. Metalegal formants

Although the protection of the economic, social, and professional reputation of a legal person is fully justified, redress for its pain and suffering is open to criticism. How can a legal person, without sensory perception of the world around it other than through its members, feel a deterioration in its well-being, its enjoyment of life in general, or any physical or psychological suffering? Art. 49, para. 1 CO demands that the harm be particularly serious for damages for pain and suffering to be awarded. In other words, the intensity of the suffering must be such that it cries out for judicial intervention. Thus, when a court awards a sum of money for pain and suffering to a legal person which by definition is not able to feel anything or to realise that it is receiving damages, the principal goal of the remedy.

However, if one finds that it is appropriate to ease the self-styled non-economic harm suffered by a legal person, other forms of compensation are preferable to a monetary award. One may consider the publication of the judgment, a correction, or some other gesture.

persönlichen Verhältnisse (Fribourg: 1960) 229; F. Dessemontet, 'La presse et les sociétés commerciales', in *Die Verantwortlichkeit im Recht* (Zurich: 1981) 205 is hesitant.

⁶³ ATF/BGE 108 II 422 c. 4a, JdT 1983 I 104.

⁶⁴ ATF/BGE 108 II 422 c. 4c., JdT 1983 I 104.

⁶⁵ ATF/BGE 95 II 489, JdT 1971 I 226. In this case, the Club Méditerranée had demanded that the Federal Court oblige the defendant to pay the sum of 1,000 Swiss Francs to the International Committee of the Red Cross.

Comparative remarks

The central consideration in this case is whether or not organisations or corporations can hold personality rights. Traditionally, such rights were regarded as only being inherent in an individual human being. Nevertheless, some legal systems have witnessed a departure from this traditional viewpoint in certain circumstances. One example is where the reputation of an organisation is at stake. In many countries, the same legal principles that govern the protection of a natural person's reputation also apply to a legal person's reputation. The approaches of the different legal systems can be divided under three broad headings.

I. Claimant is entitled to damages for both economic and non-economic loss

The claimant will be successful in suing for both economic and non-economic loss in Belgium, France, Greece, Italy, the Netherlands, Portugal, Spain and Switzerland. In most of these countries, the legal framework for the protection of reputation is the same in respect of both natural and legal persons.

Case law in France may be interpreted in the sense that organisations which exercise a commercial activity can mainly recover economic loss, while non-profit organisations can mainly recover non-economic loss. Nevertheless, in the present case, the WAF could arguably also recover the economic damage consisting in the loss of gifts and membership fees caused by the harmed reputation of the association.

Italian courts see a distinction between pain and suffering and the general category of non-economic loss, recoverable in case of violation of personality rights. In this sense, the claimant can sue for non-economic damage to reputation within the general category.

In Switzerland, the question whether a legal person can recover damages for pain and suffering is subject to much dispute amongst scholars, despite a ruling from the Federal Court affirming the principle.

II. Claimant is entitled to damages for economic loss only

In Finland, there are different provisions for the protection of the reputation of natural and legal persons. In the case of damage to an organisation's reputation, the crime of defamation under the Penal Code is not applicable. However, the disparaging statements could be considered an unfair business practice: in this case, the association

would be entitled to the same remedies as in Case 10. Only economic losses would be recoverable.

In Austria, the WAF could bring an action under the defamation law of the Civil Code (§ 1330 ABGB), which only allows the compensation of economic loss.

In Germany, although non-profit organisations can claim for both economic and non-economic loss, in this particular case the WAF will not be successful in an action for the latter. Damages for non-economic loss are only awarded if the injury cannot be remedied in any other form. In this case, the award of an injunction will seemingly offer sufficient relief to the claimant. Therefore, the WAF will only have a claim in damages for economic loss.

III. Plaintiff does not have a claim

In the common law and in Scots law, the organisation may take an action in defamation. However, actual reference must be made to an individual or a class of persons if the statement is to be deemed defamatory. With regard to a class of persons, the general rule is that the larger the class, the more difficult it is to show that the statement referred to the individual members of the class. In this case, the WAF is a large organisation and a successful action in defamation is thus unlikely.

PART III A COMMON CORE OF
PERSONALITY PROTECTION

21 A common core of personality protection

Gert Brüggemeier, Aurelia Colombi Ciacchi & Patrick O'Callaghan

Both the introductory essays and the national reports with their accompanying comparative remarks have made it clear that the protection of personality in European private law is a diverse field. The legal bases – constitutions, codes, statutes, case law, codes of conduct – as well as the perimeter of the scope of protection and the remedies are each exhibited very differently. However, the project has shown that there are still commonalities in all of this legal diversity. It must be stressed again that we are not concerned with one (general) personality right or one comprehensive aspect of personality such as privacy. Such expressions merely serve as umbrella terms. They have no specific content; they constitute the parameters of law-making through the courts. Instead, there is an array of personality interests, which have been developed at different times in certain social contexts and which are legally protected nowadays. Their borders cannot be defined exactly. Moreover, their legal treatment can differ within an individual legal system. Due to the limited space available to us, we were unable to include all relevant personality interests in the questionnaire. Yet, within this plurality of legally protected personality interests we display six representative aspects here, and will examine whether and how much there is agreement in respect of their legal protection. The six aspects are: (1) dignity and honour/reputation; (2) privacy; (3) the right to one's image; (4) the commercial appropriation of personality; (5) the right to personal identity; and (6) self-determination. In addition, we will briefly address two particular issues: (7) the personality protection of legal persons; and (8) personality violations through the internet.

1. Dignity and honour

Dignity and honour are core elements of the civil protection of personality. In Roman law, they were already recognised as the legally protected interests of *dignitas* and *fama*. Legal orders, which have continued the Roman law *actio iniuriarum*, guarantee extensive protection in this sphere (Scotland included, but with restrictions). We can distinguish two main types of injury: (i) disparaging remarks; and (ii) degrading treatment.

Disparaging remarks form the classical cases. They are the subject matter in Case 1. In particular, Case 1 concerns the important area of injuries to personality interests through media reports.¹ We find several special rules in the media laws of the countries surveyed aimed at the protection of honour. In modern private law orders, almost without exception, honour is understood in an objective sense. This concerns honour in its socio-factual dimension – prestige, reputation, repute. Honour is a societal medium of distinguishing and differentiation. Private laws in Europe unanimously protect against disparaging statements of fact. Remedies include compensation of economic and non-economic loss and, occasionally, a right of reply. In respect of statements of opinion, to the extent that a differentiation between statements of fact and value judgements can be made, it boils down to a balancing process in most legal systems, whereby freedom of expression or freedom of the press and the protection of honour are balanced against one another. In contrast to the US, where the First Amendment laws take priority,² in continental Europe this balancing is mostly an open-ended process in so far as its outcome has not been predetermined by the legislator.

The legal situation in respect of degrading treatment, which is not the subject of a hypothetical case in the questionnaire, is more diffuse. Examples include body searches, where persons are seen naked by third parties in inspection rooms,³ or degrading treatment and accommodation of detainees in prison.⁴ Dignity is something which exists by

¹ For a comparative perspective see H. Koziol and A. Warzilek (eds.), *The Protection of Personality Rights against Invasions by Mass Media* (Vienna/ New York: 2005).

² See *New York Times v. Sullivan*, 376 US 254 (1964) and *Time, Inc. v. Hill*, 385 US 374 (1967); cf. J. Page, 'American tort law and the right to privacy' (in this volume).

³ *Wainwright v. Home Office* [2003] 4 All ER 969.

⁴ See BGH, 4 Nov. 2004, BGHZ 161, 33; BVerfG, 27 Dec. 2005, NJW 2006, 1580 on one hand; and BVerfG, 5 Mar. 2008, 1 BvR 1807/07 on the other.

virtue of being human. In contrast to honour, dignity cannot simply be lost through error. There is also no gradation in the term itself. Dignity is not relative, but absolute.

The common law of England, and also perhaps Scotland, has a clear gap in protection here as the law of defamation is limited to disparagement through (permanent or transient) statements.⁵ This gap will not be filled by jurisprudence relating to breach of confidence. Legal orders with the natural law general clauses of *neminem laedere*, such as the Roman law traditions, along with Austria and Switzerland, grant compensation of non-economic loss for violations of human dignity. German law is difficult to reconcile with this, although its Constitution is universally acknowledged as a model for the protection of human dignity (Art. 1(1) GG). However, not every intrusion into human dignity should give rise to a claim for civil law compensation.⁶

2. Privacy

The protection of privacy ('right to be let alone') is another core area of personality protection in tort law. Since the famous article of Warren and Brandeis in 1890,⁷ privacy has become a synonym in Anglo-American law for many aspects of personality. In Europe, Art. 8(1) ECHR⁸ lends a constitutional quality to this personality interest. In France and Portugal, the civil codes expressly provide for protection (Art. 9 French Civil Code, Art. 79 Portuguese Civil Code and Art. 26, para. 1 Portuguese Constitution). In most civil law orders, written or unwritten rules of general tort law function as legal bases for the protection of privacy. In the English law, the equitable remedy of 'breach of confidence' serves to protect privacy under Art. 8 ECHR.

European private laws often correspondingly define the private sphere to be protected through the use of spatial metaphors. We are dealing with the protection of private and intimate spheres. The law recognises protection to quasi-spatial areas, which other private

⁵ See *Wainwright v. Home Office* above. For the corresponding gaps in American privacy law see E. J. Bloustein, 'Privacy as an Aspect of Human Dignity' (1964) 39 *New York University Law Review* 962, criticising Prosser's concept of privacy; see also J. Page, 'American tort law and the right to privacy' (in this volume).

⁶ Cf. n. 4.

⁷ S. D. Warren and L. D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

⁸ Art. 8(1) ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

persons (third parties), the media and the State may not intrude upon without consent. Such unauthorised 'intrusion' can take place in various forms: especially through secret tapping with technical equipment (Case 14); through photographing and filming with a telephoto lens, video cameras or night vision equipment; through the reading and publishing of private diaries (Case 13) or private correspondence (Case 12); through the publication of details from the private and family lives of famous people (Case 5); and through the online search of private electronic information systems.⁹ The so-called 'right to protection of one's image' originally belonged to this sphere of privacy protection. However, in the meantime the 'right to one's image' has become independent and created its own category, which is considered under the next section. A sub-category of privacy includes interests in anonymity. Some legal systems have a recognised right not to be commented on, i.e. not to be thrust into the public light and especially not to be severely criticised (Case 2). A variant of these interests in anonymity is the *droit à l'oubli* - right to be forgotten (Case 3).

Nowadays, this protection of the private sphere is, in effect, guaranteed in all private law orders, but is, as always, justified in different ways. This protection is not infinite. Where the line can be drawn depends on the concrete circumstances in the individual case. When the protection of paramount legal interests or state institutions is in concrete danger, the protection of the private sphere must always give way. Whether there is an absolute protected core area of privacy, as is frequently suggested, seems questionable.

3. Right to one's image and likeness

The advent of photography at the end of the nineteenth century brought with it a new potential for danger: the image of an individual would be available to every person through the taking and dissemination of a photograph of that person. In a manner of speaking, one had the depicted person 'in one's hands'. The argument surrounding the protection against the secret taking and dissemination of photographs of persons became an exemplary showcase for the development of the civil law protection of personality. It was partly left to the courts, such

⁹ See BVerfG, 27 Feb. 2008. NJW 2008, 822 introducing 'a fundamental right to the guarantee of the confidentiality and integrity of technical information systems'.

as in France, to develop the law in the context of the general liability law for the protection of personality, and it was partly left to the legislator, as in Germany and Spain for instance, to provide the courts with special legislation as a suitable basis to create the necessary legal protection. In the civil law systems of both Italy and Switzerland and in the common law systems of both England and Scotland, the dissemination of photographs portraying individuals is now regulated by both general tort/delict law and data protection law. The basic principle is largely identical in the individual private law regimes: the taking and publishing of a photograph depicting a person is only acceptable with that person's consent. To this extent, a 'right to one's image' is predominantly recognised. English law and the law of the Nordic states are special exceptions. This image protection applies without restrictions in respect of persons in private areas, regardless of whether they are famous or unknown. The uniformity of this legal protection diminishes as soon as one is dealing with persons in the workplace, in public places (streets, squares, etc. – Case 7) or the image of a 'famous' person (Case 8). In the latter case, Belgian and French law on the one hand, and German law on the other, took especially controversial positions. In the case of a '*figure publique*', Belgian and French law also adhere to the basic principle of the necessity of consent, yet permit exceptions. German law regarded famous persons from the opposite point of view: as a matter of principle, the secret taking and dissemination of photographs by the press was allowed but there were some recognised exceptions. The frequently cited (unanimous) decision of the ECtHR in 2004¹⁰ was required to make it clear, from the perspective of the ECHR, that the Belgian-French position alone is compatible with Art. 8(1). Using this opportunity, the ECtHR specified the conditions under which celebrities can be photographed without their consent. With these, a controversial legal issue in Europe was replaced by a much observed standard in one foul swoop.

However, the remedies remain controversial. Most legal systems allow compensation for economic and non-economic loss. This is particularly the case in respect of private laws which do not differentiate between the two forms of loss but settle damages in a lump sum, such as in Italy for instance. Others, such as the German legal system, limit

¹⁰ *Von Hannover v. Germany* (2005) 40 EHRR 1; on this and on 'post-von Hannover' jurisprudence in Germany, see G. Brüggemeier, 'Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms' (in this volume).

damages to the equitable compensation of non-economic loss in such cases where there has been the unauthorised taking and publishing of photos. Just as varied is the possibility to demand the profit that the media company has made through the publication of the photographs of celebrities. In cases involving the ‘forced commercialisation’ of personalities the penalty of general damages is partially made available.

4. Commercial appropriation of personality

Since the emergence of the photographic era, the commercial value of photographs of persons used for advertising purposes has constituted the second aspect of the civil law protection of image. This important fact pattern is the subject matter of Case 10. The use of a photograph is only *pars pro toto* the commercial use of other aspects of a (famous) person such as voice (Case 11) or general affectations.

The paradigm is the unauthorised use of photographs of famous persons¹¹ in the advertising of products or services.¹² The problem issue which arises in this scenario is whether and to what extent the respective private laws allow for a transition from a non-economic right (‘privacy right’) to a property right (‘publicity right’). The non-economic right is connected to the person and is both non-transferable and non-inheritable. By comparison, property rights are not connected to the person and are transferable and inheritable. The principles of intellectual property law apply. This means that economic loss can be recovered, which regularly involves the payment of a licence fee and the handing-over of the profit made from the violation. The legal bases for this are unjust enrichment and the general law of delict/tort. Because the ‘publicity right’ is inheritable, this means that in the event of death, the heirs of the famous person can assert a claim for compensation. The majority of the legal systems considered by this project appear to have adopted this standpoint by now.

¹¹ The use of photographs of an unknown person for advertising purposes would fall under the basic principles of the general protection of image (see above ‘Right to one’s image and likeness’). Cf. the early American cases: *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (NY 1902); *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905); and the well-known German *Herrenreiter* case: BGH, 14 Feb. 1958, BGHZ 26, 349.

¹² For a comparative account, see H. Beverly-Smith, A. Ohly and A. Lucas-Schloetter, *Privacy, Property and Personality. Civil Law Perspectives on Commercial Appropriation* (Cambridge: 2005).

To the extent that the private law regimes do indeed allow a division between 'privacy right' and 'publicity right', there appears to be a further intricate problem: when does the transition from one to the other take place? Which requirements must be fulfilled here? Is the mere fact that the person is famous sufficient? Must the concerned person have already taken part in advertisements voluntarily? The legal systems surveyed do not yet have any clear answers to such questions.

5. Right to personal identity

An important area regarding the protection of personality is the claim for authentic representation in public. This aspect extends to the very core of what amounts to personality: the right to freely represent and define oneself. This justifies a legitimate need for protection against being painted in a false light in public. The crucial issue is the false, non-authentic portrayal of the person. The representation must not be defamatory. This is precisely where this group of cases differs to injuries to honour. Prominent cases here concern false citations: where words are put into a person's mouth which they have actually not expressed and which amount to, for example, a political opinion, which that person does not actually hold.¹³ Here, we can include the invented 'exclusive interviews', which are much loved by tabloids, with princesses and other celebrities from the showbiz world, in which they talk about their private and intimate spheres. In Italy, the church campaign to abolish divorce law at the beginning of the 1970s provides us with an interesting example. Across the country, a photograph was used for this campaign depicting a man and a woman working in a field. The picture was intended to be associated with the 'holy world' of the catholic family in the countryside. The problem was that the persons in the photograph were neither married nor in agreement with the campaign to abolish divorce law. The Court of First Instance in Rome recognised compensation because of the injury to the right to image¹⁴ and the right to personal identity.¹⁵

¹³ See, in Germany, BVerfG, 3 Jun. 1980, BVerfGE 54, 208 – Böll/Walden; BVerfG, 3 Jun. 1980, BVerfGE 54, 148 – Eppler.

¹⁴ The photograph was also taken without the consent of the depicted persons. Cf. Section 3 and n. 11 above.

¹⁵ Pretura Roma, 6 May 1974, *Giurisprudenza It.* 1975, I, 2, pp. 514; see also G. Pino, 'The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made-Rights', in M. van Hoecke and F. Ost (eds.), *The Harmonisation of European Private Law* (Oxford: 2000), p. 225.

In this context, there are also cases concerning the 'alteration' or falsification of a person's life story through so-called 'key-novels' (*Schlüsselromane*) (Case 4) or television or cinema films. Here, complex issues involving the balancing of freedom of art with the protection of personality arise.

In the questionnaire, the issue of the right to personal identity mainly constitutes a theme in Case 15. This case contains a citation. It does not concern an inaccuracy, but a quote that can be attributed to an individual, which is used in a different context without his consent. Through the misuse of this quote, a doctor who campaigns against smoking effectively becomes a spokesperson for light cigarettes. All legal systems allow for compensation in this case. However, the concrete determination of the respective protected interests or personality interests often remains diffuse.

6. Self-determination

Self-determination, for its part, is a type of super-category within the law of personality protection. The self-determination of an individual person has many aspects. It begins with self-determination over one's own body and affects the entire area relating to medical treatment and patient education. Traditionally, such cases have been treated unchanged under the heading 'unlawfulness of bodily injury'. Self-determination consists of the right to know one's descendants, as well as the right not to know, for example, not to be informed of one's genetic origins. Finally, the vast area of informational self-determination comes into play, i.e. the power to dispose of one's own personal data. In most European states, this complex area is now regulated by EC directives and national data protection laws.

One of the most pertinent problems in the questionnaire surrounds the doctor-patient relationship (Case 16). How do the legal systems surveyed deal with a case where a pregnant woman is negligently misinformed about the possible disability of her foetus and thus deprived of the decision to undergo a legal abortion or to proceed with the pregnancy knowing there is a risk that her child will be born disabled? Only a few private law regimes have reached the advanced stage where the serious problem of personal self-determination is recognised, an injury to which is to be sanctioned with compensation. This is the case in the Netherlands, for instance, where courts allow equitable compensation for an interference with the freedom of choice of the pregnant

woman or both parents,¹⁶ and in France, where the courts apply the doctrine of *perte d'une chance*.¹⁷

7. Protection of personality of legal persons?

In contrast to civil law in general, where undertakings, companies and businesses are both judicially and extra-judicially the main actors as product manufacturers or providers of services, as buyers and sellers or as environmental polluters, the civil protection of personality is focused on the individual. However, a modified form of what the German Constitution generally expresses in respect of fundamental rights also applies here: personality rights protection also applies to legal persons, 'to the extent that the nature of such rights permit' (Art. 19(3) GG).

Often a dividing line is drawn in this respect between commercial, profit-oriented undertakings and non-profit organisations. The criticism of commercial performances and the activities of undertakings is qualified instead as an interference or intrusion into business. This can lead to compensation for economic loss under certain limited circumstances. By comparison, in relation to non-profit organisations, the protection of honour and reputation is considered possible for the most part, which is justified by compensation for non-economic loss in injury cases. It is still questionable whether other personality interests, for instance the right to identity, can be extended to commercial or non-commercial organisations.

8. Personality violations through the internet

The complexity of the problems arising from personality violations through the internet – anonymity, transnationality and technicalities – and its comparative examination would require a separate Common Core volume. We have devoted two cases in our questionnaire to these issues: Case 9 and Case 12. Both cases arguably show how the use of the internet increases the risk of personality rights being underprotected. With regard to Case 12, only a few legal systems accord some protection to the privacy of politicians' emails on political issues. Private emails are better protected in theory; however the private or public nature of a topic discussed via email only

¹⁶ Hoge Raad, 18 Mar. 2005, RvdW 2005, 42 (*Kelly*).

¹⁷ Cass. civ., 16 Jun. 1991, JCP 1991, IV, 336.

becomes clear after the email has been read. Moreover, in practice it is technically very easy to spy into and copy another person's emails without this person's awareness.

In relation to Case 9, the offended 'naked little girl' can theoretically recover damages in most legal systems but only from the content provider, i.e. the person who set up the individual website (Kevin). This person's identity will usually remain unknown. In practice, the victim can only sue the internet provider, but the remedies against the latter are very limited in scope.

9. Conclusion

A common core of personality protection exists in the laws of delict/torts of the considered European countries. This common core has two dimensions: on the one hand rights and interests, and on the other, remedies. Some of the rights, interests and remedies mentioned in this chapter are common to all legal systems, others are common to the continental European and Nordic countries, others in turn seem to be of concern on the European continent only.

- (1) Honour and reputation are protected in all countries. In this regard, in continental European discourse human dignity has been developed into an overarching category. The common core of remedies in defamation cases includes damages (in all countries), injunction (in the common law and in most continental legal systems), and a right of reply (in the continental and Nordic countries). In principle, these remedies apply to both natural persons and legal entities or groups. However, in the common law countries the reputation of groups seems to be protected under stricter requirements than in the continental and Nordic countries.
- (2) Privacy is now protected in all countries as a common European fundamental right enshrined in the ECHR. Damages are a conventional remedy against privacy violations (which falls within the scope of breach of confidence in the common law systems). An injunction is granted in most countries under certain conditions.
- (3) Beyond privacy and defamation cases, only in continental Europe are the name, image, voice and other aspects of one's personal identity specifically protected as *non-economic* rights and interests through damages and injunction claims.
- (4) *Economic* rights and interests in the use of personal features such as one's name, image and voice are protected through damages and injunction claims in the continental European and Nordic countries, and partly, under certain conditions, in the common law countries as well.

- (5) Outside of defamation cases, only a few continental legal systems expressly acknowledge and protect a right to personal identity as a whole, i.e. a person's right not to be portrayed in a false light.
- (6) In addition, self-determination is protected as a separate right to autonomy which constitutes the basis for damages claims in some continental legal systems.

In all countries considered, the scope of protection of both non-economic and economic aspects of personality interests has been continuously expanding over time. The comparative legal method and mutual learning processes between divergent legal cultures will probably help reach an ever greater consciousness for the central role of the human personality in all legal systems.

Index

- abortion *see* doctor's non-disclosure of foetal disease
 - account of profits 346–7
 - Austria 319, 376
 - England 460
 - France 389
 - Germany 325, 326, 392, 411
 - Greece 393
 - Ireland 240, 329
 - Italy 331, 397
 - Netherlands 334, 400
 - Portugal 335
 - Scotland 468
 - Spain 339
 - Switzerland 340, 342, 406, 506
 - advertising *see* light cigarettes reducing risk of cancer
 - amends, offer of
 - England 83
 - American Law Institute
 - Restatement of Torts 51, 54, 55, 56, 66, 71
 - artistic freedom *see* invented life story
 - Australia 469
 - Austria
 - breach of contract 512
 - convicted law professor 149
 - copied emails 433–6
 - copyright 474
 - corrupt politician 75–8
 - defamation 543
 - diaries 457–8, 474, 475
 - doctor's non-disclosure of foetal disease 511–14
 - environmental protection group (WAF) 543–4, 563
 - former statesman's family life 228–30, 255
 - freedom of expression 254
 - internet photographs (naked.little.girl.com) 348
 - invented life story 206–8
 - light cigarettes reducing risk of cancer 492–4, 508
 - paedophile case 178–9
 - paparazzo's telephoto lens 317–19
 - popular TV presenter 413–16
 - satirical magazine 257–8
 - snapshot case 275, 313
 - tape recording of committee meeting 476–8, 490
 - tennis player 375–80, 411
 - unjust enrichment 375, 379, 411, 413, 415
- Belgium
 - convicted law professor 151
 - copied emails 436–7, 456
 - copyright 459, 494, 509
 - corrupt politician 78–80
 - diaries 459
 - doctor's non-disclosure of foetal disease 515–16, 541
 - environmental protection group (WAF) 545
 - former statesman's family life 230–1, 256
 - freedom of expression 254
 - internet photographs (naked.little.girl.com) 350–1
 - invented life story 208–9
 - light cigarettes reducing risk of cancer 494–5
 - paedophile case 179–80
 - paparazzo's telephoto lens 319–20
 - popular TV presenter 416
 - satirical magazine 258
 - snapshot case 278–80, 312

- tape recording of committee meeting 478
- tennis player 380-2
- wrongful birth/life actions 515
- Bernhard, Thomas 207
- biographies *see* former statesman's family life
- Bloustein, Edward J. 57
- Brandeis, Louis D. 41-4, 45, 46, 48, 50, 51, 57, 569
- Brusselmans, Herman 209
- Canada 469
 - rights of individuals to images 301
- caricatures *see* satirical magazine
- celebrities *see* paparazzo's telephoto lens; tennis player
- children
 - criminals 169
 - non-disclosure of foetal disease
 - see* doctor's non-disclosure of foetal disease
 - photographs of *see* internet; internet photographs
- cigarettes *see* light cigarettes reducing risk of cancer
- commercial appropriation of personality 572-3
- committee meetings *see* tape recording of committee meeting
- Common Core project 3
 - Descriptive formants 4
 - Metalegal formants 4
 - Operative rules 4
- compensation *see* damages and compensation
- confidence, breach of 351
 - England 26, 152-4, 181-4, 231, 254, 280, 281, 321, 437-8, 459, 479, 569
 - France 480
 - Ireland 192, 254, 269
 - Scotland 246-7, 254, 468, 470, 491, 535
 - United States of America 42
 - see also* copied emails
- conflict of rights 120
- constitutionalism 9
 - European Convention on Human Rights and 31
 - France 15-17
 - Germany 22-5
 - Sweden 29
 - United States of America 59
- contract, breach of
 - Austria 512
 - United States of America 42
- convicted law professor (case 2) 149
 - Austria 149
 - Belgium 151
- comparative remarks 175
 - Greek and Swiss solutions 176-7
 - no claim 175-6
- England 151-7
- Finland 157-9
- France 159-60
- Germany 160-2
- Greece 162-3, 176-7
- Ireland 163
- Italy 163-5
- Netherlands 165-6
- Portugal 166-7
- Scotland 167-71
- Spain 171-2
- Switzerland 172-5, 176-7
- copied emails (case 12) 433
 - Austria 433-6
 - Belgium 436-7, 456
 - comparative remarks 453-4
 - entitlement to injunction 454-5
 - not entitled to injunction 455-6
 - England 437-8, 455, 456
 - Finland 438, 455
 - France 439-41, 456
 - Germany 441-3, 456
 - Greece 443, 455
 - Ireland 443-5, 455
 - Italy 445-7, 454
 - Netherlands 447-8, 455, 456
 - Portugal 448-9, 454
 - Scotland 449-51, 456
 - Spain 451
 - Switzerland 451-3, 455
- copyright 473-4
 - Austria 474
 - Belgium 459, 494, 509
 - England 352, 383, 438, 459
 - Finland 460, 475
 - France 13, 461
 - Germany 463, 474
 - Greece 464
 - Ireland 291, 360, 394, 465
 - Italy 292, 293, 465, 474
 - Portugal 467
 - Scotland 366, 468, 487
 - Spain 306, 473
 - Switzerland 471
 - see also* moral rights
- corporate legal personality 575
 - see also* environmental protection group (WAF)
- correspondence *see* copied emails
- corrupt politician (case 1)
 - Austria 75-8
 - Belgium 78-80

- corrupt politician (*cont.*)
 addressees of liability 147–8
 comparative remarks 140
 damages 145–6
 foundations of liability 141–3
 infringement of honour and
 reputation 141, 143–4
 injunctions 146
 right of reply or rectification 146–7
 England 81–8, 141
 Finland 88–92
 France 92–6, 142
 Germany 96–100
 Greece 100–13
 Ireland 103–5, 141
 Italy 107–9
 Netherlands 114–19
 Portugal 119–28
 Scotland 128–33, 141
 Spain 134–6
 Switzerland 136–40
 Craxi, Bettino 112
 criminal offences
 privacy rights and 50–1, 61, 65
- damages and compensation 58
 convicted law professor
 Austria 149
 copied emails
 Portugal 449
 corrupt politician 145–6
 Austria 75, 77, 145
 Belgium 78, 79, 80
 England 81, 85–6, 145
 Finland 88, 89–91
 France 92, 94, 145
 Germany 96, 98–9, 145
 Greece 100, 101, 103–13, 145, 146
 Italy 107, 109, 146
 Netherlands 114, 116–18, 145
 Portugal 119, 125, 126
 Scotland 128, 131–2, 133
 Spain 134, 145
 Switzerland 136, 139
- defamation 25
 diaries 475
 Austria 457, 458
 Belgium 459
 Finland 460
 France 461, 462
 Germany 462, 463
 Italy 465, 466
 Netherlands 466
 Portugal 467
 Scotland 468
 Switzerland 471
- doctor's non-disclosure of foetal disease
 Austria 511, 512
 Belgium 515
 Germany 520
 Greece 522
 Ireland 523
 Italy 525, 526
 Netherlands 527, 528–30
 Portugal 531
 Spain 536, 537
 Switzerland 538–40
- environmental protection group (WAF)
 562–3
 Austria 543, 563
 Finland 545, 546, 562
 France 546, 548, 562
 Germany 548, 550, 563
 Greece 550
 Italy 551, 552, 562
 Netherlands 553
 Portugal 554
 Spain 555
 Switzerland 559, 560, 562
- former statesman's family life 256
 Austria 228, 229
 Belgium 230, 231
 England 233
 Finland 233
 France 234, 236
 Greece 239
 Ireland 239
 Italy 241, 242
 Netherlands 243, 244
 Scotland 246
 Spain 251
 Switzerland 252
- internet photographs
 (naked.little.girl.com)
 (case 9) 373
 Austria 350
 Belgium 350
 Finland 353–4
 France 354
 Germany 357
 Greece 359
 Italy 361
 Netherlands 362, 363
 Portugal 364
 Scotland 366
 Spain 368
 Switzerland 369, 371
- invented life story
 Belgium 208, 209
 Finland 210
 France 212
 Italy 218, 219
 Netherlands 221
 Portugal 222

- light cigarettes reducing risk of cancer 509
 Austria 492
 Belgium 494, 495
 Finland 495, 496
 France 496
 Germany 497
 Greece 498
 Italy 499, 500
 Netherlands 501
 Portugal 501, 502
 Spain 505
 Switzerland 506
- mental distress and 56
- paedophile case 205
 Belgium 179, 180
 Finland 185
 France 186
 Germany 188, 190
 Greece 190
 Ireland 191
 Italy 192, 194
 Netherlands 194, 196
 Switzerland 202
- paparazzo's telephoto lens 346-7
 Austria 317, 318, 319
 Belgium 319, 320
 England 321
 Finland 323
 France 324, 346
 Germany 346
 Greece 328, 346
 Italy 329, 332
 Netherlands 333
 Scotland 336, 338
- popular TV presenter
 Austria 413, 415
 England 416
 Finland 417, 418
 France 418, 419
 Germany 420, 421, 422
 Greece 422
 Ireland 423
 Italy 423
 Netherlands 425
 Portugal 426
 Scotland 427
 Spain 429
 Switzerland 430
- satirical magazine
 Belgium 258
 Italy 265
 Portugal 267
- snapshot case 316
 Austria 275-8
 Finland 283
 Greece 289
 Netherlands 297
 Spain 305
- tape recording of committee meeting
 Austria 478, 490
 Germany 490
- tennis player 410-11
 Austria 376
 Belgium 380, 381
 England 382, 385, 386
 Finland 387, 410
 France 388
 Germany 391, 392, 411
 Greece 393
 Ireland 394
 Italy 396, 397
 Netherlands 399, 411
 Portugal 400, 401
 Spain 403
 Switzerland 405, 406
- data protection
 England 154, 184
 Italy 218, 241, 243, 292, 293, 446, 483
 Scotland 367
- dead people
 images of *see* tennis player
post-mortem personality rights *see* diaries;
 tennis player
- debtors
 naming of 50
- defamation 6
 Austria 543
 England 25, 152, 181, 210, 352, 382, 385, 386, 417, 479, 495, 507
 Finland 211, 282
 France 12, 546
 Greece 216
 Ireland 191, 217, 394, 422, 498, 507, 551
 Italy 552
 Scotland 223, 269, 402, 428, 502, 503, 507, 555
 Sweden 29
 United States of America 42, 59
- degrading treatment 568
- delict, law of 5, 6, 7, 8
- diaries (case 13) 457
 Austria 457-8, 474, 475
 Belgium 459
 comparative remarks 473
 due care 474-5
 foundations of liability 473-4
 remedies 475
 England 459-60
 Finland 460-1, 475
 France 461-2
 Germany 462-3
 Greece 464

- diaries (*cont.*)
 Ireland 464–5
 Italy 465–6
 Netherlands 466–7, 474
 Portugal 467
 Scotland 468–70
 Spain 471
 Switzerland 471–2
- dignity *see* honour and reputation, right to
- doctor's non-disclosure of foetal disease
 (case 16) 511
 Austria 511–14
 Belgium 515–16, 541
 comparative remarks 540
 legal systems allowing woman's claim 541
 legal systems where woman's claim could be successful 541–2
 no claim 540
 England 516–17, 541
 Finland 517–18, 541
 France 518–20
 Germany 520–2
 Greece 522–3, 542
 Ireland 523–5
 Italy 525–6
 Netherlands 527, 541
 Portugal 531–2, 541
 Scotland 532–6, 541
 Spain 536–7
 Switzerland 537–40, 542
- dramatisation of events 60
see also invented life story
- emails *see* copied emails
- England
 breach of confidence 26, 152–4, 181–4, 231, 254, 280, 281, 321, 437–8, 459, 479, 569
 convicted law professor 151–7
 copied emails 437–8, 455, 456
 copyright 352, 383, 438, 459
 corrupt politician 81–8, 141
 data protection 154, 184
 defamation 25, 152, 181, 210, 352, 382, 385, 386, 417, 479, 495, 507
 diaries 459–60
 doctor's non-disclosure of foetal disease 516–17, 541
 environmental protection group (WAF) 545
 former statesman's family life 231–3, 256
 freedom of expression 254
 internet photographs (naked.little.girl.com) 351–3
 invented life story 210, 227
 libel 81, 85–6, 152, 210
 light cigarettes reducing risk of cancer 495
 paedophile case 180–5
 paparazzo's telephoto lens 320–2, 344, 346, 347
 passing-off 352, 382, 383–5, 386, 387, 417
 personality right 8, 25–8
 popular TV presenter 416–17
 privacy right 25, 27–8, 156, 569
 rehabilitation of offenders 181, 203
 rights of individuals to images 26, 27, 571
 satirical magazine 259–60
 snapshot case 280–1, 311, 314, 315, 316
 tape recording of committee meeting 479
 tennis player 382–7, 409
 trespass 320
- Enlightenment 7
- environmental protection group (WAF)
 (case 17) 543
 Austria 543–4, 563
 Belgium 545
 comparative remarks 562
 damages 562–3
 no claim 563
 England 545
 Finland 546, 562
 France 546–8, 562
 Germany 548–50, 563
 Greece 550–1
 Ireland 551
 Italy 551–3, 562
 Netherlands 553
 Portugal 554–5
 Scotland 555
 Spain 555–8
 Switzerland 559–61, 562
- Epstein, Richard 68
- European Union 32
- false-light privacy tort 55, 68, 71
- fictional characters *see* invented life story
- Finland
 convicted law professor 157–9
 copied emails 438, 455
 copyright 460, 475
 corrupt politician 88–92
 defamation 211, 282
 diaries 460–1, 475
 doctor's non-disclosure of foetal disease 517–18, 541
 environmental protection group (WAF) 546, 562
 former statesman's family life 233–4, 256
 freedom of expression 254

- internet photographs (naked.little.girl.com) 353–4, 373
- invented life story 210–12, 227
- light cigarettes reducing risk of cancer 495–6, 510
- paedophile case 185–6
- paparazzo's telephoto lens 323–4, 344, 347
- popular TV presenter 417–18
- satirical magazine 260
- snapshot case 281–4, 309, 310, 314, 315, 316
- tape recording of committee meeting 479–80
- tennis player 387–8, 408, 410
- forgetting
 - right to be forgotten *see* paedophile case
- former statesman's family life (case 5) 228
 - Austria 228–30
 - Belgium 230–1
 - comparative remarks 253
 - balancing privacy against freedom of expression and information 254–5
 - legal bases of privacy right 253–4
 - remedies 256
 - England 231–3
 - Finland 233–4
 - France 234–6
 - Germany 236–9
 - Greece 239
 - Ireland 239–41
 - Italy 241–3
 - Netherlands 243–5
 - Portugal 245–6
 - Scotland 246–51
 - Spain 251
 - Switzerland 251–3
- France 7
 - breach of confidence 480
 - constitutionalism 15–17
 - convicted law professor 159–60
 - copied emails 439–41, 456
 - copyright 13, 461
 - corrupt politician 92–6, 142
 - defamation 12, 546
 - diaries 461–2
 - doctor's non-disclosure of foetal disease 518–20
 - environmental protection group (WAF) 546–8, 562
 - former statesman's family life 234–6, 256
 - internet photographs (naked.little.girl.com) 354–7
 - invented life story 212–14, 227
 - light cigarettes reducing risk of cancer 496–7, 509
 - moral rights 13
 - paedophile case 186, 204, 205
 - paparazzo's telephoto lens 324–5, 346
 - personality right 7, 8, 10–17
 - popular TV presenter 418–19
 - presumption of innocence 159
 - privacy right 12–13, 14, 16, 43, 45, 569
 - right to publicity 17
 - rights of individuals to images 11–12, 17, 571
 - satirical magazine 261
 - self-determination 575
 - snapshot case 284–6, 312
 - tape recording of committee meeting 480–1
 - tennis player 388–91
 - wrongful birth/life actions 516, 518, 520
- fundamental rights 5
- Gaius
 - Institutes 7
- Germany 7
 - constitutionalism 22–5
 - convicted law professor 160–2
 - copied emails 441–3, 456
 - copyright 463, 474
 - corrupt politician 96–100
 - diaries 462–3, 475
 - doctor's non-disclosure of foetal disease 520–2
 - environmental protection group (WAF) 548–50, 563
 - former statesman's family life 236–9, 255
 - freedom of expression 254
 - internet photographs (naked.little.girl.com) 357–9, 373
 - invented life story 214–16, 226
 - light cigarettes reducing risk of cancer 497–8
 - moral rights 21
 - paedophile case 188–90, 204
 - paparazzo's telephoto lens 325–8, 344, 346, 347
 - personality right 7, 8, 18
 - popular TV presenter 420–2
 - privacy right 24
 - rights of individuals to images 21, 34–7, 571
 - satirical magazine 262–3
 - snapshot case 286–9, 313, 314, 315
 - tape recording of committee meeting 481–2, 490
 - tennis player 391–3, 411
 - unification 19
 - wrongful birth/life actions 521
- Greece
 - convicted law professor 162–3, 176–7

- Greece (*cont.*)
 copied emails 443, 455
 copyright 464
 corrupt politician 100–13
 defamation 216
 diaries 464
 doctor's non-disclosure of foetal disease 522–3, 542
 environmental protection group (WAF) 550–1
 former statesman's family life 239, 256
 internet photographs (*naked.little.girl.com*) 359
 invented life story 216
 light cigarettes reducing risk of cancer 498
 moral rights 464
 paedophile case 190, 205
 paparazzo's telephoto lens 328, 346
 popular TV presenter 416
 satirical magazine 263
 snapshot case 289–90, 313, 316
 tape recording of committee meeting 482–3
 tennis player 393–4, 411
- honour and reputation, right to 568–9, 576
 convicted law professor
 Germany 160
 Greece 163
 corrupt politician 141, 143–4
 Austria 76, 77
 Finland 90
 France 142
 Germany 96, 99, 143
 Greece 101
 Italy 108, 110
 Portugal 120, 123
 Spain 135
 Switzerland 136–7, 144
- human rights 3
- identification of fictional characters
see invented life story
- identity, right to 573–4
- images, rights of individuals to 570–2
 Canada 301
 case studies *see* internet; internet photographs; paedophile case; paparazzo's telephoto lens; snapshot case; tennis player
 England 26, 27, 571
 France 11–12, 17, 571
 Germany 21, 34–7, 571
 Italy 571
 Scotland 571
 Spain 571
 Switzerland 571
 United States of America 46–8, 49, 51, 64
- impersonation *see* popular TV presenter
- information
 right to be informed *see* doctor's non-disclosure of foetal disease
- injunctions
 convicted law professor
 Belgium 151
 copied emails 454–5
 England 438, 455
 Germany 441
 Ireland 444
 Italy 454
 Portugal 448, 449, 454
 Switzerland 451, 453
 corrupt politician 146
 Austria 75
 Belgium 80, 146
 England 81, 84, 146
 Finland 88, 89, 92
 France 92, 95
 Germany 96
 Greece 100, 146
 Ireland 106
 Italy 107, 108
 Netherlands 114, 118
 Portugal 120, 127, 146
 Scotland 128, 133
 Spain 134
 Switzerland 136
- diaries 475
 Finland 460, 461
 France 461
 Germany 462, 463
 Netherlands 466
 Portugal 467
 Switzerland 471, 472
- former statesman's family life 256
 Austria 229
 England 232–3
 France 234, 236
 Greece 239
 Ireland 239, 240
 Italy 241
 Netherlands 243
 Scotland 246
 Spain 251
 Switzerland 251
- internet photographs (*naked.little.girl.com*)
 Austria 348, 350
 Belgium 350
 France 354, 356
 Germany 357, 358
 Netherlands 363

- Portugal 365
- Spain 368
- Switzerland 369, 371
- invented life story (case 4)
 - Germany 214, 215
 - Italy 218
 - Netherlands 220
 - Switzerland 224, 225
- light cigarettes reducing risk of cancer 509
 - Belgium 494, 495
 - Finland 495, 510
 - France 496
 - Germany 497, 498
 - Greece 498
 - Italy 499
 - Netherlands 501
 - Portugal 501, 502
- paparazzo's telephoto lens
 - Netherlands 334
 - Scotland 336, 338
- popular TV presenter
 - Austria 414
 - England 416
 - Finland 417, 418
 - France 418
 - Germany 420, 421
 - Greece 422
 - Ireland 422
 - Netherlands 425
 - Portugal 426
 - Scotland 427
 - Spain 429
 - Switzerland 430
- satirical magazine
 - Italy 265
 - Portugal 267
- snapshot case 316
 - Finland 283
 - Germany 286
 - Italy 291
 - Netherlands 295
 - Portugal 298
 - Spain 305
- tape recording of committee meeting
 - Austria 490
 - Germany 490
 - Italy 490
- tennis player
 - Belgium 380, 381
 - Finland 387
 - France 388
 - Germany 391
 - Greece 393
 - Ireland 394
 - Italy 396
- Portugal 400
- Spain 403
- Switzerland 404, 406
- innocence, presumption of
 - France 159
- innocent dissemination defence
 - corrupt politician
 - England 83
 - Scotland 131
- innuendo
 - Ireland 498
- insulting behaviour
 - Sweden 29
- internet 575
 - emails *see* copied emails
 - photographs (naked.little.girl.com) 348
 - Austria 348
 - Belgium 350-1
 - comparative remarks 372-4
 - England 351-3
 - Finland 353-4, 373
 - France 354-7
 - Germany 357-9, 373
 - Greece 359
 - Ireland 360-2, 373
 - Italy 361-3
 - Netherlands 362-4
 - Portugal 364-6
 - Scotland 366-9
 - Spain 368-70
 - Switzerland 369-2
- intrusion privacy tort 65, 71
- invented life story 206
 - Austria 206-8
 - Belgium 208-9
 - comparative remarks 225-7
 - England 210, 227
 - Finland 210-12, 227
 - France 212-14, 227
 - Germany 214-16, 226
 - Greece 216
 - Ireland 216-17, 227
 - Italy 218-19
 - Netherlands 220-1
 - Portugal 222
 - Scotland 223, 227
 - Spain 224, 226
 - Switzerland 224-5
- Ireland
 - breach of confidence 192, 254, 269
 - convicted law professor 163
 - copied emails 443-5, 455
 - copyright 291, 360, 394, 465
 - corrupt politician 103-5, 141
 - defamation 191, 217, 394, 422, 498, 507, 551
 - diaries 464-5

- Ireland (*cont.*)
 doctor's non-disclosure of foetal disease 523-5
 environmental protection group (WAF) 551
 former statesman's family life 239-41
 freedom of expression 254
 innuendo 498
 internet photographs (*naked.little.girl.com*) 360-2, 373
 invented life story 216-17, 227
 libel 105
 light cigarettes reducing risk of cancer 498-9
 paedophile case 191-2
 paparazzo's telephoto lens 328-9
 passing-off 394, 422
 popular TV presenter 422-3
 satirical magazine 264-5
 snapshot case 290-1, 311, 316
 tape recording of committee meeting 483
 telephone tapping 291
 tennis player 394-6, 409
- Italy
 convicted law professor 163-5
 copied emails 445-7, 454
 copyright 292, 293, 465, 474
 corrupt politician 107-9
 data protection 218, 241, 243, 292, 293, 446, 483
 defamation 552
 diaries 465-6
 doctor's non-disclosure of foetal disease 525-6
 environmental protection group (WAF) 551-3, 562
 former statesman's family life 241-3
 freedom of expression 254
 internet photographs (*naked.little.girl.com*) 361-3
 invented life story 218-19
 light cigarettes reducing risk of cancer 499-500, 508
 paedophile case 192-4
 paparazzo's telephoto lens 329-33, 344, 346
 popular TV presenter 423-5
 right to personal identity 573
 rights of individuals to images 571
 satirical magazine 265-6, 273
 snapshot case 291-5, 311, 313, 315
 tape recording of committee meeting 483-4, 490
 tennis player 396-9
 wrongful birth/life actions 525
- judiciary 45
 justification defence 82
 Justinian
Institutiones 7
- Kalven, Harry 57
- law professors *see* convicted law professor
- legal personality 575
see also environmental protection group (WAF)
- liability
 corrupt politician
 Austria 76, 147
 Belgium 78, 79, 147
 England 82
 Finland 91, 147
 France 147
 Germany 147
 Greece 101, 103 147
 Ireland 105
 Italy 147
 Portugal 121, 147
 Scotland 129
 Spain 135, 147
- libel
 England 81, 85-6, 152, 210
 Ireland 105
 Scotland 128
- light cigarettes reducing risk of cancer (case 15) 492
 Austria 492-4, 508
 Belgium 494-5
 comparative remarks 507
 legal bases 507-9
 remedies 509-10
 England 495
 Finland 495-6, 510
 France 496-7, 509
 Germany 497-8
 Greece 498
 Ireland 498-9
 Italy 499-500, 508
 Netherlands 501, 509
 Portugal 501-2
 Scotland 502-5
 Spain 505
 Switzerland 506-7
- malicious falsehood 26, 129
 convicted law professor 152
 corrupt politician 81
- Mann, Klaus 215
- media
 freedom of 253-4
 Austria 150

- balancing privacy against freedom of expression and information 254–5
 - Belgium 78, 258
 - England 84, 88
 - France 142
 - Greece 100
 - Netherlands 114, 165
 - Portugal 120, 124
- privacy right and
 - England 26
 - France 12
 - United States of America 43, 50–1, 52, 59, 60, 61, 62, 64, 68
- regulation 143
 - Belgium 79
 - England 321, 385
 - Scotland 250, 302
 - Sweden 30
 - Switzerland 453
- see also* individual case studies
- medical conditions *see* doctor's non-disclosure of foetal disease
- mental distress
 - damages and 56
- misappropriation privacy tort 53, 69–70, 71
- misinformation, communication of 55
- moral rights
 - France 13
 - Germany 21
 - Greece 464
 - Scotland 402, 403
- natural law 7, 8
- negligence
 - convicted law professor 152
 - doctor's non-disclosure of foetal disease 516, 535
 - light cigarettes reducing risk of cancer 494
- neminem laedere* principle 5, 8
- Netherlands
 - convicted law professor 165–6
 - copied emails 447–8, 455, 456
 - corrupt politician 114–19
 - diaries 466–7, 474
 - doctor's non-disclosure of foetal disease 527, 541
 - environmental protection group (WAF) 553
 - former statesman's family life 243–5, 255
 - Germany 411
 - internet photographs (naked.little.girl.com) 362–4
 - invented life story 220–1
 - light cigarettes reducing risk of cancer 501, 509
 - paedophile case 194–6
 - paparazzo's telephoto lens 333–5, 344, 346
 - popular TV presenter 425–6
 - rehabilitation of offenders 194
 - satirical magazine 266–7
 - self-determination 574
 - snapshot case 295–8, 309, 311, 312, 313, 315, 316
 - tape recording of committee meeting 484–5
 - tennis player 399–400, 411
 - wrongful birth/life actions 527
- Nordic legal systems
 - personality right 9, 28–30
- novels *see* invented life story
- O'Brien, Denis 70
- outrage, tort of 63
- paedophile case (case 3) 178
 - Austria 178–9
 - Belgium 179–80
 - comparative remarks 203–5
 - England 180–5
 - Finland 185–6
 - France 186, 204, 205
 - Germany 188–90, 204
 - Greece 190, 205
 - Ireland 191–2
 - Italy 192–4
 - Netherlands 194–6
 - Portugal 196–8
 - Scotland 199–200
 - Spain 200–1, 205
 - Switzerland 201–3
 - see also* internet, internet photographs
- paparazzo's telephoto lens (case 8) 317
 - Austria 317–19
 - Belgium 319–20
 - comparative remarks 343
 - privacy protection of celebrities in semi-public places 344–5
 - privacy protection of celebrities inside their home 343–4
 - rights after *von Hannover* judgment 345–6
 - damages and account of profits 346–7
 - England 320–2, 344, 346, 347
 - Finland 323–4, 344, 347
 - France 324–5, 346
 - Germany 325–8, 344, 346, 347
 - Greece 328, 346

- paparazzo's telephoto lens (*cont.*)
 Ireland 328-9
 Italy 329-33, 344, 346
 Netherlands 333-5, 344, 346
 Portugal 335-6
 Scotland 336-8, 347
 Spain 339-40, 346, 347
 Switzerland 340-3, 344
- passing-off 26
 England 352, 382, 383-5, 386, 387, 417
 Ireland 394, 422
 Scotland 402, 403, 469, 502, 503, 505
- persona, concept of 7
- personality right 3, 5-6, 567, 576-7
 commercial appropriation of
 personality 572-3
 constitutionalism and 9
 England 8, 25-8
 European Convention on Human Rights
 and 30-7
 France 7, 8, 10-17
 Germany 7, 8, 18
 Nordic legal systems 9, 28-30
 Roman law 18
see also individual case studies
- photographs *see* images, rights of
 individuals to; internet; internet
 photographs; paparazzo's telephoto
 lens; snapshot case; tennis player
- politicians
 caricatures *see* satirical magazine
 committee meetings *see* tape recording
 of committee meeting
 copied emails *see* copied emails
 corrupt *see* corrupt politician
 family life *see* former statesman's family
 life
- popular TV presenter (case 11) 413
 Austria 413-16
 Belgium 416
 comparative remarks 431-2
 England 416-17
 Finland 417-18
 France 418-19
 Germany 420-2
 Greece 416
 Ireland 422-3
 Italy 423-5
 Netherlands 425-6
 Portugal 426-7
 Scotland 427-9
 Spain 429
 Switzerland 430-1
- Portugal
 convicted law professor 166-7
 copied emails 448-9, 454
 copyright 467
 corrupt politician 119-28
- diaries 467
 doctor's non-disclosure of foetal disease
 531-2, 541
 environmental protection group (WAF)
 554-5
 former statesman's family life 245-6
 internet photographs (naked.little.girl.
 com) 364-6
 invented life story 222
 light cigarettes reducing risk of cancer
 501-2
 paedophile case 196-8
 paparazzo's telephoto lens 335-6
 popular TV presenter 426-7
 privacy right 569
 satirical magazine 267-8
 snapshot case 298-300, 311, 313, 315
 tape recording of committee meeting
 485-6
 tennis player 400-2
- Posner, Richard 58
- post-mortem* personality rights *see* diaries;
 tennis player
- Pound, Roscoe 43
- precedent 45
- privacy right 569-70, 576
 balancing privacy against freedom of
 expression and information 254-5
 England 25, 27-8, 156
 European Convention on Human Rights
 and 34
 France 12-13, 14, 16, 43, 45
 Germany 24
 legal bases 253-4
 United States of America 38-40, 70-2
 academic backlash 57-8
 additional protection for peace of
 mind 56-7
 birth of tort 41-5
 evolution of tort 48-55
 false-light privacy tort 55, 68, 71
 first steps 45-8
 intrusion privacy tort 65, 71
 misappropriation privacy tort 53,
 69-70, 71
 Supreme Court intervenes 59-61
 unwarranted-disclosure privacy tort
 61-6
see also individual case studies
- private law
 rights in 5
- privilege
 convicted law professor
 Ireland 163
 Scotland 170
 corrupt politician
 England 82
 Germany 97, 98

- Ireland 105 , 106
- Italy 113
- Scotland 128, 130
- former statesman's family life
 - Scotland 250
- profits *see* account of profits
- Prosser, William L. 54, 55, 56, 57
- public interest 226
 - convicted law professor
 - Austria 150
 - Finland 157-8
 - Germany 161
 - Greece 162, 177
 - Italy 164
 - Netherlands 165, 166
 - Spain 171
 - Switzerland 172, 177
 - copied emails
 - Scotland 450
 - Switzerland 452
 - corrupt politician
 - Austria 76
 - England 82
 - former statesman's family life 254
 - Scotland 249-50
 - paedophile case
 - England 185
 - Italy 192
 - Portugal 197
 - Scotland 199
 - satirical magazine
 - Portugal 267
 - snapshot case
 - Italy 294
- public law
 - rights in 5
- public meetings *see* tape recording of
 - committee meeting
- public officials, protection of 59
- publicity, right to
 - France 17
 - United States of America 53
- recording *see* tape recording of committee
 - meeting
- rectification or reply, right of
 - convicted law professor
 - Belgium 151
 - corrupt politician 146-7
 - Austria 75, 147
 - Belgium 80
 - England 81, 86
 - Finland 147
 - France 92, 96
 - Germany 96, 98
 - Italy 109 147
 - Netherlands 114
 - Portugal 125
 - Spain 134, 147
 - Switzerland 139, 147
 - light cigarettes reducing risk of
 - cancer 510
 - Greece 498
 - Italy 499
 - Netherlands 501
- rehabilitation of offenders
 - England 181, 203
 - Netherlands 194
 - Scotland 168, 171, 199
- reputation *see* environmental protection
 - group (WAF); honour and
 - reputation, right to; light
 - cigarettes reducing risk
 - of cancer
- Roman law
 - convicium* 129
 - personality right 18
- Sacco, R. 4
- satirical magazine (case 6) 257
 - Austria 257-8
 - Belgium 258
 - comparative remarks 272-4
 - England 259-60
 - Finland 260
 - France 261
 - Germany 262-3
 - Greece 263
 - Ireland 264-5
 - Italy 265-6, 273
 - Netherlands 266-7
 - Portugal 267-8
 - Spain 270
 - Switzerland 270-2
- Scotland 9
 - breach of confidence 246-7, 254, 468,
 - 470, 491, 535
 - convicted law professor 167-71
 - copied emails 449-51, 456
 - copyright 366 , 468, 487
 - corrupt politician 128-33, 141
 - data protection 367
 - defamation 223, 269, 402, 428, 502, 503,
 - 507, 555
 - diaries 468-70
 - doctor's non-disclosure of foetal disease
 - 532-6, 541
 - environmental protection group (WAF)
 - 555
 - former statesman's family life 246-51,
 - 256
 - freedom of expression 254
 - internet photographs (naked.little.girl.com) 366-9
 - invented life story 223, 227
 - libel 128

Scotland (*cont.*)

- light cigarettes reducing risk of cancer 502-5
- moral rights 402, 403
- paedophile case 199-200
- paparazzo's telephoto lens 336-8, 347
- passing-off 402, 403, 469, 502, 503, 505
- popular TV presenter 427-9
- rehabilitation of offenders 168, 171, 199
- rights of individuals to images 571
- satirical magazine 269-70
- slander 128
- snapshot case 300-4, 311, 314, 316
- tape recording of committee meeting 486-8, 491
- telephone tapping 449
- tennis player 402-3, 409
- wrongful birth/life actions 532, 533-5
- self-determination 574-5, 577
- sexual offences 155
 - images of children *see* internet; internet photographs
 - paedophiles *see* paedophile case
 - register of offenders 200
- slander 105
 - Scotland 128
- smoking *see* light cigarettes reducing risk of cancer
- snapshot case (case 7) 275
 - Austria 275, 313
 - Belgium 278-80, 312
 - comparative remarks 308
 - legal bases 309-10
 - no taking of photographs without consent 310
 - notoriety of photographed persons 314-15
 - persons photographed at work or attending private affairs 315-16
 - photographs can be taken in public without consent 310-11
 - publication of photographs 312-14
 - remedies 316
 - England 280-1, 311, 314, 315, 316
 - Finland 281-4, 309, 310, 314, 315, 316
 - France 284-6, 312
 - Germany 286-9, 313, 314, 315
 - Greece 289-90, 313, 316
 - Ireland 290-1, 311, 316
 - Italy 291-5, 311, 313, 315
 - Netherlands 295-8, 309, 311, 312, 313, 315, 316
 - Portugal 298-300, 311, 313, 315
 - Scotland 300-4, 311, 314, 316
 - Spain 304-6, 309, 313, 315
 - Switzerland 306-8, 313, 315
- Spain
 - convicted law professor 171-2

- copied emails 451
- copyright 306, 473
- corrupt politician 134-6
- diaries 471
- doctor's non-disclosure of foetal disease 536-7
- environmental protection group (WAF) 555-8
- former statesman's family life 251
- internet photographs (naked.little.girl.com) 368-70
- invented life story 224, 226
- light cigarettes reducing risk of cancer 505
- paedophile case 200-1, 205
- paparazzo's telephoto lens 339-40, 346, 347
- popular TV presenter 429
- rights of individuals to images 571
- satirical magazine 270
- snapshot case 304-6, 309, 313, 315
- tape recording of committee meeting 488
- tennis player 403-4
- wrongful birth/life actions 536
- Squillante, Renato 112
- subjective rights 5
- suicide 19
- Sweden
 - constitutionalism 29
 - defamation 29
 - insulting behaviour 29
 - personality right 28-30
- Switzerland
 - convicted law professor 172-5, 176-7
 - copied emails 451-3, 455
 - copyright 471
 - corrupt politician 136-40
 - diaries 471-2
 - doctor's non-disclosure of foetal disease 537-40, 542
 - environmental protection group (WAF) 559-61, 562
 - former statesman's family life 251-3, 256
 - internet photographs (naked.little.girl.com) 369-2
 - invented life story 224-5
 - light cigarettes reducing risk of cancer 506-7
 - paedophile case 201-3
 - paparazzo's telephoto lens 340-3, 344
 - popular TV presenter 430-1
 - rights of individuals to images 571
 - satirical magazine 270-2
 - snapshot case 306-8, 313, 315
 - tape recording of committee meeting 488-9

- tennis player 404–8
- wrongful birth/life actions 537
- tape recording of committee meeting (case 14) 476
 - Austria 476–8, 490
 - Belgium 478
 - comparative remarks 489–90
 - no claim 490
 - possible claim 490–1
 - England 479
 - Finland 479–80
 - France 480–1
 - Germany 481–2, 490
 - Greece 482–3
 - Ireland 483
 - Italy 483–4, 490
 - Netherlands 484–5
 - Portugal 485–6
 - Scotland 486–8, 491
 - Spain 488
 - Switzerland 488–9
- telephone tapping
 - Ireland 291
 - Scotland 449
 - United States of America 54
- telephoto lenses *see* paparazzo's telephoto lens
- television *see* popular TV presenter
- tennis player (case 10) 375
 - Austria 375–80, 411
 - Belgium 380–2
 - comparative remarks 408
 - claimant's claim 408–9
 - damages awarded 410–11
 - post-mortem* appropriation of personality 411–12
 - England 382–7, 409
 - Finland 387–8, 408, 410
 - France 388–91
 - Germany 391–3, 411
 - Greece 393–4, 411
 - Ireland 394–6, 409
 - Italy 396–9
 - Netherlands 399–400, 411
 - Portugal 400–2
 - Scotland 402–3, 409
 - Spain 403–4
 - Switzerland 404–8
- trespass
 - England 320
- United States of America 9
 - breach of confidence 42
 - breach of contract 42
 - communication of misinformation 55
 - constitutionalism 59
 - defamation 42, 59
 - privacy right 38–40, 70–2
 - academic backlash 57–8
 - additional protection for peace of mind 56–7
 - birth of tort 41–5
 - evolution of tort 48–55
 - false-light privacy tort 55, 68, 71
 - first steps 45–8
 - intrusion privacy tort 65, 71
 - misappropriation privacy tort 53, 69–70, 71
 - Supreme Court intervenes 59–61
 - unwarranted-disclosure privacy tort 61–6
 - protection of public officials 59
 - right to publicity 53
 - rights of individuals to images 46–8, 49, 51, 64
 - telephone tapping 54
 - tort of outrage 63
- unjust enrichment
 - Austria 375, 379, 411, 413, 415
- unwarranted-disclosure privacy tort
 - United States of America 61–6
- voice
 - right to *see* popular TV presenter
- WAF *see* environmental protection group (WAF)
- Warren, Samuel D. 41–4, 45, 46, 48, 50, 51, 57, 569
- White, Edward G. 55
- Whitman, James Q. 44
- wrongful birth/life actions
 - Belgium 515
 - France 516, 518, 520
 - Germany 521
 - Italy 525
 - Netherlands 527
 - Scotland 532, 533–5
 - Spain 536
 - Switzerland 537