



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

FOURTH SECTION

CASE OF SELISTÖ v. FINLAND

(Application no. 56767/00)

JUDGMENT

STRASBOURG

16 November 2004

FINAL

16/02/2005

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 Selistö v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr J. CASADEVALL,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr J. BORREGO BORREGO,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 10 February 2004, 1 June 2004 and on 26 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 56767/00) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Ms Seija Selistö, on 9 April 2000.

2. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen, Director, Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that her conviction of defamation violated Article 10 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 10 February 2004 (Rule 59 § 3).

6. By a decision of 10 February 2004, following the hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application partly admissible.

There appeared before the Court:

(a) for the Government

Mr A. KOSONEN, Director, Ministry for Foreign Affairs

Agent,

Mr I. HANNULA, Counsellor of Legislation,

Adviser,

Mrs L. LEIKAS, Legal Officer,

Adviser

(b) *for the applicant*

Mr M. WUORI, advocate,

Mr R. RYTI, advocate,

Counsel,

Adviser

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1941 and lives in Vaasa, Finland.

8. The applicant is a journalist at the regional daily *Pohjalainen* which is published in Vaasa. In two articles published in January and February 1996 she described the allegedly unprofessional behaviour of an unnamed surgeon, "X", which allegedly had caused the death of a patient in the Seinäjoki Central Hospital on 7 December 1992. The patient's top rib had been pressing on her artery, thereby hampering the blood flow in her left arm which would occasionally go numb. The surgery had consisted of shortening the top rib by 5-8 centimetres. Complications had arisen after the rib had been shortened and the patient was established to have died from the bursting of her subclavian vein and the blood flow into her pleural cavity.

9. The patient's widower, Mr Haapalainen, had filed a criminal complaint against X and another surgeon who had assisted during the operation. The National Medico-Legal Board (*terveydenhuollon oikeusturvakeskus, rättskyddscentralen för hälsovården*) had not found it possible to establish at what stage of her operation Mrs Haapalainen had suffered the injury leading to her death. Consequently, no causal link could be established between the injury and the conduct of either of the two surgeons.

10. The Central Criminal Police had conducted a pre-trial investigation into the death. In April 1994 the Vaasa County Prosecutor had decided not to press charges against X, as there was no evidence that he was guilty either of an offence in office caused by negligence or of involuntary manslaughter. The prosecutor had reasoned, *inter alia*, as follows:

"... From the point of view of criminal law it must be examined whether the subclavian vein burst as a result of conduct of which someone may be held guilty and whether errors were committed during the after-care. ... The [expert] opinions have not found that the subclavian vein burst as a result of maltreatment or negligence attributable to [X] or the other operating surgeon. ... [The pre-trial record contains] a number of statements concerning [X's] possible alcohol consumption. ... In respect of the day of the operation the information is contradictory. ... Therefore there is insufficient evidence to find that [X] was under the influence of alcohol while operating on Mrs Haapalainen and that such influence affected his ability to carry out

his duties. ... Nor has it been possible to determine whether [X's] shaking hands impacted in any significant way on the conduct of his surgery. ...”

11. The applicant's first article of 4 January 1996 bore the title “*If only I could get a good grip on life again*” (*Kun saisi vielä joskus elämästä kunnolla kiinni*). It contained an interview with Mr Haapalainen. The text accompanying his picture read as follows:

“How is it possible that a surgeon is allowed to conduct surgery with alcohol in his blood – is it not a fact that pilots only get to manoeuvre a plane when they are absolutely sober, wonders Jorma Haapalainen, who lost his wife.”

The introductory text on the front page bore the title: “*How to survive all of this? (Miten tästä kaikesta selviää?)*”. It read as follows:

“Jorma Haapalainen, a father of two in Old Vaasa is trying to get a grip on his life again. Three years ago the wet Independence Day of a Seinäjoki surgeon cost the life of [Mr Haapalainen's] wife.

– Whose is the responsibility, asks Jorma.”

The front page also carried a picture of the couple.

12. On 9 January 1996 *Pohjalainen* published a second article by the applicant entitled: “A position of responsibility never goes with alcohol” (*Vastuullinen työ ja alkoholi eivät koskaan sovi yhteen*). It contained interviews with the Chief Physician of the Helsinki University Hospital and a Chief Controller of Finnair and discussed the need for surgeons and pilots to be sober and also otherwise in an appropriate condition in order to perform their tasks. The article made no reference to the previous article, nor did it mention Mr or Mrs Haapalainen or X

13. A third article by the applicant – published on 27 February 1996 – was entitled “*The case of Eeva did teach us something*” (*Jotakin Eevan tapaus sentään opetti*) and made reference to her article of 4 January 1996. It read, *inter alia*, as follows:

“[The article of 4 January] raised the question of patient safety: how was it possible that a relatively young woman in good shape died from routine surgery. The pre-trial records speak, among other things, of the wrong form of collegiality. ...”

Under the subheadings “We were concerned for our patients” and “Complications arose after the surgeries” the article cited four extracts from statements by hospital staff heard during the pre-trial investigation. The extracts read, *inter alia* as follows:

“Surgeon X has been the specialist doctor on the ward for two years and a half. Soon after he came to work here alcohol-related problems occurred. Often he had a visible hangover, which showed in his not being neatly dressed, in his reddish and swollen face, in his shaking hands and in his breath which smelled freshly of alcohol.’

‘We were concerned for the patients on whom surgeon X was operating. The Monday mornings were the worst, when [his] hands were also shaking the most. We would inform the other doctors on the ward of our observations, mainly Dr Y and Dr

Z. In particular before a more important surgery we would ask another doctor to attend it. On many occasions Dr Y and Dr Z would attend because we had so requested.'

'The patients operated on by surgeon X have suffered from more post-operative complications. The patients have had bleeding. ...'

'Apparently patients have also made their own observations: I remember the case of a patient – due to arrive for an operation – who enquired who was going to operate on him. Since no surgeon had yet been designated, the patient informed us he would not come at all, unless Dr Z would perform the surgery. After the incident on 7 December 1992 we have been receiving many telephone calls like this one ...'

These unpolished statements can be found in the pre-trial record drawn up by the Vaasa branch of the Central Criminal Police. [The record] is a public document and may therefore be cited in this newspaper. ..."

Under a subheading entitled "*Dubious appointment*" (*Valinta hiersi*) the article described certain hesitations which had preceded X's appointment in 1990.

Under a subheading entitled "*The best interests of the patient seem to have been forgotten*" (*Potilaan paras taisi unohtua*) the article continued as follows:

"The pre-trial records clearly reflect the collegiality within the medical team, as shown in a wish to cover up a colleague's clear problem. ...

A nurse who attended the round [preceding Mrs Haapalainen's operation] attempted to remedy the situation:

'During the round surgeon X came over to my left side. Then I noticed that he was clearly drunk. ...

I tried to establish eye contact with the other doctors in order to indicate [my concern] to them. I got no such opportunity. I even tried to have one of the two other doctors stay behind after the round but they had already gone off to the coffee room.'

... The pre-trial record gives the impression that the memory of either of the two [surgeons] is failing. Even the Board for Patient Injuries arrive[d] at the conclusion that no one [could] be considered guilty, though, sadly, the patient died. Judging from [an X-ray] picture, the piece of bone [osteophyte] which remained inside [Mrs Haapalainen] after the operation was at any rate so sharp that it could have been fatal in itself even at a later stage. ..."

The article of 27 February 1996 then continued with statements by chief physicians and chief surgeons of four central university hospitals, essentially reassuring the reader that a surgeon who was drunk, ill or just tired would not be allowed to operate.

Finally, the article contained a statement by the Chief Physician of the Seinäjoki Hospital "who at the time took a rather humane, even though strict approach":

“When more serious problems started occurring in surgeon X's work, we established another parallel position for a surgeon specialised in the same field, and things started working well. After [Mrs Haapalainen's] death, surgeon X was prohibited from operating for two years. In the beginning when he came to work he had to perform a breathalyser test.

– Now surgeon X is the physician responsible for one of the wards and occasionally assists during surgery. Everything has been going well: even his hands are no longer shaking.”

The article was illustrated with a drawing depicting a seemingly intoxicated surgeon using a pen to mark where to cut open the patient's stomach.

14. The public prosecutor, joined by X, charged the applicant before the Vaasa District Court (*käräjäoikeus, tingsrätt*) on two counts of intentional defamation. In the article of 4 January 1996 she had defamed X “without better knowledge” (*ei vastoin parempaa tietoa, icke emot bättre vetande*). In the article of 27 February 1996 she had defamed X “despite better knowledge” (*vastoin parempaa tietoa, emot bättre vetande*), that is to say by imputing an offence to him whilst knowing that he had not committed one.

15. The editor-in-chief of *Pohjalainen*, Mr Elenius, was charged with negligent abuse of the freedom of the press (*painovapauden tuottamuksellinen väärinkäyttö, vållande till missbruk av yttrandefriheten*) within the meaning of section 32 of the Freedom of the Press Act (*painovapauslaki, tryckfrihetslag 1/1919*). The prosecution argued that, regardless of the fact that he had become aware of the possibility that the applicant's article of 4 January 1996 might have defamed X and of the fact that the applicant was intending to write a further article, he had failed to supervise the publication of the applicant's article of 27 February 1996 by demanding that the article be approved by him.

16. The applicant denied both charges, arguing that X could not have been identified on the basis of her articles and that she had not even been aware of his identity when writing her first article. That article had concentrated on describing Mr Haapalainen's feelings as the surviving widower, whereas the article of 27 February 1996 had discussed patient safety. She had quoted from official documents and her articles had not forced X to close his private practice, as alleged by him.

Mr Elenius also denied the charges against him, stating *inter alia* that after the first article had been published he had offered to publish a response by X. No such response had been forthcoming. The articles had been based on various sources and official documents accessible to the public. Moreover, the press was entitled to deal with the activities of a public hospital and patient security within such institutions.

17. On 14 September 1998 the District Court, relying on chapter 27, section 1, of the Penal Code (*rikoslaki, strafflag*) as in force at the relevant

time, convicted the applicant of defamation committed “despite better knowledge” and by using a printed matter (*painotuotteen kautta vastoin parempaa tietoa tehty herjaus, smädelse genom tryckalster emot bättre vetande*). The conviction was grounded only on her article of 27 February 1996, whereas she was acquitted of defamation committed “without better knowledge” by means of her article of 4 January 1996. She was sentenced to 25 daily income-based fines at the rate of 166 Finnish Marks (FIM) (corresponding to 27.90 euros (EUR)), totalling FIM 4.150 (EUR 698).

18. Mr Elenius was convicted as charged and sentenced to 12 daily fines at the rate of FIM 333 (EUR 56), totalling FIM 3,996 (EUR 672).

19. The defendants were ordered to reimburse jointly a witness fee in the amount of FIM 685.90 (EUR 115.36) as well as the complainant's legal costs in the amount of FIM 20,276 (EUR 3,410.20).

20. In examining the charges against the applicant as based on her article of 4 January 1996, the District Court took note of the banner headline and picture texts as well as of a third statement appearing in the text and which found it strange that nobody had intervened to prevent the surgeon from conducting the operation, even though everyone must have seen in what condition he was. The last-mentioned statement and the picture text had to be understood as having been expressed by Mr Haapalainen. The article had contained an allegation that the surgeon had been drunk or had been suffering from a hangover while operating on Mrs Haapalainen and that this had led to her death, without specifying in any detail why.

The District Court further found that as the article of 4 January 1996 had contained a statement to the effect that the surgeon had been prohibited from conducting further operations, it had given the reader the impression that he or she had been punished for some sort of breach of official duties.

21. Turning to the article of 27 February 1996, the District Court noted that it had contained a reference to the first one and had asked how it was possible that a relatively young woman in good physical condition could die as a result of a routine surgery. The article had then cited statements from the pre-trial record which had discussed the surgeon's alcohol problem and the attitude of hospitals to that problem generally. Moreover, although the National Medico-Legal Board¹ had been of the opinion that no one could be considered guilty of Mrs Haapalainen's death, the osteophyte which had remained in her body after the operation could have been fatal at any later stage.

The article of 27 February 1996 had given the reader the impression that the surgeon had been drunk or had been suffering from a hangover while operating on Mrs Haapalainen. The final statement in that article – to the effect that “surgeon X was now doing fine” – strengthened the impression

¹ In the original language apparently incorrectly referred to as the Board for Patient Injuries (*potilasvahinkolautakunta, patientskadenämnden*).

that his or her alcohol problem had been acute at the time of the operation in question. Even though the article's reference to a sharp osteophyte had been somewhat misleading in light of the National Medico-Legal Board's opinion, this article had not taken any position as to the cause of Mrs Haapalainen's death.

The District Court further found that even though X could not have been identified on the basis of the first article, the article of 27 February 1996 did render him identifiable to his potential clients in the Seinäjoki area.

22. Considering the fact that the articles had been published in a daily with an interval of some six weeks between them, the applicant's possible guilt had to be determined in respect of each of the articles. Her first article had been based solely on information provided by Mr Haapalainen, although already then she had been aware both that a police investigation had been conducted into the suspected maltreatment and that the public prosecutor had decided not to bring charges against the operating surgeon. Subsequently, but before writing her article of 27 February 1996, she had obtained from the office of the Central Criminal Police the complete pre-trial investigation record, the opinion of the National Medico-Legal Board and the County Prosecutor's decision.

23. In elaborating on the applicant's possible guilt the court reasoned as follows:

“The court acknowledges the freedom of the press to report critically on hospitals and, among other issues, on any alcohol abuse that might have been established in such an institution. A critical reviewer must nevertheless bear in mind that his or her statements may amount to criminal defamation. The readership has the right to expect that the facts forming the basis of an article have been verified and that any erroneous piece of information has been corrected. The persons dealt with in the articles are entitled to demand that they be based on correct facts and a person who has been criticised must be given the right to respond. These principles are also to be found in the ethical guidelines adopted within the [journalistic] profession.

Ms Selistö's conduct does not meet the aforementioned criteria. The surgery performed by [X] has been carefully scrutinised without any error [on his part] having been established. Regardless of this, Ms Selistö's article [of 27 February 1996] contains a groundless allegation that the surgeon conducted an operation in a drunken state or while suffering from a hangover.

When writing her article [of 27 February 1996] Ms Selistö had become aware that it was capable of subjecting the surgeon who had operated Mrs Haapalainen to contempt and of damaging his livelihood.

The article [of 27 February 1996] contains many direct quotations from the pre-trial record ... which had been made public – in particular from the statements of a nurse. The court does not find that this renders Ms Selistö's conduct less reprehensible. The large pre-trial investigation material contains elements *pro* and *contra* and in the overall assessment, for example in the County Prosecutor's reasons, the statements of the nurse in question have not been given any weight. Ms Selistö selected only those elements that supported her [own] opinion without clearly stating that the National

Medico-Legal Board had provided a reasoned opinion and that the County Prosecutor had made a reasoned decision not to bring charges. In the District Court's view the statements of the nurse arguably could have been used in an article discussing, at a general level, the alcohol problems existing in hospitals. In the article now in question the nurse's statements have been reported together with the death of Mrs Haapalainen.

In the Supreme Court's precedent no. 1971 II 77 the defendants were convicted of defamation for not having checked the veracity of information contained in a circular before dispatching it.

The District Court finds that Ms Selistö had no reasonable cause to believe that the allegations contained in the article [of 27 February 1996] were true. [She] could and should have verified the facts of the story. [Her] negligence in this respect is attributable to her as an intentional offence. ...”

24. On 26 May 1999 the Vaasa Court of Appeal (*hovioikeus, hovrätt*), after a re-hearing, found the applicant guilty of continued defamation “despite better knowledge” and by using a printed matter. Her sentence was increased to 50 daily fines, totalling FIM 8,300 (EUR 1,396). Mr Elenius was likewise found guilty of negligent abuse of the freedom of the press and his sentence was increased to 25 daily fines, totalling FIM 8,325 (EUR 1,400).

25. The appellate court considered that the allegation against X which had appeared in the articles had been particularly serious, had defamed his honour fundamentally and had diminished his social status and professional prospects. The articles had been visibly published in a mass medium, where they had been given much print space. In light of the general sentencing practice, the defendants' conduct as well as the nature and seriousness of the defaming statement, the sentences inflicted by the District Court had been too lenient.

26. The appellate court considered that the applicant's articles had been so linked together, both by their substance and by the local circumstances they had dealt with, that the two alleged forms of defamation had to be considered as one single act. The court reasoned, *inter alia*, as follows:

“Ms Selistö and Mr Elenius have argued that the subject of patient safety which had been discussed, in particular, in the article of 27 February 1996 is such an important issue in society that the press must be entitled to express even strong criticism without being prevented from doing so by the criminal law provisions on defamation. [They] have further argued that they had strong and plausible grounds for believing that the information published in the articles had been truthful.

Public health care is a societal issue of such magnitude as to entitle the press to express criticism. Given his position as a practising surgeon in a public hospital, [X's] activities were of such public-office nature that he had to accept even strong criticism of his behaviour. That criticism nevertheless had to be appropriate and based on facts. A mass medium may not always be able to obtain a confirmation of the absolute veracity of information to be published. The information to be published must at any rate be sufficiently grounded and all negative allegations or allegations directed against a specific person which may be defamatory when published, must be

examined critically. Confirmation of the veracity of the allegations should as far as possible be sought from more than one source. The more serious and hurtful the criticism, the stronger the duty to have the truthfulness of information confirmed.

...

The information gleaned from the interview with Mr Haapalainen and the elements selected from the pre-trial investigation record, all of which supported the view that [X's] conduct had been reprehensible, was not such reliable information as to provide Ms Selistö with sufficient grounds for the allegations contained in her article of 27 February 1996 and for the tone thereof. In addition, Ms Selistö has conceded that at the time of writing that article she had been aware of the conclusion reached by the National Medico-Legal Board in its opinion as well as of the fact that [X] had not been charged. Ms Selistö nonetheless failed to verify in detail the terms of [the Board's] opinion as well as of the outcome of the pre-trial investigation, even though that could easily have been done. In these circumstances Ms Selistö must be found to have accused, in the articles of 4 January and 27 February 1996, a person identifiable as [X] of an offence as well as of reprehensible conduct, without having verified the allegations and without having had any objectively weighty grounds or likely reasons for considering the defamatory allegations truthful.

[X] was not given the possibility of presenting his views in respect of either article.

...

... Even though [X] was not named in the articles, the information stated therein was so detailed that [he] could nevertheless be recognised as the surgeon whom the articles had concerned. ...”

27. On 18 October 1999 the Supreme Court (*korkein oikeus, högsta domstolen*) refused Ms Selistö and Mr Elenius leave to appeal.

28. On 22 March 2001 the Deputy Parliamentary Ombudsman (*eduskunnan apulaisoikeusasiamies, riksdagens biträdande justitieombudsman*) responded to a petition by Mr Haapalainen. She noted, *inter alia*, that the National Medico-Legal Board had initiated an inquiry into X's professional conduct in the beginning of 1994. He had been prohibited from conducting surgeries until September 1995, when he had been found capable of resuming his work as a surgeon.

As for the County Prosecutor's decision not to press charges against X the Deputy Ombudsman found that a conclusion to the contrary would have been more justified as suspicions concerning gross maltreatment should preferably be examined by a court of law. She stated that this was not tantamount to a finding that the County Prosecutor had overstepped his margin of discretion in breach of the law or his duties. In any case the legal successors of Mrs Haapalainen had enjoyed an independent right to bring private prosecution proceedings. The case had been investigated as suspected manslaughter, for which any criminal proceedings had been time-barred already by the time of the petition. While the Deputy Ombudsman still had the right to bring charges for aggravated manslaughter, she concluded that this was no longer appropriate.

II. RELEVANT DOMESTIC LAW

29. Article 8, subsection 1 (969/1995) of the 1919 Constitution (*Suomen hallitusmuoto, regeringsformen för Finland*), as in force at the relevant time, stipulated that the private life, honour and home of every person was to be secured. This provision corresponds to Article 10 of the Constitution of 2000 (*perustuslaki, grundlagen*; Act 731/1999 which entered into force on 1 March 2000).

30. Article 10 of the Constitution stipulated the following:

“Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.

Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.”

The same provision appears in the current Constitution of 2000 (section 12).

31. According to chapter 27, section 1, of the Penal Code, as in force at the relevant time, a person alleging, contrary to his or her better knowledge, that someone had committed an offence was to be convicted of defamation, unless he or she could show probable cause in support of the allegation. If the defamation took place in public or, for example, by means of a printed matter, the sentence could be increased.

Under chapter 27, section 2 of the Penal Code, as in force at the relevant time, a person alleging, albeit not contrary to his or her better knowledge, that someone had committed an offence was to be convicted of defamation, unless he or she could show probable cause in support of the allegation.

32. The current chapter 24, section 9, subsection 2 of the Penal Code, as amended by Act no. 531/2000, provides that where criticism is aimed at the conduct of another person in his or her political or business activity, public office or function, scientific, artistic or other comparable public activity, and where this criticism clearly does not exceed the limits of acceptable conduct, it shall not be considered defamation within the meaning of subsection 1.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained that her conviction for defamation of X. violated Article 10 of the Convention which in so far as relevant reads as follows:

“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. ...

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.”

34. The Court notes that it was common ground between the parties that the applicant's conviction constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Furthermore, there was no dispute that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2. The Court endorses this assessment.

35. The dispute in the case relates to the question whether the interference was “necessary in a democratic society.”

A. The parties' submissions

1. The applicant

36. The applicant maintained that the impugned measures were based on factual statements, not on value judgments. She argued that the thrust of her articles concerned the alarming circumstances surrounding the death of a patient, possibly resulting from gross negligence on the part of medical staff. This was a matter of considerable public interest. The quality of her journalism had been impeccable and she had acted in good faith. No names of medical staff had been disclosed. The sanction inflicted on her was disproportionate to the legitimate aim invoked by the Government and was likely to discourage critical journalism or to curtail it in a manner which was not necessary in a democratic society.

37. The applicant submitted that she succeeded in obscuring the identity of the surgeon in question, as was demonstrated by the fact that three of X's colleagues at the same hospital immediately reacted to the reportage in question as they had inferred that they had been singled out and targeted, thus also illustrating the applicant's point that the case described in the reportage was neither unique nor exceptional, but a symptom of a more wide-spread and serious problem.

38. The purpose of the articles was to present a cautionary example with a view to preventing such gross negligence from happening in the future, without any intent to identify or focus on the person of X. Thus, an interview with X was out of the question even though it was good journalistic practice not to publish anonymous interviews or commentary by persons directly involved in a topical issue. It would have been illogical to avoid, on the one hand, disclosure of the identity of surgeon X while distributing the statements by him on the specifics of a given operation, on the other. X was in any case unwilling from the very beginning to cooperate in establishing the facts of the case.

The applicant maintained that both she and the editor of *Pohjalainen* offered X an opportunity to comment on the article(s). They were also prepared to publish any comment or rejoinder that X might have wished to make, but with the proviso that that specific observations on the details of a concrete case could not be published anonymously, as this would have been contrary to the most elementary rules of good journalistic practice. After the publication of the first article there was contact from X simply asking for pecuniary compensation, without any request for specific corrections to the information as such. Further, shortly before the editor's, Mr Elenius's, last working day as editor-in-chief (*i.e.* 24 April 1996), and before the District Court proceedings, the applicant and Mr Elenius each in turn proposed that X draft a rejoinder to be published in the paper. Both proposals were rejected, on the grounds that if X drafted a rejoinder to the articles, his identity could become known, while X's claim was based on the fact that X had already been identified. The applicant concluded that she and Mr Elenius had demonstrated sufficient willingness to accommodate any factual or other views on the concrete substance of the articles that X may have wanted to articulate.

2. *The Government*

39. The Government submitted that the paramount issue was whether the national authorities correctly exercised their discretion when they convicted the applicant for being in breach of her obligation to provide the public with *bona fide* information. Though her articles did raise the general problem of ensuring that surgeons did not operate on patients when in an intoxicated condition, her articles did not discuss problems of health care as such but focused on a particular person and a particular case. They

maintained that only a very minor part of the articles concerned the general problem of ensuring that operating surgeons were not in an intoxicated condition. Even assuming that the articles in question concerned a matter of general interest, the very severe allegations targeted at X, who was never convicted or even officially accused of any wrong-doing, could not be seen as contributing to public discussion.

40. The Government also submitted that the articles intentionally quoted only certain parts of the pre-trial investigation records, leaving the overall impression that, as was noted by the Court of Appeal, Mrs Haapalainen's death was attributable to X due to the latter's intoxicated state and negligence. As was further noted by the Court of Appeal, the applicant used the information concerning X's alcohol consumption in a selective manner, failing to mention the public prosecutor's decision not to press charges. By nevertheless publicly alleging that the patient's death had been attributable to X the applicant failed in her obligation to verify the truth of the factual allegation in question.

41. The Government further pointed out that, while she did have access to this information and was not under pressure of time, the applicant omitted to mention the National Medico-Legal Board's conclusions of 30 August 1993, according to which no negligence or mistake had been found in the treatment of Mrs Haapalainen.

42. Moreover, the Court of Appeal noted that while the articles did not mention X by name, they did provide such detailed information as to render it possible for others to identify him. In the Government's opinion X was not only identifiable in his working place, the hospital where over 2,000 persons work, but also in his town of residence and in his home town.

43. The Government emphasised that the applicant admitted in the Court of Appeal that she did not try to verify the facts given to her by the widower of Mrs Haapalainen as regards the first article (of 4 January 1996). They maintained that after the publication of this article another person, subsequently heard as a witness in the trials, contacted the applicant naming surgeon X and requesting her to interview X on the issue and issue a rectification of the facts. According to the Government the applicant refused to contact X, stating that the Letters to the Editor-section (*yleisönosasto, insändarspalt*) was available for commentary. In the Government's view, writing a letter to be published would have revealed X's identity and had he commented on a specific case, he would have violated his obligation of professional secrecy and the right to privacy of the patient in question, e.g., mentioning the patient's repeated refusal of blood transfusion on the grounds of religious conviction. Moreover, the Court of Appeal's judgment confirmed that an opportunity to comment on an article afterwards did not alter liability for an offence that had already been committed.

44. As regards the article of 27 February 1996, the applicant did not, in the Government's opinion, offer the draft to X for verification of the facts in

advance. After the publication of the second article the editor of the newspaper was approached by phone by the same person that had approached the applicant previously. Also X's lawyer contacted the editor in writing in order to discuss the procedures to avoid legal action. The editor refused to comply with the request to apologise and to publish a correction and pay compensation to X.

45. The Government concluded that the Court of Appeal, when finding the interest in protecting X's reputation outweighing the applicant's freedom of expression, relied on reasons which could reasonably be regarded as "relevant and sufficient" for the purposes of Article 10.

B. The Court's assessment

1. General principles

46. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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 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 v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 26, § 37). This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.

47. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

48. The Court further recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds,

particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, 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 the *Jersild v. Denmark*, cited above pp. 23-24, § 31, the *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37, and the *Bladet Tromsø and Stensaas* judgment cited above, § 59). Not only does it have the task of imparting such information and ideas: the public also has a right to receive them (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and the *Bladet Tromsø and Stensaas* judgment cited above, § 59). In cases such as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of “public watchdog” by imparting information of serious public concern.

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, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see *Bergens Tidende and Others v. Norway*, no. 26132/95, § 50, ECHR 2000-IV).

2. Application in the present case

50. As noted above (see paragraph 35) the principal issue in the present case is whether the interference with the applicant's freedom of expression was “necessary in a democratic society”. In particular the Court must determine whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient (see *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62).

51. The Court observes at the outset that the impugned articles, which recounted the personal experiences of the surviving widower as well as matters of patient safety, concerned an important aspect of health care and as such raised serious issues affecting the public interest (see *Bergens Tidende and Others v. Norway*, cited above, § 51). The Court is unable to accept the Government's submission that only a very minor part of the articles concerned the general problem of ensuring that operating surgeons were not in an intoxicated condition.

52. The Court notes that the articles of 9 January and 27 February 1996 were closely connected in that the latter article contained a reference to the first article. The article of 9 January 1996 discussed the necessity to be sober in the working place and existing safeguards in the contexts of

hospital environment and air traffic. The purpose of the three articles was to discuss the general problem of alcohol consumption while working, a matter which is obviously of great public concern. The fact that the first and the third article dealt with a particular case, namely the operation on Mrs Haapalainen and its surrounding circumstances, does not alter this conclusion. It is natural in journalism that an individual case is chosen to illustrate a wider issue.

53. Where, as in the present case, measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.

54. The Court reiterates that Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article, the exercise of this freedom carries with it “duties and responsibilities” which also apply to the press. These “duties and responsibilities” assume significance when, as in the present case, there is a question of attacking the reputation of private individuals and undermining the “rights of others” (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III). By reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I).

55. The Court endorses the parties' consensus that the articles concerned factual statements and not value judgments. A distinction is necessary, as the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 46). As the issues in the present case concerned factual statements it is of great importance that the duties and responsibilities mentioned above were respected.

56. In order to assess whether the “necessity” of the restriction of 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 domestic courts. It must thus be assessed whether the applicant's conviction struck a fair balance between the public interests involved and the interests of X.

57. The Court first notes that to a large degree the national courts did not find that the facts presented in the articles had been erroneous as such. The applicant's conviction was based more on what was not mentioned (*i.e.* the public prosecutor's decision not to press charges and the statement of the

National Medico-Legal Board) and on some assertions included in the texts, and the overall impression thus conveyed to the reader.

The District Court found that the article of 4 January 1996 contained an allegation that X was drunk or suffering from a hangover during the surgical operation and that this led to Mrs Haapalainen's death. Reference to the ban on X performing operations in the future gave the reader the impression that X had been subjected to some sort of a punishment for his mistake. As regards the article of 27 February 1996 the District Court found that although it contained discussion about the general subject of hospitals' attitude towards drinking problems, it strengthened the impression that X had had an alcohol problem at the time of the operation, and was drunk or suffering from a hangover while operating. It further found that X could be identified based on the information contained in the articles. It noted, *inter alia*, that before writing the article of 27 February 1996 the applicant was familiar with the decision not to press charges and with the National Medico-Legal Board's statement, according to which no neglect or erroneous measures had been substantiated. Against this background the District Court found that the allegation in the article of 27 February 1996 about X's drunkenness or hangover was groundless and that the applicant had neglected to verify the facts appropriately.

The Court of Appeal found that the quotations from the pre-trial records were selective and that the overall attitude and tone of the article of 27 February 1996 was disapproving and condemnatory. It considered that the National Medico-Legal Board's conclusion was mentioned sarcastically and that the article failed to include the decision not to press charges against X. The notice in the article about the fact that nobody could be held responsible for Mrs Haapalainen's death did not, in the Court of Appeal's opinion, eliminate the libellous character of the article. It also found that the details provided in the articles were so precise that X could be identified at least in his working environment and also by members of the general public. While acknowledging that X had to endure even severe criticism as a civil servant the Court of Appeal found that the applicant had failed to verify the facts appropriately. It also pointed out that X had not been given an opportunity to present his observations on the contested articles.

58. The Court does not find it necessary to resolve the question as to how the newspaper articles would be interpreted by the ordinary reader. Its function is rather to determine whether, considering the impugned articles in the wider context of the *Pohjalainen's* coverage as a whole, the measures applied by the Court of Appeal, including the award of damages, were proportionate to the legitimate aim pursued.

59. The Court observes that the first article was based on the interview of the widower, Mr Haapalainen. It recalls that news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". The methods of objective

and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists (see the *Jersild* judgment cited above, pp. 23-25, §§ 31 and 34). The Court notes that the text accompanying the picture of Mr Haapalainen (see paragraph 11 above), questioning “how is it possible that a surgeon is allowed to conduct surgery with alcohol in his blood ...” is an expression used by Mr Haapalainen, reflecting his own understandable perception of the matter. Reading the articles as a whole, the Court cannot find that this statement was excessive or misleading.

60. The Court attaches considerable weight to the fact that it has not been claimed that the actual facts in the contested articles were erroneous as such. It is also of importance that the depicted events and quotations in the article of 27 February 1996 were derived from the police's pre-trial record, which was a public document. In the Court's opinion no general duty to verify the veracity of statements contained in such documents can be imposed on reporters and other members of the media, who must be free to report on events based on information gathered from official sources. If this were not the case the efficacy of Article 10 of the Convention would to a large degree be lost.

61. The Court also notes that an important argument supporting the applicant's conviction was the assessment that the factual statements in the article of 27 February 1996 were selective. It observes that in the article it was maintained that the pre-trial records clearly reflected the collegiality within the medical team and criticised that this was failing to address the danger to patient safety. In the Court's opinion the fact that the quotations in the article only comprised some of the pre-trial statements of a nurse, present at the operation in question, and that there were no quotations from the other persons present during that operation, who had not perceived signs of the alleged drunkenness or hangover, gives rise to the impression that the reporting was somewhat one-sided. The fact however remains that the reporting was based on information included in the public pre-trial records.

It further attaches weight to the fact that the article did mention that “even the Board for Patient Injuries arrive[d] at the conclusion that no one [could] be considered guilty, though, sadly, the patient died.” Unlike the Court of Appeal, the Court cannot regard this statement in its context as purely sarcastic. Despite the fact that it contained an apparently unintended error in that the National Medico-Legal Board was referred to as the Board of Patient Injuries, it nevertheless acknowledged the fact that no breaches of official duties had been substantiated as regards X.

62. The fact that the decision not to press charges against X was not mentioned in the article is nevertheless problematical. As mentioned above, the article of 27 February 1996 did mention that “no one [could] be

considered guilty”, but this assertion was made in connection with the National Medico-Legal Board's conclusions. In any case there was no express mention of the waiver of charges although it is common ground between the parties that the applicant was aware of that decision before writing the article. It is observed however that in the Court of Appeal the applicant testified that although aware of the decision, she obtained a copy of the decision only after the publication of 27 February 1996. In evaluating the importance of this fact the Court has taken into account the Deputy Parliamentary Ombudsman's decision of 22 March 2001. Although the Deputy Parliamentary Ombudsman did not expressly state her opinion concerning the lawfulness of X's actions and she refrained from bringing an action herself, her decision nevertheless supports the view that based on the pre-trial records a court ruling would have been preferable and, thus, that there were relevant reasons to press charges against X. This finding lends support to the approach to the facts taken by the applicant in the contested articles, or, at the very least, suggests that the content of the articles had not been erroneous or that the applicant had not failed to verify the facts appropriately.

63. The information contained in the articles gives in any case an alarming picture about issues of patient safety. In the light of the above findings the Court concludes that the reporting was based on accurate and reliable facts. The certain selectiveness of quotation in the article of 27 February 1996 cannot be regarded as both a sufficient and relevant reason to justify the applicant's conviction. Generally, journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation (see the *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 38). From the point of view of the general public's right to receive information about matters of public interest and, thus, from the stand point of the press there were justified grounds supporting the need to conduct public discussion about the matter.

64. The Court further attaches considerable weight to the fact that at no point was X's name, age or gender mentioned in the contested articles. The Court observes that the District Court held that X became identifiable in his home town after the publication of the article of 27 February 1996 (*i.e.* not based on the article of 4 January 1996). The Court of Appeal did not distinguish between the two articles and found that based on the information contained in the two articles as a whole, X was identifiable at least in his working place and, based on two witness statements, also beyond X's immediate circle and acquaintances. Based on these findings by the domestic courts the Court accepts that the information contained in the two contested articles could have led to X's identity being disclosed at least to some persons. It is however to be emphasised in the present context that X's identity was never expressly communicated to the general public.

65. As there were certain risks of identification it is understandable that X was reluctant to have his rejoinder published in the *Pohjalainen*. The question of whether and how X was provided with an opportunity to present his views concerning the articles is, however, disputed.

According to the applicant both she and the editor of *Pohjalainen* offered X an opportunity to comment on the article(s). They were also prepared to publish any comment or rejoinder that X might have wished to make. Further, the applicant claims that she and the editor each in turn proposed that X draft a rejoinder to be published in the paper.

According to the Government the applicant, however, refused to contact X and stated that the Letters to the Editor-section was available for commentary. In the Government's view, writing a letter to be published would have revealed X's identity and had he commented on a specific case, he would furthermore have violated his obligation to professional secrecy and the right to privacy of the patient in question. As regards the article of 27 February 1996, the applicant did not in the Government's opinion offer the draft to X for verification of the facts in advance.

66. Based on the submitted material the Court cannot draw any conclusive inferences as regards X's possibility to comment on the articles. It however notes that the applicant's observations are inconclusive in that although it is maintained that X was given an opportunity to comment "on the article(s)", it is left open whether this opportunity concerned both articles and if not, which one of them, and, regarding both articles, whether such an opportunity was proposed before the publication or only afterwards. The Court is satisfied that he was provided with an opportunity to present his comments after the publication of each article. There is no indication that he was offered a possibility to comment on the articles in advance.

67. The Court is of the opinion that although due weight must be given to the fact that X's identity might have been disclosed had he published his rejoinder, this circumstance in itself, nevertheless, cannot prevent the publication of matters of public interest, subject to the proviso that in the reporting of issues of general interest journalists act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

In the present case X was given an opportunity to have his comments published following the publication of the articles. In this respect it is to be noted that there is no indication that X had tried to obtain permission from Mr Haapalainen to lift X's duty of professional secrecy or to reveal matters concerning the privacy of the late Mrs Haapalainen in his rejoinder. Although the opportunities given to X to put forward his arguments may be regarded as somewhat limited, the Court is nevertheless unable to find that X was not given a chance to defend himself or that the ethics of good journalism had been violated.

68. In conclusion the Court notes that the purpose of the applicant's articles was to discuss matters of patient safety. The operation on Mrs Haapalainen was selected as an example illustrating the problems involved. It is often the case that discussion of individual cases is used to highlight a more general problem. It cannot find that the factual statements contained in the articles were either excessive or misleading. Nor is there any indication that the applicant had acted *mala fide*.

69. The Court does not accept that the limited nature of the fine is decisive as regards the issue of necessity; what is of greater importance is that the journalist was convicted.

70. In light of the above, the Court does not find that the undoubted interests of X in protecting his professional reputation was sufficient to outweigh important matters of legitimate public concern. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic" society.

Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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."

A. Damage

72. The applicant sought compensation for pecuniary damage incurred through the fine imposed by the Court of Appeal in the amount of FIM 8,300; the legal costs and expenses she was obliged to pay X by the District Court, amounting to FIM 20,276 with an annual interest currently of 11 per cent as from 20 October 1998, and by the Court of Appeal, amounting to FIM 12,754.80, with an annual interest of 11 per cent as from 26 June 1999; as well as remuneration to the State for costs of evidence amounting to FIM 685.90 at the District Court and to FIM 1,083 at the Court of Appeal, thus totalling FIM 43,099.77 (corresponding to EUR 7,248.85).

The applicant also claimed the sum of EUR 50,000 in compensation for non-pecuniary damage for suffering and distress caused by the violation of her rights, including the loss of her professional esteem and reputation as journalist.

73. As far as pecuniary damages were concerned and in case the Court was to find a violation, the Government conceded that the applicant was entitled to compensation. They noted that the applicant's claims for pecuniary damages were not specified except for the fine paid by her. For the rest, the applicant was jointly and separately liable for the costs with her editor and could not in the Government's opinion claim the amounts in full as her own liability. They calculated that that the applicant had been ordered to pay in total EUR 4,413.50. More specifically, the applicant had been ordered to pay: the fine (EUR 1.396); half of the legal costs of X before the District Court (EUR 1,705.10) and before the Court of Appeal (EUR 1,072.60) as well as the costs of evidence before the District Court (EUR 57.70); and remuneration of the costs of evidence before the Court of Appeal (EUR 182.10). As to the claims for interest they noted that the Court should use its normal grounds of assessment in the Finnish cases.

The Government stated that the finding of a violation should constitute in itself a sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. At any rate, the applicant's claims for non-pecuniary damages were in their opinion far too excessive as to *quantum*, and that the applicant should be awarded as compensation for non-pecuniary damages EUR 2,000 at the most.

74. The Court finds that there is a causal link between the violation found and the alleged pecuniary damage. Consequently, there is justification for making an award to the applicant under that head. Taking into account all the circumstances, it awards the applicant EUR 3,500 for compensation for pecuniary damage.

75. The Court accepts that the applicant has also suffered non-pecuniary damage – such as distress and frustration resulting from the conviction and sentence – which is not sufficiently compensated by the findings of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

76. The applicant requested the reimbursement of her legal costs and expenses before the domestic courts of FIM 51,325.73 (EUR 8,632.37), including the fee of FIM 250 levied by the Supreme Court.

The applicant also claimed the reimbursement of her legal costs and expenses incurred through the proceedings before the Court, amounting to EUR 15,782.44 (including VAT).

77. The Government noted that the applicant's total claim for reimbursement of legal costs and expenses was EUR 24,414.44. They further stated that there was no documentation regarding the costs before national courts except the reference to the amount in the decision of the Court of Appeal, and that it was unknown whether that amount included

VAT or not. The Government also submitted that the reimbursement of costs and expenses should be reduced because on 1 June 2004 the Court declared inadmissible the applicant's complaint under Article 6 § 2 of the Convention. They also maintained that there were two cases before the Court's oral hearing of 10 February 2004, which fact should be taken into consideration when deciding the amounts of costs to be awarded.

78. The Government left it to the Court's discretion to decide whether the applicant had substantiated her claims for costs and expenses adequately. However, in their view the total amount of compensation for costs and expenses for the applicants should not exceed EUR 13,000 (including VAT) in the present case.

79. As regards the domestic proceedings the Court observes that in the Court of Appeal's judgment of 26 May 1999 it was mentioned that the applicant requested reimbursement of her own legal expenses before the Court of Appeal for FIM 51,015.73 (EUR 8,590.32). There is no other indication concerning the applicant's legal expenses incurred before the domestic courts. Having regard to all the circumstances, the Court awards the applicants EUR 8,000 under this head.

80. As for the proceedings before this Court the applicants' bill of costs and expenses of 10 September 2004 totalled EUR 15,782.44 (including VAT). Having regard to all the circumstances, the Court awards the applicant EUR 15,000 under this head.

C. Default interest

81. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 10 of the Convention;
2. *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) EUR 3,500 (three thousand five hundred euros) in respect of pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage; and

(iii) EUR 23,000 (twenty three thousand euros) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

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

N.B.
M.O.B.

DISSENTING OPINION OF SIR NICOLAS BRATZA

I regret that I am unable to share the view of the majority of the Chamber that there has been a violation of the applicant's rights under Article 10 of the Convention.

I am in full agreement with the analysis in the judgment of the general principles which should govern the Court's approach to the issues raised in a case such as the present. Two of those principles are to my mind of particular relevance.

(i) Press freedom is of cardinal importance in a democratic society, the press having both a right and a duty to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest and concern. Accordingly, careful scrutiny is called for on the part of the Court of the proportionality of measures taken by national authorities which are capable of discouraging the press from performing its vital role as “public watchdog”. However, the exercise of the freedoms guaranteed by Article 10 carries with it “duties and responsibilities” which not only apply to the press but assume special significance when, as in the present case, the statements made may affect the reputation and rights of other private individuals. As the Court has consistently held, these duties and responsibilities are such that the guarantees afforded to journalists by Article 10, in reporting on issues of general interest, are subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their source as reliable with respect to the allegations (see, among other authorities, *McVicar v. the United Kingdom*, no. 46311/99, § 84, ECHR 2002–III and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 66, ECHR 1999-III).

(ii) 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, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation. In carrying out this task, the Court must assess whether the reasons given by the national authorities are both relevant and sufficient to show that the interference was “necessary in a democratic society” and proportionate to the legitimate aim served.

I share the view of the majority of the Chamber that the reasons relied on by the national courts and by the respondent State were relevant to show that the interference was necessary. Where I part company with the majority is as to their view that the reasons were not “sufficient” and that the interests

of X in protecting his professional reputation were not such as to outweigh important matters of legitimate public concern.

It is beyond dispute that the general subject matter which was at the heart of the three articles concerned – namely, the dangers posed to the public by alcohol abuse on the part of members of certain professions, notably surgeons and pilots – was a matter of great and legitimate public interest. However, the articles of 4 January 1996 and 27 February 1996 which were the subject of the defamation proceedings against the applicant differ from that of 9 January 1996 in that they focussed on the specific case of the operation carried out by surgeon X, which resulted in the death of Mrs Haapalainen. Both articles, as found by the national courts, contained a clear allegation that X had been drunk or had been suffering from a hangover while operating on Mrs Haapalainen and that this had led to her death – an allegation which, as the Court of Appeal observed, was of the utmost seriousness for the reputation and professional standing of a practising surgeon.

Both the District Court and the Court of Appeal acknowledged that the press were free to report critically on hospitals and on any alcohol abuse that might have been established in such an institution and that, as a practising surgeon in a public hospital, X's professional activities were such that he had to accept even strong criticisms of his behaviour. But both courts also stressed that such criticism had to be appropriate and based on fact. While the media may not always be able to obtain confirmation of the absolute veracity of information which was to be published, such information should, in the view of the Court of Appeal, at any rate be sufficiently grounded in fact and allegations against a specific person should be critically examined. The more serious and damaging the allegation made, the stronger the obligation to confirm the truth of the information on which the allegation is based.

It was the unanimous conclusion of both courts that the impugned articles did not meet those criteria. In the view of the Court of Appeal, the information gleaned from the interview with Mr Haapalainen and the selected parts of the statements in the pre-trial investigation file did not afford a reliable basis for the allegations contained in the articles. Moreover, despite being aware of the conclusions of the National Medico-Legal Board, as well as the fact that no prosecution had been brought against X, the applicant had failed to check in detail the terms of the Board's opinion or the outcome of the pre-trial investigation. This being so, the applicant had accused X of an offence, as well as of reprehensible conduct, “without having verified the allegations and without having had any objectively weighty grounds or likely reasons for considering the defamatory allegations truthful”. In addition, the Court of Appeal found that X had not been given the possibility of presenting his views in respect of either article.

In concluding that the reasons given by the national courts, and adopted by the respondent Government, were not sufficient to justify the interference with the applicant's freedom of expression, the majority of the Chamber place reliance on a number of features of the case – the fact that it had not been claimed that the actual facts were erroneous as such; the fact that, although the reporting was somewhat one-sided, it had been based on information included in the public pre-trial records; the fact that in March 2001 the Deputy Parliamentary Ombudsman found that it would have been preferable if charges had been brought against X; the fact that at no point was X's name, age or gender mentioned in the articles in question; and the fact that X was provided with an opportunity to present his comments after publication of each article. In my view, none of these factors, whether considered individually or cumulatively, are such as to justify the conclusion that the domestic courts exceeded any acceptable margin of appreciation.

Even if the national courts did not find the facts stated in the two articles to be erroneous as such, they clearly found that there was no sufficiently reliable information to support the allegation that X had been under the influence of alcohol when operating on Mrs Haapalainen. The fact that the information in the article of 27 February 1996 was obtained from public pre-trial records and contained direct quotations from statements by hospital staff has to be viewed in the light of the national courts' finding that the applicant had selected only those parts of the records which supported her own thesis and, more importantly, that she had omitted to mention that the County Prosecutor had issued a reasoned decision not to institute criminal proceedings – a decision reached on the basis of all the material in the pre-trial file.

While accepting that this failure on the applicant's part was “problematic”, the majority of the Chamber emphasise that “although aware of the decision of the County Prosecutor, the applicant had only obtained a copy of it after the publication of 27 February 1996”. It is also pointed out that the County Prosecutor's decision has in any event to be seen in the light of the decision of 22 March 2001 of the Deputy Parliamentary Ombudsman. I do not consider that either point assists the applicant. The Prosecutor's decision had been taken in April 1994, nearly two years before the impugned articles were published. I find it difficult to see how the failure of the applicant to obtain a copy of the decision before publication of the two articles may be said to be consistent with the diligence expected of a responsible journalist. Moreover, when judging the necessity and proportionality of measures taken by the national courts in 1998 and 1999, I cannot attach much weight to the fact that in 2001 the Deputy Parliamentary Ombudsman voiced a view different from that of the County Prosecutor some 7 years before. Still less can I accept that the decision of the Deputy

Ombudsman suggests, as the judgment of the Chamber argues, that “the applicant had not failed to verify the facts appropriately” (judgment, § 62).

As to the fact that X's identity “was never expressly communicated to the general public” (judgment, § 64), I am again unable to attach the same importance to the point as the majority of the Chamber when it is borne in mind that the national courts found it to be established that, as a result of details given in the two articles, X was identifiable in his home town, in his working place and beyond his immediate circle and acquaintances.

The opportunity afforded to X to reply to the allegations made against him was, as the judgment correctly acknowledges, a “somewhat limited” one. It is apparent from the judgments of the national court that X was given no possibility to comment in advance of the publication of either article. In this respect the case is to be distinguished from that of *Bergens Tidende and Others v. Norway* (no. 26132/95, ECHR 2000-IV) in which Doctor R, the subject of the articles in question, had been approached by the applicant newspaper prior to the publication of the articles and his comments invited on the interviews which the applicant had conducted with his former patients. While it is common ground that X was given an opportunity to have any comments or rejoinder published after the articles had appeared in print, this cannot in my view be regarded as affording him an effective opportunity to defend himself, the damage to his reputation having already occurred.

The judgment concludes in paragraph 68 by noting that the purpose of the applicant's articles was to discuss matters of patient safety and that the operation on Mrs Haapalainen was selected as an example illustrating the problems involved. While I accept that it is perfectly legitimate to use individual cases to highlight a more general problem, where, as in the present case, this involves the making of serious allegations against an identifiable individual, special care must be exercised to ensure the accuracy of the allegations made. The national courts were, I consider, entitled to conclude that the necessary care had not been shown in the present case.

As to the penalty imposed on the applicant, the majority of the Chamber assert that the limited nature of the fine cannot be decisive as regards the issue of necessity, the fact that the applicant was convicted being of greater significance. The relatively modest amount of the fine may not be of decisive importance but it is in my view of clear relevance to the proportionality of the interference with the applicant's Article 10 rights. Although I have reservations in principle about the use of criminal sanctions to punish statements defamatory of private individuals, neither the conviction of the applicant nor the fine imposed on her in the present case can in my view be regarded as disproportionate to the legitimate aim of protecting the rights of others.