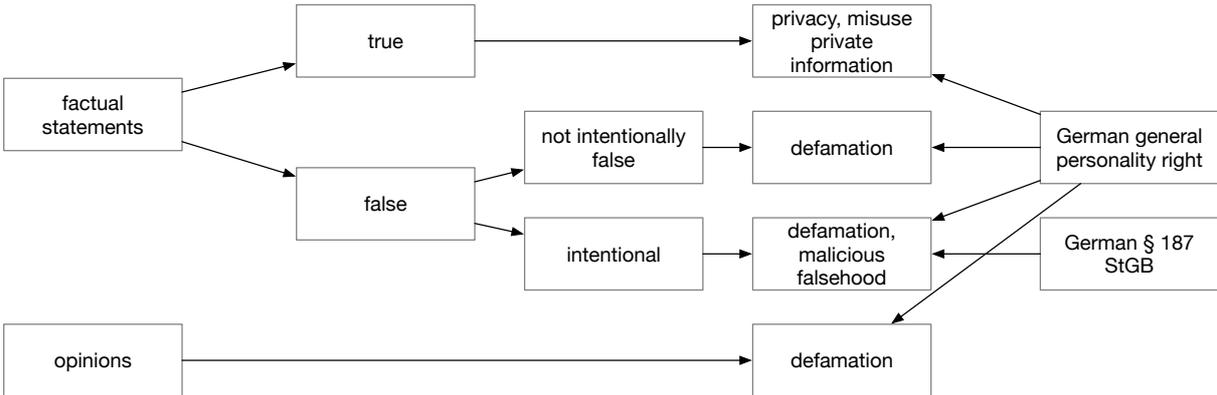


Note on defamation

As a supplement to the textbook, a few additional details regarding defamation may be helpful to the reader. Defamation is part of the liability for public dissemination of information. This is distinguished from cases where information was provided primarily to a specific victim, causing harm to that victim. Those are covered by torts like negligent misstatement and deceit. Public dissemination of information involves cases where the general public receives information, and that fact causes harm to the victim.

There are various torts involved. The following road map may help to find your way.



It is easiest to start from the available torts in English law, and then analyse how those torts are reflected in German and French law. In English law, liability for wrongful statements is primarily covered by the Defamation Act 2013.¹ However, there are several other torts that cover cases close to defamation. In order to illustrate their relation, we will present this area in a way that differs from the usual description of defamation.

The torts that we discuss here involve *publication of statements*. Statements include not only text, but also images and other expressions (see s. 15 Defamation Act 2013).² An image such as a doctored photograph or a photograph in a misleading context can be treated like a false statement; a cartoon can be treated like an opinion. Publication simply means that the statement has been communicated to someone else than the claimant;³ wide circulation is not necessary.

Furthermore, for the purposes of the tort of defamation, we need to be clear about what defamation involves. A defamatory statement is, unfortunately, hard to define. An oft-quoted test is “would the words tends to lower the plaintiff in the estimation of right-thinking members of society generally?”⁴ More recently courts have mentioned as their task “to determine whether the behaviour or views that the offending statement attributes to the claimant are contrary to common, shared values of our society.”⁵ Typically this is because the statement brings the claimant hatred, contempt or ridicule, or otherwise leads to the claimant

¹ Which modifies rules from common law and the earlier Defamation Act 1996; the earlier rules that have not been superseded are still valid. Many other common law jurisdictions also have Defamation Acts of their own.
² In the past English common law distinguished between libel (written text) and slander (spoken utterances); this distinction has been abolished. You may still find this distinction in other common law jurisdictions.
³ An exception is communication to a spouse, which is protected.
⁴ *Sim v Stretch* [1936] 2 All ER 1237.
⁵ *Brown v Bower* [2017] EWHC 2637 (QB), at 43, referring to *Monroe v Hopkins* [2017] EMLR 16, at 51.

being shunned without moral discredit.⁶ This can include disparagement of the claimant in his profession. Of course, the views on what is defamatory may change: an imputation that a couple is living together out of wedlock is not defamatory in modern England, although it would have been in the past. Similarly, an allegation that someone is a homosexual was in the past a clear cause for defamation,⁷ but nowadays may not be defamatory anymore.⁸ There are many further details about what counts as defamatory and to whom; these are covered in textbooks.⁹

For the modern law of defamation, there is a further requirement: there must be serious harm (s. 1 Defamation Act 2013). Claims for trivialities as common insults are thereby barred.

The most important category of cases involves factual statements. Although a true statement can be defamatory, the truth of the statement is a defence (s. 2 Defamation Act 2013). Nonetheless true statements can lead to liability, albeit on the basis of the English tort of misuse of private information¹⁰ or more broadly for infringement of privacy (although that is not recognised as a separate tort in English law). Note that those actions do not require that the statement is defamatory or that there is serious harm.

For false factual statements the tort of defamation is the principal cause of action. A complication with defamation is the issue of proof of the truth of the statement. The defendant generally carries the burden of proof that the statement is true,¹¹ which in specific cases may appear inopportune or unjust such as a case where a defendant had to prove that the Holocaust did happen.¹² However, claimants may actually choose to prove the falsity of the statement,¹³ as in the absence of such proof they are unlikely to obtain substantial damages or an injunction.¹⁴

An action for defamation does not require that the false statement was made intentionally. If, however, the tortfeasor published the statement knowing of its falsity (or not caring whether it was true or false), the tortfeasor may also be liable for malicious falsehood.

This leaves us with the category of statements that are not factual, rather are opinions.¹⁵ Opinions can in principle also be defamatory, but s. 3 Defamation Act 2013 allows the defence of honest opinion. This requires, simply put, that the opinion was actually held by

⁶ Winfield and Jolowicz 2020, para 13-002.

⁷ Witness the famous trial of Oscar Wilde.

⁸ In *Brown v Bower* [2017] EWHC 2637 (QB), at 50 parties agreed that being called 'gay' was not defamatory. Of course being 'outed' against one's will may still be wrongful, but arguably that involves violation of privacy rather than defamation.

⁹ E.g. Clerk and Lindsell 2020, para 21-15 through 21-54, Winfield and Jolowicz 2020, para 13-002 through 13-017.

¹⁰ *Campbell v IGN* [2004] UKHL 22.

¹¹ This follows from the fact that the falsity of the statement is not an element of the tort. In the U.S. the burden of proof of the falsity is on the claimant (following the Supreme Court decision in *New York Times Co. v Sullivan* 376 US 264 (1964)), as the US Supreme Court wanted to avoid the chilling effect on free speech (R.L. Weaver, 'Defamation: a half-century of changes (more or less)', in: A Koltay and P Wragg (eds), *Comparative Privacy and Defamation* (Cheltenham: Edward Elgar 2020), p. 243-252).

¹² *Irving v Penguin* [2001] EWCA Civ 1197; the claim was ultimately denied and claimant had to pay legal costs of GBP 3 million.

¹³ You may wonder what the difference is. It is quite possible that the defendant does not prove the truth of the statement for lack of evidence, whereby the court is left in doubt whether the statement is true or false. In such a case the falsity is not proven either, and if it is not established that the statement is actually false, the court may find that it is not proven that there is loss. The claimant carries the burden of proof for the presence of damage.

¹⁴ *Adelson v Anderson* [2011] EWHC 2497 (QB), at 78.

¹⁵ The distinction between the one and the other is not always easy to make. Furthermore, the opinion must be based on a true fact (or on a privileged fact, such as an academic publication).

defendant (hence was ‘honest’), and that had a factual basis. Because of the wide applicability of this defence, opinions will only be actionable in rare circumstances. Mere verbal abuse (insults) is not actionable.¹⁶ While in the past there were actionable forms of defamation such as ridicule, but those have mostly been abolished by the ‘serious harm’ threshold, whereby it is hard to see how insults, however grievous, can in themselves lead to a claim for defamation.

There are several defences to defamation (both against false statements and to opinions), besides truth and honest opinion. Certain publications are privileged, they cannot give rise to an action for defamation.¹⁷ A distinction is made between absolute privilege (which applies always) and qualified privilege (which only applies if the statement was not made with malice, for an improper purpose).¹⁸ Furthermore there is the so-called qualified privilege at common law.¹⁹

Once the elements of defamation are fulfilled, the claimant may be awarded damages or obtain an injunction.²⁰ Damages aim at full compensation and can be substantial: English law is generous in allowing awards of millions of pounds, while the loser also has to pay the legal costs which again may run in the thousands or millions. The resulting costs may easily bankrupt a defendant. Combined with the fact that the defendant carries the burden of proof of the truth of statements, caused a preference for litigants to sue in defamation in England. Thereby London (where such cases are heard) has in the past been referred to as the defamation capital of the world. The Defamation Act 2013 put into place restrictions that strengthened the position of the defendant,²¹ nowadays some claim that Australia has surpassed England in this regard.²²

This brings us to another topic. Defamation is principally committed by the author of the statement. But the publication of a statement may involve numerous parties who are all instrumental in having the statement reach its audience. Should those parties also be held liable? English law allows an exception for innocent dissemination,²³ and also secondary publishers.²⁴

For websites there is a specific exception, relating to Internet Service Providers (ISPs), discussed in the textbook (§ 7.5.4).

¹⁶ For instance, calling a doctor ‘a quack of the rankest species’ could be allowed under opinion, as are reviews of works of art (Winfield and Jolowicz 2020, para 13-091).

¹⁷ The Defamation Act 2013 (s. 4, 6 and 7) refers inter alia to court proceedings, parliamentary reports and discussions, peer-reviewed scientific and scholarly articles, publications in the public interest.

¹⁸ Winfield and Jolowicz 2020, paras 13-057 and 066.

¹⁹ This covers, simply put, internal communication between businesses, such as explaining the reason for dismissal of an employee. It is based on precedent and not found in the Defamation Act 2013 or 1996.

²⁰ Surprisingly, English law does not allow the court to order a retraction (Winfield and Jolowicz 2020, para 13-122).

²¹ Such as the serious harm requirement, or the requirement that England is the most appropriate jurisdiction (s. 9 Defamation Act 2013),

²² This is because several Australian precedents (*Dow Jones & Company Inc v Gutnick* [2002] HCA 56 and *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766) allow claimants to sue ISPs for content on their platforms as if they were publishers, even if the case is only tangentially related to Australia (as long as the posts were online).

²³ S. 1 Defamation Act 1996; this act has been mostly superseded by the Defamation Act 2013, but some provisions are still in force. Innocent dissemination means further publishing a statement after the original publication; this defence applies (briefly put) if defendant did not know and had no reason to believe that it was a defamatory statement.

²⁴ S. 10 Defamation Act 2013. Persons who are not author, editor or publisher may not be sued unless it is not reasonably practical to sue the author, editor or publisher (for instance, if the author is anonymous).

For German law we can refer to the discussion in the textbook (§ 7.5.3). A few additional details can be discussed here. As pointed out there, the publication of wrongful information regarding individuals is prohibited primarily by the personality right as another right in § 823 I BGB.²⁵ This covers cases like privacy infringement (including what in English law is called misuse of private information), but also statements that besmear the reputation of the victim, what is comparable to defamation.²⁶ German law also operates with the distinction between false statements²⁷ and opinion, but in contrast to English law, overly strongly worded opinion can be defamatory (they can be an insult, *Beleidigung*) and lead to liability.²⁸ It should be mentioned that on occasion the publication of a true statement may also be wrongful as infringing the personality right, for instance when it concerns a crime committed years ago for which the person had served a prison sentence.²⁹ Similarly to English law, the context of the statement is important, for instance whether it is a matter of public interest.

§ 823 II BGB in conjunction with § 185-187 Strafgesetzbuch also provides protection. Defamation is recognized as a ground of liability on the basis of § 187 Strafgesetzbuch, which provision also shows that the truth of the statement is a defence. As these provisions require intention, it may be worthwhile to also sue on the basis of infringement of the personality right in case intention cannot be established. Insults are actionable on the basis of § 185 Strafgesetzbuch: this covers both insulting opinions and insulting statements of fact. Only strong invective can give rise to liability.³⁰

The law in this area is heavily influenced by the simultaneously applicable constitutional protection and the relevant provisions of the ECnHR,³¹ a detailed treatment exceeds the bounds of the present text. Defamation and related issues are usually regarded as a specialized topic, due to the combination of human rights law, constitutional law, criminal law, and tort law.

You can see that the general provisions of German law allow a certain grouping of the different torts of English law. However, the generality of those provisions also means that the details of defamation are not clear from the text of the statutes. In a surprising inversion of the usual state of affairs, English law in this area has a more detailed codified law while Germany relies on case law for regulating the details.

In addition to the discussion on French law in the textbook (§ 7.5.3), a few details may be helpful.

Injurious expressions or insults (*L'injure*) covers opinions that are worded as strong invective, insults. The case law discusses strong expressions: calling a deputy a 'thug' was an insult but allowed in a political context, similarly saying about an opponent: "Why would the French people want to be the only European people to be ruled by a fascist leader?" was

²⁵ On which Wagner 2021, chapter 7.

²⁶ About this Wagner 2021, para 7.20-28.

²⁷ The truth of a statement is a defence, Wagner 2021, para 7.23.

²⁸ To give an idea: calling a news presenter a 'goat who is milked dry' was not allowed, while on the contrary calling a lawyer who published about Jewish influence on economy could be criticised as right-wing and his writings as 'right-leaning trash' (Wagner 2021, para 7.24).

²⁹ Bundesverfassungsgericht (BverfGE) 35, 202, GRUR 1973, 541, discussed in Wagner 2021, no 7.23.

³⁰ This can also be based on the general personality right, see Wagner 2021, no 7.24.

³¹ Compare also the ECtHR case of *Hannover v Germany*.

insulting but allowed in a political debate.³² Similarly, cartoons of a right-wing politician showing her with a swastika were allowed, as was the phrase ‘fascistoid bitch’, but comparing her to excrement was found too far in infringing her dignity.³³ These examples show that opinions may fairly quickly be considered insulting; the protection against liability is found in the context that allows strongly worded opinions (influenced by art. 10 ECnHR). This is somewhat similar in how the defences to defamation work in English law.

Defamation (*La diffamation*) consists of allegations of fact that harm, briefly put, the reputation of a person or corporate body.

The French courts consider this an area principally regulated by the right of freedom of expression, as found in art. 10 European Convention on Human Rights, whereby only abuses of this freedom may give rise to liability. You should take note of the existence of a specific statute, as a similar approach may be found in other jurisdictions: the limitations of freedom of expression (and therefore liability for defamation or other information) may be found in specific statutes relating to freedom of the press. You may therefore need to research that area of the law to obtain a complete overview. Here we will not discuss the case law of the European Court of Human Rights as that would lead us too far astray.

The courts appear to require that a person who makes a statement was diligent in research to support the statement, although the degree of diligence varies according to the accusation and context of the statement. Furthermore, the wording of the statement or opinion is relevant: a strongly worded denunciation may lead to a conviction where a milder phrase would not.³⁴

³² G. Gil, ‘Free speech and the rights involving politicians in French law’, in: A Koltay and P Wragg (eds), *Comparative Privacy and Defamation* (Elgar: Cheltenham 2020), p. 343-344, referring to Cass. (crim.), 9 December 2014, no 13-85-401 and Cass. (Crim.), 28 February 2017, 15-86.591.

³³ Gil 2020, p. 344-345, referring to Cass. (crim.), 20 September 2016, nos 15-82.941, 15-82.942 and 15-82.944.

³⁴ Le Tourneau 2020, nr. 2212.51.