

only to the seizure of the first kind of materials and not to the second type of materials.

E. Private Sanctions

- 124 In the Italian legal system, as well as in all *civil law* systems, the judge does not have a power to order the wrongdoer to compensate damage for an amount higher than the actual damage caused (contrary to the *common law* judge who can award so-called *punitive damages*).
- 125 In our field of interest, however, this power is granted to the judge by art. 12 of the press law,⁵⁴ according to which "in case of defamation committed through press, the damaged party may claim, in addition to compensation of damage pursuant to art. 185 of the criminal code, a monetary sum for reparation. This sum is based on the seriousness of the offence and on the extent of the dissemination". It should be pointed out that this sanction, although only applicable when a defamation felony can be assessed, may also be awarded by the civil judge, who can independently envisage the existence of a criminal wrong.

VIII. Unjustified Enrichment

- 126 The case law has never adopted the unjustified enrichment rule to protect personality rights. Among the legal authors, instead, some have stated that whoever used the image of a non-famous person in an advertisement without his consent has a duty to give the profits to the depicted person. Accordingly, this duty arises from the general and implicit principle according to which whoever makes a profit out of someone else's assets without his consent must return to the owner the sums thus obtained.⁵⁵

⁵⁴ See, above all, C. Tenella Sillani, [1985] *Dir. inf.*, 918.

⁵⁵ P. Vercellone, [1995] *Riv. trim. d. proc. civ.*, 1171 et seq.

Italy

DAMAGES AWARDS IN DEFAMATION CASES IN A COMPARATIVE PERSPECTIVE

Vincenzo Zeno-Zencovich

The remarks that follow are based on the data collected in the Rome civil court of first instance in three research studies¹. 1

Although the Rome court is only one of over one hundred Italian Courts of first instance, it is the largest and the one before which the greatest number of defamation cases and tortious invasion of personality cases are brought. 2

The Rome Court has also generally laid down principles that have been considered landmark cases and therefore followed by other Courts, since 27 March 1984² decision in which a non-symbolic sum (over € 40,000) was awarded to the plaintiff in a libel case. 3

Thirteen years and over 650 decisions scrutinized also appear to be significant from a statistical point of view and indicate existing trends in Italian judge-made law. 4

It should be added that, although no equivalent research has been conducted on the Rome Court of Appeals and on the Italian Court of Cassation, the decisions of the Rome Court of first instance, if appealed, appear, generally, to muster judicial review, at least as to damages awards. 5

The main results of the research studies and of their comparison are the following:

¹ A. Scarselli/V. Zeno-Zencovich, *Analisi di 170 sentenze sulla lesione della personalità rese dal Tribunale di Roma (1988-1994)*; A. Scarselli/V. Zeno-Zencovich, *Analisi di 200 sentenze sulla lesione della personalità rese dal Tribunale di Roma (1994-1997)*; V. Zeno-Zencovich/R. Bitetti, *Analisi di 286 sentenze sulla lesione della reputazione rese dal Tribunale di Roma (1997-2000)*, all published in [1995] *Diritto dell'informazione e dell'informatica*, 701; [1998] 823; [2002] 109.

² *Pannella v. Scalfari*, in [1984] *Foro italiano I*, 1687.

- 6 There is a significant increase in libel cases in civil courts: in 1988 the Rome court rendered 40 decisions, in 2000, 151. The growth is due partly to the fact that more and more defamed persons prefer a civil action rather than criminal libel³. But it also appears to be the result of a general increase of tort actions.
- 7 The defendants are generally publishers of printed press, mostly daily newspapers. Television companies are much more rarely involved, radio stations never. The most probable explanation is that a printed article is easy to find and examine. A television or a radio programme are difficult to find, one must ask a specialized company for the recording, one must exhibit it in court.
- 8 In over 50% of the cases the plaintiff wins his claim and is awarded damages.
- 9 In the latest research (1997–2000) the average award was of € 27,000, which is a significant increase compared with the previous surveys (€ 23,000 and € 15,000).
- 10 The damages awarded are practically always non-pecuniary damages. The decisions generally conclude that no pecuniary damage has been proven by the plaintiffs. The criteria used to determine the sums are – following those indicated in the already mentioned landmark decision Tribunale Roma 27 March 1984 – the seriousness of the accusation, the position of the article, the sales and readership of the newspaper, the kind of readers, the standing of the plaintiff, the identity of the defamers, both from a social and economic point of view. From a relative point of view these criteria should enable a comparison of cases, but do not help very much in assessing the amount of damages which is left to the judgment *ex aequo et bono* of the Court.
- 11 On the whole, one has the impression that although the Court always indicates some criteria of evaluation it mostly pays lip-service to its duty to explain the reasons for its decisions.
- 12 The surveys also took into account the profession of the plaintiffs. In the most recent survey, the biggest group was that of judges and public prosecutors, followed by politicians (36 over 185). The best awarded groups were the military and police officers (€ 45,000 *pro capite*), followed by journalists (defamed by other journalists: € 40,000) and judges (€ 35,000). Below average were common persons, businessmen, sportsmen and politicians.
- 13 The overall damages awarded in the period 1997/2000 amounted to approximately € 5 million, more than double in respect of the previous survey (€ 2.4 million) and about four times the first survey (€ 1.4 million).
- 14 An interim survey on the period 2001/mid-2003 seems to confirm the results up to now illustrated, with only a slight increase in the damages awarded, presumably due to a general inflationary trend in the passage from Liras to Euros.

³ Defamation, in Italy, as in many other continental countries, can be also a criminal offence.

Although many caveats must be made on generalizing the results of only one Court, the three surveys offer significant data on the existing trend in Italian case-law. In order to verify if such a trend is in line with other European legal systems, it appears extremely important to collect data from other countries. A very summary attempt in this direction⁴ took into account reported cases in France and the UK (and the US). The evidence showed that, in the many French cases, damages awards were extremely limited, ranging from a maximum of € 30,000 to the symbolic one Franc, with an average of € 3,000 to € 8,000. In the few British cases, the awards are sometimes higher, although frequently reduced by the Court of Appeals. One criterion commonly used is that of breaking down the lump sum to see what yearly income it could yield.

Interesting considerations might arise from a comparative examination of the influence of libel damages on the balance sheet of publishers. From an economic point of view, damages awards are only a business risk for any enterprise in the media sector. Newspapers and television buy news and fictional stories and sell them to the public and to advertisers. It is, therefore, foreseeable that such a dissemination may cause damage to third parties. What is the amount of such damage as compared with other industries? From a tort law perspective if it should result that there is under-deterrence or over-deterrence, the response lies in modifying some elements of the tort procedure: examples come from the American experience with the actual malice standard set out by the Supreme Court or from EU law which imposes strict liability for illegal treatment of personal data⁵.

It is quite clear from the Italian experience that libel damages tend to strike mainly publishers with an extremely aggressive editorial policy and who rather loose control over the content that is published. It is submitted that it is common also in other countries. The natural response – from a business point of view – is to introduce a stricter review on the editorial process, unless the publisher clearly considers that damages awards are off-set by revenues from increased sales and advertisements. While this is a rational attitude of media companies, one can also imagine risk-reducing policies such as quality brands for information gathering and dissemination.

The comparative survey should take into account insurance policies in the different countries. For example, although Italian law allows insurance of media companies for damage arising due to acts of their employees (such as journalists), it appears that no publisher is insured for damage to third parties. Insurance is the normal response to third party damage, because it allows businesses to spread and transfer the cost of the insurance premium to the buyers of the product or to the advertisers through minimum increases of price.

⁴ V. Zeno-Zencovich, *Profili comparatistici dell'alchimia: la liquidazione dell'impalpabile*, [1995] *Rivista trimestrale diritto procedura civile*, 1145.

⁵ Directive 46/1995.

- 19 In a wider perspective, one should take into account the fact that the "information society" is much, much wider than the traditional media world, and involves not only new media (especially the Internet), but also new actors: every institution and company, a great number of individuals are involved in the gathering and dissemination of information. This activity is generally ancillary to broader goals, and is mostly conducted on a free basis or for indirect economic advantages.
- 20 One should therefore also take into account the growing legislation in this field: not only the already cited Directive 46/1995 on personal data treatment, but also Directive 31/2000 on e-commerce (with its provisions on the liability of providers) and the various EU plans for a safe use of the Internet.

Japan

THE PROTECTION OF PERSONAL RIGHTS FROM DEFAMATION AND INVASION OF PRIVACY BY MASS MEDIA IN JAPAN

Masamichi Okuda and Elisabeth Raidl-Marcure

I. Preliminary Remarks

This country report on Japan owes a great deal to Professor Kiyoshi Igarashi's recently published book *jinkakukenho gaisetsu* containing almost all decisions of the Japanese courts at all levels published so far on protection of personal rights¹. 1

However, the following report focuses on judgments rendered by the *saiko saibansho* (Japanese Supreme Court); judgments of lower courts are dealt with only occasionally. 2

II. Infringement of Personal Rights by the Mass Media

A. *The Protection of Personal Rights and Freedom of Expression*

Within the context of Japanese law the notion of personal rights (*jinkakuken*) may be summed up as legally protected interests such as life, bodily integrity, individual liberty, one's honour (including, in the case of women, chastity), and the privilege attached to one's name, likeness and economic reputation. 3

In Japan as in other countries, most violations of personal rights by mass media occur in the form of injury to a person's honour or invasion of privacy. Infringement of personal rights by newspaper articles will be the main focus of the following. Tortious reporting in pictorial magazines will be covered incidentally. 4

¹ K. Igarashi (Professor Emeritus of Hokkaido University), *jinkakukenho gaisetsu* (Law Concerning Personal Rights – An Outline) (2003).