

THE IMPORTANCE OF CONTEXT IN THE QUALIFICATION OF A STATEMENT AS DEFAMATORY

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Abstract: Legal disputes regarding defamation are always characterised by specific individualism, which is demonstrated by the circumstance that two disputes with seemingly similar content (taking into account the circumstances) may lead to different outcomes. The reason for this is the understanding of the context. Context is a main criterion, based on which a statement may be considered defamatory, or vice versa, a person's freedom of expression may not be restricted for the same statement. Therefore, the proper consideration of the context is crucially important for qualifying a statement as defamatory. This point of view has been established in practice. Thus, it is important to consider the matter of context both in terms of international (the European Court of Human Rights) and local judicial practice. Moreover, in the case of defamation disputes, the legislation obliges courts to rely on the practice of the said international court.

Keywords: defamation, context, freedom of expression.

Foreword

Defamation is one of the legal institutions of restriction of freedom of expression, in the review of which courts should be particularly cautious in order not to disturb balance in a democratic society¹: a court decision should not have a 'chilling effect'² and it should not establish a practice that will only be of a formal nature³. For this reason, it is important that courts examine the context that precedes or follows the statement in question, and make decisions on whether defamation is present or not only based on that⁴. The diversity of the case law clearly demonstrates the purpose and criteria of context, which should become an important guiding standard in defamation disputes.

1. The European Court of Human Rights states the same as well. See, for example, the decisions of the European Court of Human Rights in the cases *Bladet Tromsø and Stensaas v. Norway*, 20.5.1999, No 21980/93 and *Pentikäinen v. Finland*, 20.10.2015, No 11882/10.
2. *Rogal L.*, Anonymity in Social Media, *Arizona Summit Law Review*, Vol. 7:61, 2013, p. 64.
3. An example may be the ruling of the Supreme Court of Georgia, 24.3.2023, No სბ-1498-2022.
4. Regarding the meaning of context, see the ruling of the Supreme Court of Georgia, 3.4.2012, No სბ-1477-1489-2011.

1. Formal grounds for considering a statement as defamatory

In order for a statement to be considered as defamatory, it is important to determine three main aspects: a) determining the area of dissemination of the statement; b) understanding the content of the statement; and c) identifying the addressee.

1.1 The area of dissemination of a statement

Determining the area of dissemination of a statement is crucially important for considering the statement as defamatory⁵. For example, the content of a document drawn up for the purpose of official activities⁶, as well as personal correspondence between two persons⁷, are not considered as defamation. Unless the criterion for the dissemination of a statement is met⁸, the discussion of the content of the statement will not be of importance⁹.

1.2 Composition of the content of a statement

According to the Law of Georgia on Freedom of Speech and Expression, in order to qualify a statement as defamatory, it is a necessary precondition to prove that it contains a substantially false fact inflicting harm on a person¹⁰. Namely, it is sufficient to qualify a statement as opinion in order for a respondent not to be held liable¹¹. An absolute privilege envisaged by law guarantees the protection of an expression of opinion. The absoluteness of an opinion does not by itself imply the violation of others' rights, and in this case, the rights of a person must be protected¹².

1.3 Identification of an addressee

The identification of an addressee is a formal ground as well. For example, a statement addressing an undefined group of people will not be considered defamation¹³. However, this does not imply the need for a rigid approach to the issue: a person may be identified based on the context. For example, in the case of a nickname. Although a nickname does not represent an institution having legal protection, considering the overall picture, a person can be identified in this way. For example, a group is created on social media where defamatory statements are made about a person. The name of the group contains the nickname of a person,

5. Ruling of the Supreme Court of Georgia, 5.3.2021, No სს-810-2019.

6. Ruling of the Tbilisi Court of Appeals, 27.6.2023, No 28/754-23.

7. Regarding this matter see *Jorbenadze S.*, Legal Scope of Freedom of Disclosure of Personal Correspondence in Social Networks, *Lado Chanturia* 55, Anniversary Edition, Tbilisi, 2018, p. 54, et seq.

8. For example, in the context of public dissemination, which implies both so-called traditional media and social media. Regarding this matter see the ruling of the Supreme Court of Georgia, 9.1.2014, No სს-1559-1462-2012.

9. Decision of Tbilisi City Court, 20.12.2022, No 2/19427-20.

10. In the case of a public person, additionally, the issue of intention/performance of an appropriate action arises.

11. See, for example, the ruling of the Supreme Court of Georgia, 6.4.2020, No სს-1366-2019.

12. Decision of Tbilisi City Court, 20.12.2022, No 2/38600-22.

13. Decision of Tbilisi City Court, 17.12.2019, No 2/6328-19.

which is known by a certain part of the society. Therefore, the person can be identified by that part of the society. In such case, in order for the person to prove the connection of the nickname to him/her¹⁴, he/she can refer to various circumstances: the photos that are shared in the group (following the defamatory statement), tags that makes it clear who they are talking about, etc¹⁵.

1.4 The relation of context with formal grounds

Each of the above cases is eventually qualified based on its contextual meaning. This is reflected in the case law of the European Court of Human Rights as well, both in terms of the area of dissemination and the content¹⁶. In terms of the latter it is important to note that, according to the case law of the international court, even if a statement is formulated with words that are unpleasant for a person, it may not be subject to restriction¹⁷. This approach is shared in the judicial practice of Georgia as well¹⁸. Accordingly, certain words (terms) may fall within the scope of protection under freedom of expression, and a person may not be held liable for them, even if he/she uses unpleasant, harsh or flagrant words¹⁹. In contrast, if a statement contains unpleasant words but is aimed at damaging the business reputation of a person and not at expressing the personal mood and attitude of the person making such statement, freedom of expression may be restricted²⁰. Thus, in each case, whether a person should be protected or not, despite using such terminology, is determined by examining the context.

2. The essence and aspects of the context

The term ‘context’ is not regulated at the legislative level, however, determining its essence is of crucial importance for defamation disputes. It is best demonstrated in the situation where it is quite possible that in relation to the statements (activities) with a similar content a court may in one case establish a violation, and in another case no violation²¹. When examining each matter, a court puts forward the aspect of context and makes a decision based on it.

In turn, context can be determined according to three main aspects: a) consideration of the overall circumstances; b) contextual understanding of the statement; and c) identity of the addressee.

14. Which is an important ground for the admissibility of a claim. See, for example, the ruling of Tbilisi City Court, 30.11.2018, No 2/34293-18.

15. See *Jorbenadze S.*, Social Media Law, Tbilisi, 2019, p. 64.

16. See, for example, the decision of the European Court of Human Rights in *Peruzzi v. Italy*, 30.6.2015, No 39294/09.

17. Decision of the European Court of Human Rights in *Lingens v. Austria*, 8.7.1986, No 9815/82.

18. See, for example, the ruling of the Supreme Court of Georgia, 30.3.2023, No 36-1373-2022.

19. Ruling of the Supreme Court of Georgia, 24.3.2023, No 36-1498-2022.

20. Ruling of the Supreme Court of Georgia, 30.3.2023, No 36-1373-2022.

21. As an illustration, see the decisions of the European Court of Human Rights in *I.A. v. Turkey*, 13.12.2005, No 42571/98 and *Giniewski v. France*, 31.1.2006, No 64016/00.

2.1 Consideration of the overall circumstances

Even if a statement contains disputable expressions, it will not have negative legal consequences for a respondent unless some element of the violation of rights is present. For example, a term that accuses a person of committing a certain illegal action may be used for expressing an opinion. Accordingly, a statement stating that a particular person (an addressee) is a murderer, a person with a criminal record, etc. is usually, but not always, considered as defamation²². A person may publicly present the circumstances or the situation, on the basis of which he/she believes that the action (inaction) by an individual has led to negative consequences, and emphasise, in conclusion, that the addressee is a murderer²³. Especially if the matter is of public interest²⁴.

The antithesis of this reasoning is a case where a person defames an addressee in such a manner that he/she can neither substantiate the actual facts nor use them for evaluation²⁵. For example, a situation where a person disseminating a statement points to the commission of a specific crime²⁶. In this case, the content of the statement is specific, it creates an impression of an objective situation, and it can be confirmed (proven)²⁷. Therefore, taking into account the principle of the presumption of innocence, in terms of context, such act cannot be considered as opinion and is considered defamation²⁸.

Following the above reasoning, another example is where a statement includes the words ‘in my opinion’, ‘allegedly’, etc., but the statement (based on its form) is formulated in such a way that it contains obvious signs of defamation on the part of the person disseminating it. In such cases, a statement cannot fall within the scope of protection under the concept of an opinion (in terms of absolute privilege) and is subject to restriction.

2.2 Perception of the content of a statement

An infringing statement raises two questions: a) the extent to which it is properly perceived by a third person; and b) the extent to which the entirety of the text is aimed at disseminating the defamatory statement. Submitting a claim only based on the words extracted from their context does not fall within the legal scope²⁹. For example, a statement that is shared in a group of friends as a joke, or where the public knows about the friendship of those persons, will not be considered defamatory; also if a person posts the following statement about his/her friend on social media³⁰ ‘you are a fraud’ and tags the addressee (i.e. his/her friend),

22. See, for example, the decision of the European Court of Human Rights in *M.L. and W.W. v. Germany*, 28.6.2018, Nos. 60798/10 and 65599/10.

23. Ruling of the Supreme Court of Georgia, 24.3.2023, No სს-1498-2022.

24. More detailed discussion on this topic is provided in the context of the identity of an addressee.

25. Ruling of the Supreme Court of Georgia, 6.2.2023, No სს-549-2022.

26. Decision of Tbilisi City Court, 2.3.2023, No 2/38600-22.

27. Compare: the ruling of the Supreme Court of Georgia, 1.10.2014, No სს-179-172-2012.

28. Ruling of the Supreme Court of Georgia, 6.2.2023, No სს-549-2022.

29. See, for example, the ruling of the Supreme Court of Georgia, 6.4.2020, No სს-1366-2019.

30. For more clarity, it is advisable to continue the discussion based on the above example and to focus on criminal terminology.

it will not unconditionally become grounds for defamation. Based on this example, it is important to understand the purpose for which a person posted the statement (status) and the kind of relationship he/she has with the addressee.

In turn, the context of a joke cannot always be considered as a precondition for the absence of a violation of rights. According to the same logic, despite an action that is ‘hidden behind a joke’, the rights of a person may be violated and he/she may submit a respective claim to a court³¹.

2.3 Identity of an addressee

The identity of an addressee is directly related to both of the above cases. Firstly, a relatively simple aspect can be established, namely the distinction between a private and a public person. In this regard, the case of a public person can be used as an example. Based on the concept of the obligation of tolerance of a public person, in this case the issue of public interest will be brought to the fore^{32/33}. Especially if a public person holds a position in politics. Moreover, in the case of a public person, a court should review the matter in terms of qualified privilege. Therefore, context is of crucial importance in such cases, primarily due to the status of a person.

The issue related to natural or legal persons holding different statuses is relatively multifaceted. For example, in the case of a journalist (media), a non-governmental organisation³⁴, or a representative of academia, etc. In this respect, according to the case law of the European Court of Human Rights, the rights of a journalist (in terms of freedom of expression) may be violated, but the rights of a person carrying out academic activities may not be violated in the same case³⁵. Accordingly, it would not be correct to establish the same standards for journalists as are established for other persons (such as persons carrying out academic activities)³⁶. Namely, in judicial practice, the status of a so-called ‘watchdog’³⁷ is very important in terms of freedom of expression which, respectively, shows the standard from a different perspective³⁸. First of all, it covers media³⁹, which means that restrictions that may

31. Mainly, taking into account the violation of non-property rights.

32. See, for example, the decision of the European Court of Human Rights in Magyar Kétfarkú Kutya Párt v. Hungary, 20.1.2022, No 201/17.

33. Public interest may play an important part in the case of a private person as well, however, in practice, most cases are related to a public person.

34. See, for example, the decision of the European Court of Human Rights in Animal Defenders International v. the United Kingdom, 22.4.2013, No 48876/08.

35. Decision of the European Court of Human Rights in Akdeniz and Others v. Turkey, 4.5.2021, No 41139/15, No 41146/15.

36. For example, the decision of the European Court of Human Rights in Hertel v. Switzerland, 25.8.1998, No 59/1997/843/1049, which requires more grounds in the case of a journalist.

37. In English ‘watchdog’.

38. See, for example, the decision of the Supreme Court of Georgia, 5.7.2019, No 56-847-791-2017.

39. Decision of the European Court of Human Rights in Stoll v. Switzerland, 25.4.2006, No 69698/01.

apply to certain natural persons cannot be automatically applied to media⁴⁰. The above, in turn, clearly demonstrates the importance of context.

3. The need to have a so-called ‘three-part test’.

The best example of the above reasoning is the so-called ‘three-part test’ and the resolution of cases based on it. First of all, it is important to determine the extent of the admissibility of an interference as provided for by law⁴¹. The second stage is the existence of a legitimate aim, which may also be expressed in terms of the protection of the right to dignity⁴². Finally, the aspect of proportionality, which implies the correlation of the necessity of restriction and the applied means with the aim to be achieved⁴³. The form of interference with a right⁴⁴ should be used in such a way that it does not damage constitutional principles⁴⁵. In the case of each of the above conditions, the issue should be resolved based on its context and the decision should be made in this way. For example, whether or not a statement, that is a friend’s joke, violates non-property rights; or whether or not a statement, which focuses on an unpleasant topic that falls within the scope of public interest, can be a ground for restriction, etc.

4. Relation to public law regulation of freedom of expression

The fact that context is of great importance in disputes related to freedom of expression is evident from the public law relationship as well. For example, the placement of any video-clip by a broadcaster which features a politician (including a former official) is not pre-election/political advertising⁴⁶, which is different from the situation where a video clip features current officials⁴⁷. In each case, the interpretation of the context determines the legal outcomes⁴⁸.

Similarly, a parallel can be drawn with the protection of the rights of minors. For example, according to Article 56¹ of the Law of Georgia on Broadcasting, materials inappropriate for a person under the age of 15 shall not be broadcast before 23:00. Under Article 56²(2)(c) of the same Law, such materials include ‘*offensive language, unless it is justified by its context*’.

40. In some cases, the non-governmental sector is equated with the media, which is of great importance for the formation of a democratic state. See, for example the decision of the European Court of Human Rights in Magyar Helsinki Bizottság v. Hungary, 8.11.2016, No 18030/11).

41. Mainly, in terms of the freedom of political and judicial speech based on Article 5 of the Law of Georgia on Freedom of Speech and Expression.

42. The Constitutional Court has interestingly developed its reasoning regarding the restriction of rights for the purpose of achieving a legitimate aim. See decision No 1/1/468 of 11 April 2012 of the Constitutional Court of Georgia in ‘the Public Defender of Georgia v. the Parliament of Georgia’.

43. See, for example, the decision of the Supreme Court of Georgia, 30.9.2015, No სს-1052-1007-2014.

44. In defamation disputes: refusal, as well as claim for the compensation for damages.

45. Decision No 1/3/534 of 11 June 2013 of the Constitutional Court of Georgia in ‘Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia’.

46. Resolution of Tbilisi City Court, 29.10.2021, No 4/6707-21.

47. See, for example, the decision of the Georgian National Communications Commission, 23.8.2023, No ჯ-22-03/2096.

48. It can be achieved by comparing the combination of evidence and the overall picture.

It is clear from the literal interpretation of the norm that context is of crucial importance in this case as well. The Georgian National Communications Commission has developed an interesting practice in this matter, which has established that an actor's address to the audience with offensive words during one of the programmes did not constitute a violation of law⁴⁹. Namely, the Commission explained that as it is characteristic to the character, who is portrayed by the actor, to use specific vocabulary and terminology (which also includes offensive vocabulary), it does not constitute a violation.

Afterword

Context is an important factor in qualifying a disputable statement as defamatory. In such cases general preconditions are checked, such as the circumstances based on which a statement is made⁵⁰ and the feeling that is shared in the statement⁵¹.

The importance of context depends on both the content of a statement and the area of its dissemination. Even if a statement contains negative and unpleasant words, primarily the emphasis should be placed on the context. For example, in the case of public interest, where freedom of expression is characterised by a high standard of protection.⁵² In each case, a court should take into account three main factors: a) overall circumstances: what a statement is based on and based on what it has been made; b) how a statement is perceived by a relevant (or undefined) group of people; and c) who the addressee of the statement is and what status the addressee has. Considering the above criteria, a court may deliver different decisions in similar cases and explain them on the grounds of context.

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