

## Media & Entertainment - Switzerland

### Defamation in the Web 2.0 environment – what are the remedies?

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#### When the honeymoon is over

On November 4 2013 the Federal Court – Switzerland's highest court – decided on a defamation case in the Web 2.0 environment.

The dispute involved a prominent Swiss individual (X) and his girlfriend (Y). In October 2009 Y initiated criminal proceedings against X for personal injury. One year later, a newspaper reported on the criminal proceedings. On the same day, X's side of the story was published on website Z (provided by Z AG). X stated that Y's allegations were false and could be refuted with photographic evidence (pictures were taken shortly after the claimed personal injury had occurred). Further, X was quoted as saying that the criminal proceedings and allegations were "a pure retaliation campaign of a disappointed lover". In addition, the article, entitled "Y exposed as a liar", was posted on two of X's Facebook profiles.

Based on Y's civil claim, on May 22 2012 the Meilen District Court in the Canton of Zurich decided that X's conduct constituted defamation. It ordered two remedies – injunctions and the publication of an apology from X as compensation for moral tort. The injunctions aimed to prevent X and Z AG from future defamation and, among other things, prohibited:

- further publication of Y's picture in any media;
- the re-posting of Y's picture on the two Facebook profiles; and
- the re-posting of the article "Y exposed as a liar" on website Z, the two Facebook profiles or in any other media.

As compensation for moral tort, X and Z AG were ordered to publish an apology on the two Facebook profiles and website Z. The text to be published was stipulated by the district court.

X and Z AG appealed the decision. On March 8 2013 the Zurich Appeal Court dismissed Y's claim. However, the appeal court confirmed the Meilen District Court decision regarding court and lawyer fees imposed on X and Z AG. It argued that X and Z AG had caused Y's claim through their conduct, even if the remedies requested by Y could no longer be granted.

#### Avoiding injunctions by process - tactical apology?

Regarding the injunctions awarded by the Meilen District Court, the appeal court held that the requirements were no longer fulfilled at the time of its decision.

It ruled, in particular, that X no longer contested the illegality of the article posted on the Facebook profiles in his appeal response. Further, X provided a written apology as an exhibit, which was stipulated by his attorney. In this letter X confirmed that he would no longer post the article, its title or pictures of Y. The court acknowledged that the apology was tactical. However, it held that even in such a situation, preliminary injunctions may not be maintained forever just because there is a risk of new defamation by removing them. The court held that there must be a concrete and substantial risk of re-offending, which was not the case here.

The Federal Court held that the appeal court had assessed the facts diligently, and that its decision not to grant the injunctions was correct. It emphasised that the urgency of injunctions may be reduced over time and may ultimately be unnecessary. The facts at

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the time of the respective decision are relevant for the assessment of whether an injunction is to be awarded. At the time of the appeal court's decision, the facts ruled against injunctions, even though these injunctions might have been justified at the time of the district court decision.

According to the Federal Court, it must be accepted that the respondent may avoid the grant of injunctions by tactical means (ie, by appealing against lower court decisions so that time lapses and injunctions become unnecessary).

However, the Federal Court believed that Y's good faith was undamaged – at least from a monetary perspective – by the negative appeal court decision. The appeal court dismissed Y's claim, but nonetheless imposed court and lawyer fees on X and Z AG.

It is unclear from the Federal Court decision whether the court considered the written apology to be significant. However, as it mentioned that the factual situation at the time of the appeal court decision was relevant, it did not exclude the apology's significance. The main argument was, however, the time lapsing and not the apology.

### **Publication of apology as remedy for moral tort**

The appeal court also dismissed the claim for publication of an apology on the two Facebook profiles and website Z. The court qualified the publication of an apology as a remedy for moral tort. It held that the defamation was severe, and that in such cases moral tort remedies are generally justified. However, it argued that such remedies should no longer be awarded if the victim is indemnified for the injury in another way.

In this regard, the court held that publication of the apology would not address uninvolved third parties because the apology would be taken into consideration by third parties who only specifically accessed website Z and the Facebook profiles. According to the court, the website and Facebook profiles were no longer in existence or were out of date (ie, there was little traffic). The court denied a multiplication effect of the publication with respect to uninvolved third parties and held that the apology's publication would be unsuitable for indemnifying Y.

With respect to the involved parties, the court held that X had already apologised in the written letter.

Further, the court emphasised that the personal injury claimed by Y was acknowledged and decided through other civil and criminal proceedings between X and Y. The respective decisions were widely discussed in newspapers and excerpts from these decisions were published by the courts. The court held that Y was already indemnified by publication of these decisions. The publication of an apology was therefore no longer necessary or proportionate.

The Federal Court confirmed that publication of an apology may be a remedy for moral tort, even though the usual remedy in such cases is monetary compensation. It further held that the other different civil and criminal proceedings mentioned by the appeal court were irrelevant, as they did not deal with the allegation that Y was a liar. Finally, it held that X's written apology, which was provided in the course of the appeal response, did not sufficiently compensate Y for moral tort.

Pursuant to the Federal Court, concerning publication of an apology as a type of moral tort remedy, whether the apology is read is irrelevant. It is important whether the victim feels indemnified by the remedy. The court emphasised that publication of an apology as remedy for moral tort is different from the claim for publication of a court decision. Publication of a court decision (in libel cases) is justified only if the incorrect information provided to uninvolved third parties cannot be corrected with another remedy. Therefore, the question of whether there is a multiplication effect of the publication of the court decision with respect to uninvolved third parties is decisive. This is contrary to the publication of an apology as remedy for moral tort.

In cases where a defamation campaign takes place on social media platforms and dynamic websites, the publication of an apology (and thus the explicit or implicit declaration that the conduct was illegal) as an indemnification for moral tort is therefore a more suitable remedy than the publication of the court's decision.

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