



## Eversheds Sutherland

### European Court of Human Rights Rules on Liability for Hyperlinking to Defamatory Content

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Defamation; Freedom of expression; Hungary; Hyperlinks; Political parties; Reputation; Websites

In *Magyar Jeti ZRT v Hungary*, the Fourth Section of the European Court of Human Rights has found that the Hungarian national court's decision, holding an online news provider liable for posting a hyperlink to 90 Entertainment Law Review (2019) 30 Ent. L.R., Issue 3 © 2019 Thomson Reuters and Contributors

defamatory content on YouTube, was a violation of the right to freedom of expression under the European Convention on Human Rights art.10<sup>1</sup>

#### Background

The applicant company operates a popular online news portal in Hungary called 444.hu. On 5 September 2013, a group of apparently intoxicated football supporters, travelling by bus to a football match, stopped at an elementary school in a village. The students there were mostly Roma. The hooligans disembarked and proceeded to sing and

chant and shout racist remarks, threaten the children in the playground, wave flags and throw beer bottles. One of them reportedly urinated in front of the school building. The teachers were so scared they called the police and instructed the younger children to hide under desks and in the bathroom.

Interviewed on the same day about the incident, the local mayor described the events and stated, in apparent reference to the right wing political party Jobbik:

*"Jobbik came in. They attacked the school, Jobbik attacked it", "Members of Jobbik, I add, they were members of Jobbik, they were members of Jobbik for sure."*

The interview was uploaded to YouTube and picked up by a number of news organisations, including the applicant company which posted a link to the interview beneath an article about the events (which importantly, made no mention of Jobbik). The political party, Jobbik, brought defamation proceedings against the local mayor and various

<sup>1</sup> *Magyar Jeti ZRT v Hungary* (11257/16) [2018] 12 WLUK 615; [2019] E.M.L.R. 8.

media outlets who had provided links to the impugned video.

It argued that by using the term Jobbik to describe football supporters and by publishing a hyperlink to the Youtube video, the respondents had infringed its right to reputation.

The claimant's case was upheld at every stage in the Hungarian national courts, including the Constitutional Court. The applicant was liable for publishing and disseminating the mayor's defamatory statements. The applicant was ordered to publish excerpts of the judgment on its website and to remove the hyperlink to the YouTube video from its online article. The mayor was ordered to pay punitive damages. The court noted that the damage was especially caused by virtue of the fact that the violation of the claimant's right to reputation had occurred nearly six months prior to parliamentary elections. A claim for punitive damages against the applicant was rejected because it had not been shown that the applicant was culpable, i.e. there had been no deliberate false publication. The courts did not criticise the applicant's procedures. The applicant, had, the court noted, presented the events of 5 September "in the most realistic way, and they used the available information channels and forms of control in the expected manner".

The Court of Appeal and Constitutional Court confirmed that making a false statement available through a link, even without identifying it, qualifies as the dissemination of facts.

The applicant complained that the rulings of the Hungarian courts establishing objective liability on the part of its internet news portal for the content it had referred to via a hyperlink had amounted to an infringement of freedom of expression as provided in art.10.

## Judgment

It was not in dispute that the applicant's art.10 rights had been interfered with by the domestic courts' decisions.

The question was whether, under art.10(2), the interference was *prescribed by law*, pursued one or more of the *legitimate aims* (such as protection of the rights of others) and was necessary *in a democratic society*.

### Prescribed by law

Given its conclusions on the other questions, the ECtHR ducked the question of whether the interference was *prescribed by law*. It, however, noted that this criterion relates to both the legal basis in domestic law and the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.

Persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can be expected to take special care in assessing the risks that such activity entails.

### Legitimate aim

The ECtHR accepted Hungary's submission that the interference pursued the legitimate aim of protecting the rights of others.

### Necessary in a democratic society

The ECtHR emphasised the importance of the internet in enhancing the public's access to news and facilitating the dissemination of information in general while at the same time stressing the risk of harm posed by content and communications on the internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life.

Because of the particular nature of the internet, the "duties and responsibilities" of internet news portals for the purposes of art.10 differed from those of a traditional publisher. The court had noted with approval developments distinguishing the legal principles regulating the activities of the traditional print and audiovisual media on the one hand and internet-based media operations on the other.<sup>2</sup>

Hyperlinking, as a technique of reporting was essentially different from traditional acts of publication, in that, as a general rule, it merely directed users to content available elsewhere on the internet. A further distinguishing feature of hyperlinks, compared to acts of dissemination of information, was that the person referring to information through a hyperlink, did not exercise control over the content of the website to which a hyperlink enabled access, which could be changed. Additionally, the content made available through the hyperlink had already been made available by the initial publisher.

<sup>2</sup>

See *Delfi AS v Estonia* (64569/09) [2015] 6 WLUK 504; [2015] E.M.L.R. 26.

Consequently, given the particularities of hyperlinks,

the court could not agree with the approach taken by domestic courts consisting of equating the mere posting of a hyperlink with dissemination of the defamatory information.

The court considered the following questions relevant to whether liability should be imposed for posting a hyperlink:

- Did the journalist endorse the impugned content?
- Did the journalist repeat the impugned content (without endorsing it)?
- Did the journalist merely put a hyperlink to the impugned content (without endorsing or repeating it)?
- Did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful?
- Did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?

In the present case, the court noted that the article in question simply mentioned that an interview conducted with the mayor was to be found on YouTube, and provided a means to access it through a hyperlink, without further comment or repetition. No mention was made of the political party at all. The impugned article did not amount to an endorsement of the incriminated content.

As to whether the journalist (and the applicant company) knew or could have known that the hyperlink provided access to defamatory content, the court noted that the limits of acceptable criticism are wider as regards a politician or political party. A politician inevitably and knowingly lays himself open to close scrutiny of his or her every word and deed by both journalists and the public at large, and he or she must consequently display a greater degree of tolerance.<sup>3</sup> Accordingly, the journalist in this case could reasonably assume that the contents of the YouTube interview, although perhaps controversial, would remain within the realm of permissible criticism of political parties and, as such, would not be unlawful.

Furthermore, the Hungarian law applied by the domestic courts, excluded any meaningful assessment of the applicant's art.10 rights, in a situation where restrictions

would have required the utmost scrutiny, given the debate on a matter of general interest. Indeed the courts held that the hyperlinking amounted to dissemination of information and allocated objective liability—a course of action that effectively precluded any balancing between the competing rights, that is to say, the right to reputation of a political party and the right to freedom of expression of the applicant. For the court, such objective liability had foreseeable negative consequences for the flow of information on the internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they had no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the internet.

The court found that the domestic court's imposition of objective liability on the applicant was not based on relevant and sufficient grounds. Therefore the measure constituted a disproportionate restriction on its right to freedom of expression. Accordingly, there had been a violation of art.10

## Comment

This is the first case to discuss liability for hyperlinks in libel. It is heartening to see the ECtHR understand the technology and appreciate its importance. No memes about out-of-touch US Senators interviewing Mark Zuckerberg required here. The assistance of interveners was no doubt useful. BuzzFeed, Article 19, The Media Law Resource Center Inc, the Newspaper Association of America, Index on Censorship, all weighed in. The issue was critical and rightly determined.

It is useful to see the court's list of relevant questions when assessing liability. Media lawyers will be familiar with the relevant questions for assessing liability in IP when hyperlinking to content which infringes, for example copyright, from the Court of Justice ruling in *GS Media BV v Sanoma*.<sup>4</sup> One of the relevant questions is the same: did the publisher know that the content was unlawful? Others may yet be borrowed: was the content freely accessible? Is there a profit-making intention?

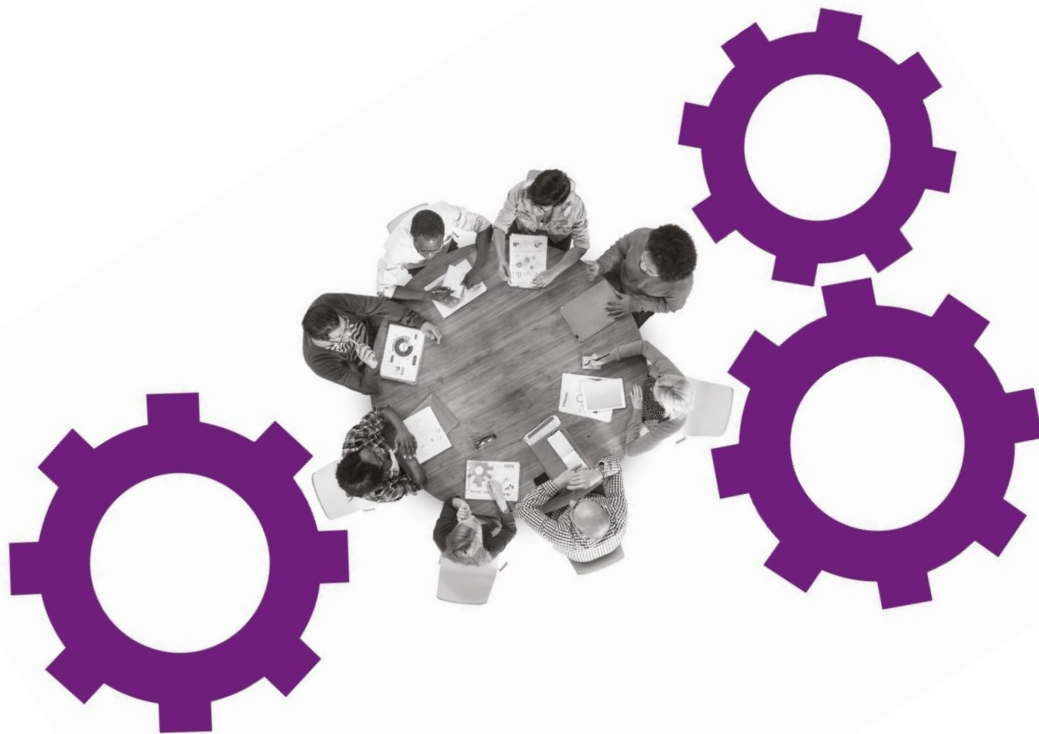
It is useful to see the ECtHR reiterate that politicians must tolerate greater scrutiny. In the UK, since the House of Lords decision in

<sup>3</sup> See *Lindon, Otchakovksy-Laurens and July v France* (21279/02 and 36448/02) [2007] 10 WLUK 570; (2008) 46 E.H.R.R. 35.

<sup>4</sup> *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644; [2016] Bus. L.R. 1231.

*Derbyshire CC v Times Newspapers*<sup>5</sup> “organs of government” do not have standing to bring claims in libel. While there is no special privilege for criticism of politicians or public officers, a claim is now much more likely to be affected by privilege as a result of the Reynolds defence, codified in the Defamation Act 2013 s.4.

This was not the first time Hungary has had its knuckles rapped over its failure to balance the interests required under the ECtHR’s case law. Readers will recall the case of *Magyar Tartalomszolgáltatók Egyesülete v Hungary*.<sup>6</sup> As Pinto De Albuquerque J states in his concurring opinion in the current case, by equating hyperlinking to “dissemination” in four consecutive instances, the Hungarian courts’ findings “resulted in a truly draconian interference with the applicant company’s art.10 rights. This criticism of the Hungarian Courts is not new”. It is comforting to see the ECtHR do its job and set Hungary right, once again.



<sup>5</sup> *Derbyshire CC v Times Newspapers* [1993] A.C. 534; [1993] 2 W.L.R. 449.

<sup>6</sup> *Magyar Tartalomszolgáltatók Egyesülete v Hungary* (22947/13) [2016] 2 WLUK 62; 42 B.H.R.C. 52.