COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF THOMA v. LUXEMBOURG

(*Application no. 38432/97*)

JUDGMENT

STRASBOURG

29 March 2001

FINAL

29/06/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Thoma v. Luxembourg,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr B. CONFORTI,
Mr G. BONELLO,
Mrs F. TULKENS
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 30 November 2000, and on 1 February and 8 March 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38432/97) against the Grand Duchy of Luxembourg lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Luxembourg national, Mr Marc Thoma ("the applicant"), on 9 September 1997.

2. The applicant was represented by Mr P. Urbany, a lawyer practising in Luxembourg. The Luxembourg Government ("the Government") were represented by their Agent, Mr R. Nothar, a lawyer practising in Luxembourg.

3. The applicant alleged, in particular, a breach of his freedom of expression, as guaranteed by Article 10 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Mr M. Fischbach, the judge elected in respect of Luxembourg, withdrew from sitting in the case (Rule 28). The President of the Court accordingly appointed Mrs F. Tulkens, the judge elected in respect of Belgium, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 25 May 2000 the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr R. NOTHAR, of the Luxembourg Bar, *Agent*,
Mrs A. CLEMANG,
Mr G. PHILIPPS, *Counsel*;

(b) *for the applicant*
Mr P. URBANY, of the Luxembourg Bar, *Counsel*.

The Court heard addresses by Mr Urbany and Mr Nothar and the replies to the questions of one of its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 6 November 1991 *Tageblatt*, a Luxembourg daily newspaper published in German, printed an article by journalist Josy Braun on various reafforestation techniques that had been used after the storms in early 1990 that devastated part of the Luxembourg woodlands. The article appeared under the title "*Wiederaufforstung ... das ganze noch einmal*" ("Reafforestation ... all over again") and included the following:

> [Translation from a French translation provided by the applicant]
>
> "The cynicism really knows no limits, since it should not be forgotten that these forest gardeners cut down trees, buy, plant, 'treat' with public funds, to the tune of millions of francs. (Ministers, lend an ear!)
>
> What does all this hide? Of course, there will be a full denial by all concerned, but the conclusion to be drawn after various discussions with people in the industry should be this: It is better to replant two or three times with plants from a seller who gives a generous percentage than once with plants from a firm that has the nerve to refuse to pay bribes. (Comment from someone familiar with the system: 'I know of only one person who is incorruptible.' He gave the name of the forest warden from 'Bambësch'.)

> 'Naturally', it's a case of the tabloid press yet again publishing 'unsubstantiated monstrosities'; 'naturally', there is no truth in any of it, but the owners of the woodlands, whether the State, municipalities or private individuals, should be aware of one thing: they are the ones who must pay for the repeated reafforestation of dubious benefit; and they the ones who should demand that the political authorities remove the dung from Augeas's Stables, instead of continually trying, with mixed success, to muzzle those who have the nerve to put the public interest before the private interests of a few 'fleas in the scrotum of the Welfare State' (dixit Degenhard)."

10. The applicant was at the time a journalist on a national radio station, RTL 92.5, for whom he presented a weekly programme in Letzeburgesch entitled "Oekomagazin" dealing with nature and the environment. He had raised the subject of the problems connected with reafforestation after the 1990 storms on a number of occasions on the programme and had alluded, along with other Luxembourg publications, to a breakdown in the system.

11. The applicant had chosen reafforestation as the subject matter for his "Oekomagazin" programme of 6 November 1991. He began the programme with an introduction in which he reminded listeners that he had spoken the previous week about "the temptation for Forestry Commission people to take advantage when an opportunity present[ed] itself" and had referred to "a series of telephone calls from people all over the country who [had] interesting tales to tell". He went on to say "in any event, one thing is clear: the woodland management chapter is much thornier than people might think". He also reported, indicating that he was giving an example, that a person who had had work done in woodland he owned by a private contractor "no longer knew which way to turn" after receiving a bill for the work from the Forestry Commission responsible for the sector rather than the private contractor. After that introduction, he quoted certain passages from the aforementioned article, which he said was "strongly worded". He said, *inter alia*:

> [Translation from a French translation provided by the applicant]
>
> "But there is money to be made at the sawmill as well as in wood. The same applies to the plantations, because they can be counted in millions. In a two-page article in today's edition of *Tageblatt*, Josy Braun does not mince his words in denouncing various plantation practices used by the Water and Forestry Commission and he makes no concessions. The journalist writes, and I quote: 'One already requires a certain dose of cynicism not to forget that these gardeners of the forest do not clear out, buy, plant, and (in inverted commas) treat the publicly owned woodlands with their own money, but with public funds to the tune of millions.' Josy Braun then provides the proof (*fazit*) of the proposition: 'It is better to replant two or three times with plants from a seller who pays a percentage than once with plants from a firm that has the nerve to refuse to pay a percentage.' The *Tageblatt* journalist then cites an authoritative source from the industry who is quoted as saying: 'I know of only one person who is incorruptible.' The name of the forest warden from Baumbusch is given in that connection. 'The owners of our forests, whether the State, municipalities or private individuals should be aware of one fact: they are the ones who must pay for umpteen questionable reafforestation projects', to quote again from the *Tageblatt* journalist, 'It

is they who ought to demand that the political authorities clean out Augeas's Stables once and for all' ..."

12. The applicant explained that with that "strongly worded" article, Josy Braun had implicitly referred to the provision in the Criminal Code relating to intermeddling, which prohibits civil servants working for the State or the municipalities to use their official status to derive personal gain. He added that people working for the Water and Forestry Commission "have a reasonable salary and can under no circumstances claim a hand-out and get rich at the expense of public-owned woodlands or of private owners, buyers of wood or tree nurseries".

13. He then proceeded with the theme of the programme and put questions to W., a Water and Forestry Commission engineer, before asking R., a private woodlands owner:

[Translation from a French translation provided by the applicant]

"In a strongly worded article by journalist Josy Braun this morning, it is said: 'It is better to replant two or three times with plants from a seller who is generous with bribes than once with plants from a firm that has the nerve to refuse to pay bribes.' Mr R., what do you think of that strongly worded phrase. You also work a little in this branch: what is your experience in this sphere? Is what Josy Braun says true?"

14. After R. had expressed his opinion on that point, the applicant questioned him further on the subject of the importation of plants, a matter he had previously raised with W., the engineer. He asked R. the following questions:

[Translation from a French translation provided by the applicant]

"And what is your opinion on the delivery of plants from abroad, possibly through Luxembourg traders? Is it possible that the plants, which come from Hungary or Spain, for example, are delivered without being checked?"

15. After R.'s reply, the applicant ended his programme with a long debate on the theme of public tenders.

16. In a press release on 19 November 1991, the Association of Luxembourg Foresters announced its intention to lodge a complaint for defamation against the applicant. However, it did not do so.

17. Between November 1991 and February 1992 fifty-four forest wardens and nine forestry engineers brought civil actions in damages against the applicant alleging that he had damaged their reputation. They each claimed 1,000,000 Luxembourg francs (LUF) in compensation complaining that he had quoted accusations from the article published in the 6 November 1991 edition of *Tageblatt* without in any way toning them down, correcting them or commenting on them "the slightest bit critically", and that he had passed them off as his own. He had thus suggested publicly that all forestry wardens in Luxembourg (of whom there

were eighty at the time) and all Luxembourg forestry engineers were, with only one exception, corruptible and corrupt. In their writs, they quoted from a Luxembourg judgment of 1989, in which it was held as follows:

> "By establishing freedom of the press, the Constitution does not impose any restriction on the fundamental principle contained in Articles 1382 and 1383 of the Civil Code. Freedom of the press is not unlimited and ends where it infringes the legitimate rights and interests of others. Journalists do not enjoy any immunity exempting them from their obligation to exercise care towards all individuals and even the State and its institutions, and any breach, albeit slight, of that obligation is unlawful under the aforementioned Articles of the Civil Code which oblige anyone who, through his wrongdoing, or negligent act or omission causes damage to another, to make reparation.
>
> Journalists may be held severally liable for any breach of their obligation to be truthful and objective" (judgment no. 9.637 of 13 November 1989, *Cepal v. Bever*).

18. The sixty-three statements of claim were couched in more or less identical terms.

19. The applicant requested that the various actions against him be joined and declared inadmissible on the ground that he had merely quoted statements made by a clearly identified person. He offered to adduce witness evidence to show that his investigations revealed numerous offences in the sphere concerned. He also lodged a counterclaim against each of the claimants for payment of LUF 25,000 as an allowance for preparing the case for trial and LUF 100,000 for abuse of process and vexatious proceedings; he also claimed costs and expenses.

20. The Luxembourg District Court examined the sixty-three cases at a single hearing and handed down sixty-three almost identical judgments on 14 July 1993. It awarded each of the claimants one franc in nominal damages, dismissed the counterclaims and ordered the applicant to pay the costs and expenses.

21. After examining the text of the aforementioned passage from the *Tageblatt* article and the aforementioned quotations from the transcript of the applicant's radio programme, the District Court held, *inter alia*:

> "The journalist, Thoma, seized upon the article by Josy Braun and, in particular, the impugned passage, to persuade the public that the legislation in force was not being complied with and to adopt Josy Braun's '*fazit*' conclusion.
>
> This Court considers that the use of the words '*Forstleit, Forstverwaltung*' to restrict the circle of people concerned by the programme, the use of Braun's conclusion to support the assertions, citing a person who was supposedly familiar with that circle (*Berufener Stemm aus dem Milieu*), the assertion that that person knew only one person – from that background – who was incorruptible, meant that those against whom the accusation was made are sufficiently identifiable.

In view of his position (as a Forestry Commission employee), the claimant has sufficiently established in law that Thoma's remarks were directed against him.

This Court must analyse whether by so acting the defendant has committed an act that falls to be dealt with under the provisions of Articles 1382 and 1383 of the Civil Code.

It is true that the press has the right, and even the duty, to criticise abuses that come to light in public life (*CSJ* 23 March 1912 P.8, p. 346).

It is incumbent on professional journalists to publish breaking news, news items and, generally, anything which seems to them to present an interest as soon as they can (Luxembourg District Court, 14 February 1990, no. 100/90). The press must preserve its right to criticise the social activity of individuals, that is to say all those whose dealings directly concern the community. The press is entitled to say what it thinks about their activities, provided that it does not attack their reputation and provided that it acts in good faith (Luxembourg District Court, 27 October 1986, *Feuille de liaison de la conférence St Yves* no. 69, p. 43).

Marc Thoma was, accordingly, perfectly entitled to investigate the problems posed by the reafforestation of our woodlands after the storms and to denounce and to criticise practices which he considered to be inconsistent with the laws and regulations.

Indeed, through a series of articles in the press, the Luxembourg journalists have not missed the opportunity of drawing the attention of the public and the public authorities to matters which they believe it was their duty to criticise.

While it is true that absolute objectivity cannot be required of journalists, in view of their relatively unreliable means of investigation, they nonetheless have an obligation to act on information that has been verified to the extent the means available to them reasonably permit. The law requires journalists to act in good faith and does not seek to give immunity to persons who through spite, malice or foolishness seek by publication to discredit others. A *mala fide* intention may appear when a journalist had reasons to doubt the truth of the facts or his ability to produce evidence establishing them (Civ. Bruxelles, 29 June 1987 J.T. 1987).

In the instant case, it was for Thoma to prove that he had obtained sufficient evidence to enable him to adopt Braun's allegations and to assert that the claimant had been guilty of corruption in connection with the reafforestation of the woodlands."

22. After rejecting an offer by the applicant to adduce evidence as being too vague, the District Court concluded:

"Marc Thoma has, accordingly, not established that he has sufficient evidence to show that the claimant was guilty of corruption in connection with the reafforestation of the woodlands.

It is not for this Court to order or complete investigative measures of its own motion in order to assist the journalist to carry out *ex post facto* the investigations and research which he should have performed before publishing the impugned article.

By giving the impression without evidence and without qualification that all the Water and Forestry Commission officials concerned by the reafforestation work were, with but one exception, corruptible, Thoma has overstepped the boundaries of his right to impart bona fide information and has, accordingly, committed a tort."

23. The applicant appealed against all sixty-three judgments. In his appeal submissions, he requested the joinder of the fifty-four cases brought by the forestry wardens and the nine actions brought by the forestry engineers. His opponents contested that request. The applicant did not renew the offer to adduce evidence which he had made at first instance.

24. The Court of Appeal of the Grand Duchy of Luxembourg (Seventh Division) gave its decision in almost identical judgments delivered on 30 January 1996. It acceded to the applicant's request for joinder and upheld the impugned judgments. In support of its decision to award each of the claimants nominal damages of one franc, the Court of Appeal added the following grounds to those that had been relied on by the District Court:

"By attributing the phrases '*Ich kenne nur einen der unbestechlich ist. Sie nannte den Namen des Baumbusch-Försters*' not to a particular individual, but to a '*berufene Stimme aus dem Milieu*', that is to a person in the know, someone from the background who is aware of confidential matters and can be relied upon not to provide false information, the text of Braun's article quoted by the appellant suggests to the public and leads it to believe that, apart from the forest warden responsible for Baumbusch there was not one other Water and Forestry Commission official, whether ordinary forest wardens or even members of its management, who was incorruptible.

It follows that, contrary to the appellant's assertion, the text quoted by him qualifies as corruptible 'a defined group of identified people', since he suggests that all Water and Forestry Commission officials are in that position and together they constitute a defined group of identified persons.

It follows from the foregoing that the claimants at first instance and respondents to this appeal – on whom the burden of proving the merits of their claims lies – have, in view of their position (as Forestry Commission staff), established that Josy Braun's text quoted by the applicant was directed at them.

Further, the applicant fails in his attempts to deny liability by arguing that his remarks are no more than a quotation from the impugned article by Josy Braun.

A journalist cannot escape liability by arguing that the impugned article which he has published is merely a reproduction of one already published by someone else since, by choosing to reproduce the article, he appropriates the allegation contained in the reproduced text and thus incurs personal liability.

That is the position and a journalist who merely quotes from an article that has already appeared will only escape liability if he formally distances himself from the article and its content and if in terms of newsworthiness an interest exists in communicating the content of the article that has already been published.

In the instant case it is quite clear that in repeating in the 'Oekomagazin' programme of 6 November 1991 in Letzeburgesch the impugned passage from Josy Braun's article in that day's edition of *Tageblatt*, the appellant did not distance himself from the quoted text and, in particular, the aforementioned allegation which it contains.

It follows that even supposing that the appellant had merely quoted the impugned passage from Josy Braun's article, that quotation nonetheless rendered him liable.

Finally, the Court of Appeal holds below that the appellant has failed to establish the merits of the allegation of corruption contained in the impugned passage in Josy Braun's article which he quoted from without formally distancing himself from it. Under these circumstances, that allegation establishes by itself that when in the 6 November 1991 edition of 'Oekomagazin' the appellant repeated the passage from Braun's article containing that allegation unreservedly, there was, contrary to what he asserts, no 'lack of malice' on his part ...

It follows that by leading public opinion to believe without evidence that the entire staff of the Water and Forestry Commission from forest wardens to the director were corruptible, the only honest employee being the forest warden from Baumbusch, the appellant has not complied with his obligation to impart bona fide information and has consequently committed a tort rendering him liable under Articles 1382 and 1383 of the Civil Code ..."

25. The applicant appealed to the Court of Cassation, which dismissed his appeals in two judgments of 20 March 1997. The Court of Cassation said, *inter alia*, that Articles 1382 and 1383 of the Civil Code established a system of reparation and that, subject to the last sentence of Article 24 of the Constitution and of section 16(2) of the Law of 20 July 1869 on the Press, the scope of those Articles in press cases was unlimited since, as in every other sphere, the courts would take account of the special nature of the activity of journalists in deciding whether a tort had been committed. It added that the courts below had justified their decision in law for finding a tort.

II. RELEVANT DOMESTIC LAW

26. The relevant provisions of the Luxembourg Civil Code concerning liability under the general law read as follows:

Article 1382

> "Any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it."

Article 1383

> "Everyone is liable for the damage which they have caused not only through their acts, but also through their negligent omissions or acts."

27. For the purposes of Articles 1382 and 1383 the tort may result from a violation of a rule of criminal law. In that eventuality, the victim may either bring a civil action, or institute or be joined to criminal proceedings as a civil party.

28. The offence of damaging a person's reputation is laid down by Article 443 of the Criminal Code, which provides:

> "Anyone who, in the circumstances set out hereafter, maliciously accuses another of something that is liable to damage that person's reputation or expose him to public scorn shall be guilty of calumny if, in cases where it is possible by law to plead a defence of justification, no admissible evidence supporting the accusation is adduced. He shall be guilty of defamation if the law does not allow of a defence of justification."

29. Section 16 of the Law on the Press provides:

> "Everyone who shall have taken part, as a principal, co-offender or accomplice in press offences shall incur criminal and civil liability.
>
> However, if the principal is of known identity, a Luxemburger and domiciled in the Grand Duchy, the printer, editor and any accomplice shall be immune from suit."

30. That provision introduced the notion of "indirect liability" in proceedings against the press. According to legal commentators, the system obviates the need for the author's work to be subjected to prior censorship by the editor, printer or distributor. It is not a question of liability being diluted but of its attaching to one person, that person being the author, if his identity is known and he is domiciled in Luxembourg, or, failing that, the editor, printer or distributor.

31. Section 18 of the statute provides:

> "No one shall be entitled to invoke by way of excuse or justification the fact that the writings, printed material, pictures or emblems are merely a reproduction of materials published in the Grand Duchy or abroad."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant considered that the judgment against him constituted an unjustified interference with his right to freedom of expression in breach of Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicant

33. The applicant considered that the judgment against him indisputably amounted to an interference with his right to freedom of expression, since even an order for nominal damages constituted an interference. In any event, he had been ordered to pay the costs of the proceedings.

34. He submitted that the interference had not been prescribed by law as the wording of Articles 1382 and 1383 of the Civil Code was too vague and did not satisfy the criteria of foreseeability. He stressed the principle that a special law should take precedence over a general law so that the Law on the Press of 20 July 1869, which met the accessibility and foreseeability criteria, had to apply to proceedings brought against journalists. Section 16 of the Law on the Press, which established a system of indirect liability, excluded any interference with the applicant's freedom of expression, as he had merely cited a clearly identified author. In addition, the interference was excluded by a supra-legislative rule, namely Article 24 of the Luxembourg Constitution. Finally, he produced a judgment of the French Court of Cassation dismissing an appeal against a judgment in which

the Paris Court of Appeal had dismissed the appellants' claim under Article 1382 of the Civil Code in proceedings against the press. He submitted that that judgment had to be applicable in the instant case.

35. The applicant said that the interference did not pursue a legitimate aim in that he had not personally made offensive allegations but had merely quoted from an article written by Josy Braun. Thus, though it was possible that the interference with Josy Braun's freedom of expression could be regarded as having pursued a legitimate aim, that could not be true of the interference with the applicant's freedom.

36. Referring to *Jersild v. Denmark* (judgment of 23 September 1994, Series A no. 298), the applicant added lastly that the interference had not been necessary in a democratic society. He explained that he had even taken the precaution of clearly indicating that he was quoting the passages from an article published by a fellow journalist, and of inviting the guests on his programme to state their views. He added that the topic had been widely debated and that eleven criminal and eight disciplinary investigations had been started into the activities of Water and Forestry Commission officials. He also insisted upon the fact that the sentence was disproportionate in that the legal costs which he had been ordered to pay were very substantial.

37. He submitted that staff from the Water and Forestry Commission could not be regarded as entitled to the special protection that was afforded in *Janowski v. Poland* ([GC], no. 25716/94, ECHR 1999-I), as the facts of that case were distinguishable from those in the instant case.

38. The applicant concluded by saying that his right to freedom of expression had been violated by the Luxembourg authorities.

2. The Government

39. The Government maintained that the judgment against the applicant could not constitute an interference with his right to freedom of expression, as he had been ordered to pay only nominal damages and thus had not sustained any pecuniary damage. Furthermore, the penalty, which was symbolic, had not restricted or violated the applicant's freedom of expression. The courts had merely reminded the applicant that the freedom in question was a relative one.

40. The Government submitted that the interference was in any event prescribed by law and, more specifically, Articles 1382 and 1383 of the Civil Code, which established the general rule of liability in tort in Luxembourg. To the extent that there was no code of conduct for determining the obligations of journalists in that sphere, the general law was applicable. The provisions of Articles 1382 and 1383 – which imposed an obligation on anyone who, through his fault, or negligent act or omission caused damage to another to make reparation for it – were precise and accessible. Those principles and, in particular, their application to journalists, had been explained and clarified by the courts. The Government

added that the applicant could not rely on section 16 of the Law on the Press establishing a system of indirect responsibility, since the Luxembourg courts had not found against him on the basis of that provision. He had incurred liability for wrongly adopting the words of Josy Braun, since he had prefaced the quotation of the extracts from the latter's article by a statement reflecting his personal opinion. The applicant had thus used the article by Josy Braun published in that morning's edition of *Tageblatt* in his "Oekomagazin" programme without checking the relevance and veracity of the matters it related and with the sole aim of backing up his personal opinion.

41. The Government said that the interference pursued a legitimate aim as it was justified by the need to protect the reputation and rights of the forest wardens and the presumption of innocence that operated in their favour.

42. The Government asserted lastly that the interference was necessary in a democratic society and proportionate to the aim pursued. In that connection, they stressed the importance of the factual circumstances of the case. The programme in issue was broadcast on a nationwide radio station at the end of a long campaign against the managers of the woodlands. Furthermore, since Luxembourg was a small country with few forestry engineers and forest wardens, the persons concerned were clearly identifiable to those who heard the programme. It was clear too that the applicant had made the allegation that the Water and Forestry Commission officials were corruptible right from the start of the programme. By quoting the offending passage by his fellow journalist he was thus merely providing an illustration of the allegation which he had by then already made and which he proceeded subsequently to make worse, notably by referring to the provisions concerning the offence of "intermeddling". In that connection, the Government referred more particularly to *Janowski*, cited above, in which the Court, after noting that public servants required the confidence of the general public in order to discharge their duties, held that the margin of appreciation had not been overstepped when Mr Janowski was convicted of offensive verbal attacks against acting civil servants. In the same way, the Government submitted that the interference had been necessary in the light of the importance of protecting the reputation of the forest wardens and of the lack of proof supporting the applicant's allegations. It had also been proportionate to the legitimate aim pursued as damages had been nominal and the judges had not ordered publication of the judgment.

B. The Court's assessment

1. General principles

43. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 41). Although freedom of expression may be subject to exceptions they "must be narrowly interpreted and the necessity for any restrictions must be convincingly established" (see The Observer *and* The Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 30, § 59).

44. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and *Jersild*, cited above, p. 26, § 37).

45. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57).

46. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

47. Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their conduct (see *Oberschlick v. Austria (no. 2)*,

judgment of 1 July 1997, *Reports* 1997-IV, p. 1275, § 29, and *Janowski*, cited above, § 33).

48. Furthermore, as a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, pp. 500-01, § 40, and *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 47).

49. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

2. Application of the aforementioned principles to the instant case

50. In the instant case, the applicant was ordered to pay nominal damages together with costs and expenses for failing to comply with his obligation to provide the public with bona fide information. He had quoted from an article in which a fellow journalist had said that, according to someone who knew the industry well, all but one of the Water and Forestry Commission officials were corruptible. The appellate court held that the applicant had not formally distanced himself from the quoted text and was deemed to have adopted the allegation it contained. It went on to hold that the applicant had failed to establish that the allegation was well-founded and had thereby incurred liability.

51. The judgment against the applicant incontestably amounts to "interference" with the applicant's exercise of his right to freedom of expression (see *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2880, § 39).

52. The issue is whether that interference can be justified under paragraph 2 of Article 10. It is therefore necessary to examine whether it was "prescribed by law", pursued a legitimate aim under that paragraph and was "necessary in a democratic society" (see *Lingens*, cited above, pp. 24-25, §§ 34-37).

53. The Court notes that Articles 1382 and 1383 of the Civil Code establish the principles governing tortious liability and that the Luxembourg courts apply those provisions to journalists in their case-law. The Court further notes that section 18 of the Law on the Press of 1869 provides that "no one shall be entitled to invoke by way of excuse or justification the fact that the writings, printed material, pictures or emblems are merely a reproduction of materials published in the Grand Duchy or abroad". The Court consequently considers that the applicant could have foreseen to a reasonable degree, if necessary by seeking advice from those qualified to give it, that the remarks broadcast during his programme did not render him immune from an action and that the interference may be regarded as having been "prescribed by law" (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30).

54. The Court considers that the grounds relied on by the Luxembourg courts were consistent with the legitimate aim of protecting the reputation and rights of the forestry engineers and the forest wardens, and the presumption of innocence that operated in their favour. Consequently, the aim of the interference was to protect "the reputation and rights of others".

55. The Court must now examine whether the interference complained of was "necessary in a democratic society" in order for that aim to be achieved and, therefore, determine whether it met a pressing social need, was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient.

56. The Court notes at the outset that there is a special feature to be taken into account in view of the size of the country. Even though the applicant made his remarks in the programme without mentioning anyone by name, the engineers and wardens were easily identifiable to listeners, given the limited number of officials working for the Water and Forestry Commission in Luxembourg.

57. The Court finds that some of the allegations made during the programme of 6 November 1991 by the applicant about the officials concerned were serious. In addition to quoting from Josy Braun's article, the applicant referred, among other things, to the "the temptation for Forestry Commission people to take advantage when an opportunity present[ed] itself". He also alluded to the serious offence of "intermeddling" by Water and Forestry Commission officials in private woodlands trade, whereas civil servants depend on the confidence of the general public in order to discharge their duties (see *Janowski*, cited above, § 33).

58. The Court must note, however, that the topic raised in the programme was being widely debated in the Luxembourg media and concerned a problem of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed. Accordingly, the Court must exercise caution when, as in the instant case, the measures taken or penalties imposed by the national authority are such as to dissuade the press

from taking part in the discussion of matters of public interest (see *Jersild*, cited above, pp. 25-26, § 35).

59. The paramount issue is whether the national authorities correctly exercised their discretion when they gave judgment against the applicant for being in breach of his obligation to provide the public with bona fide information.

60. On that subject, the Court notes that it is not unreasonable to take the view, as the Government did, that, having regard to the comments he made throughout the programme, the applicant had adopted – at least in part – the content of the quotation in issue.

61. However, in order to assess whether the "necessity" of the restriction on the exercise of the freedom of expression has been established convincingly, the Court must examine the issue essentially from the standpoint of the reasoning adopted by the Luxembourg courts. In that connection, the Court notes that the Court of Appeal only had regard to the fact that the applicant had quoted from his fellow journalist and, on that basis alone, found that he had adopted the allegation contained in the quoted text since he had failed formally to distance himself from it.

62. The Court reiterates that "punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild*, cited above, pp. 25-26, § 35).

63. In the instant case the Court of Appeal firstly examined the content of the quotation in issue. They found that by attributing the phrase in issue "I know of only one person who is incorruptible" to someone who knew the industry well, that is to say, someone familiar with it who "can be relied upon not to provide false information", the article by Josy Braun "suggests to the public and leads it to believe that, apart from the forest warden responsible for Bambusch there was not one other Water and Forestry Commission official ... who was incorruptible". The Court of Appeal went on to hold that the applicant could not escape liability by asserting that he had simply quoted from Josy Braun's article. It explained that "a journalist who merely quotes from an article that has already appeared will only escape liability if he formally distances himself from the article and its content ..." Lastly, it noted that, as the applicant had quoted the passage from Josy Braun's article containing the allegation – whose merits he had not established – unreservedly, there had been no "lack of malice" on his part.

64. The Court considers that those cannot, in the circumstances of the instant case, be regarded as "particularly cogent reasons" capable of justifying the imposition of a penalty on the journalist. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke

others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas. In the instant case, the résumé of the programme shows that in any event the applicant consistently took the precaution of mentioning that he was beginning a quotation and of citing the author, and that, in addition, he described the entire article by his fellow journalist as "strongly worded" when commenting on it. He had also asked a third party, a woodlands owner, whether he thought that what Josy Braun had written in his article was true.

65. In the light of the foregoing, the grounds given for holding the applicant liable are not sufficient to satisfy the Court that the interference in the exercise of the applicant's right to freedom of expression was "necessary in a democratic society". In particular, the means employed were disproportionate to the aim pursued, namely "the protection of the reputation or rights of others".

66. Consequently, the judgment against the applicant infringed Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

68. In the event that the Court found a violation of the Convention, the Government requested it to determine the sums to be awarded by way of just satisfaction on an equitable basis.

A. Damage

1. Pecuniary damage

69. The applicant requested an amount of 43,538 Luxembourg francs (LUF) for pecuniary damage, comprising LUF 23,520 for his personal expenses incurred in travelling to his lawyer's offices and the courts, LUF 63 for the nominal damages he had paid to his sixty-three opponents and the remainder as a lump sum for the costs he had incurred in correspondence and telephone communications with his lawyers.

70. The applicant also claimed LUF 1,678,648 for costs and expenses, comprising LUF 362,884 for the legal costs his opponents said they had incurred, and LUF 1,315,764 in legal fees billed by his lawyer. In the Court's view, those costs, assuming them to be justified, come under the head of pecuniary damage.

71. The Court reiterates that under its case-law a sum paid as reparation for damage is only recoverable if a causal link between the violation of the Convention and the damage sustained is established. Thus, in the present case, the sums which the applicant had had to pay to his opponents pursuant to the court decisions could be taken into account (nominal damages of LUF 63, the legal costs of LUF 362,884 claimed by his opponents' lawyers), plus the costs of serving the procedural documents that are mandatory under Luxembourg law for the validity of the proceedings, namely LUF 378,493.

72. Consequently, the amount to be awarded to the applicant comes to a total of LUF 741,440.

2. Non-pecuniary damage

73. The applicant sought LUF 1,500,000 as compensation for the non-pecuniary damage caused by the adverse publicity and the emotional strain that had followed the judgment against him.

74. The Court considers that the decisions of the Luxembourg courts against the applicant must have caused him some inconvenience. However, the finding of a violation of the Convention provides sufficient just satisfaction for that.

B. Costs and expenses

75. The Court points out that sums paid to the other side pursuant to the orders of the Luxembourg courts and the costs of service of the documents in the domestic proceedings must be regarded as pecuniary damage and have been dealt with under that head.

76. As to the costs and expenses that relate to his representation in court, the applicant claimed LUF 12,149,927, that is LUF 8,649,777 for the proceedings before the domestic courts and LUF 3,500,150 for the proceedings before the Convention institutions.

77. The Court reiterates that an applicant may recover his costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, ECHR 1999-V). The Court considers the costs and expenses claimed by the applicant's lawyer in the present case unreasonable and, having regard to the information in its possession and the aforementioned criteria and ruling on an equitable basis, it awards the applicant LUF 600,000.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in Luxembourg at the date of adoption of the present judgment is 5.75% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 10 of the Convention;

2. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) LUF 741,440 (seven hundred and forty-one thousand four hundred and forty Luxembourg francs) for pecuniary damage;
      (ii) LUF 600,000 (six hundred thousand Luxembourg francs) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 5.75% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 29 March 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Bonello is annexed to this judgment.

C.L.R.
E.F.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

(Translation)

I do not share the majority's opinion that the finding of a violation of Article 10 of the Convention constitutes in itself sufficient just satisfaction for the applicant's alleged non-pecuniary damage. I consider that such a "denial of a remedy" is unsatisfactory whatever the court of justice concerned. Moreover, it is inconsistent with the terms of the Convention, as I explained in detail in my partly dissenting opinion in *Aquilina v. Malta* ([GC], no. 25642/94, ECHR 1999-III).