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The comparative analysis of the UK and
Germany in civil pleadings

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The comparative analysis of the UK and Germany in civil pleadings

1st Edition 2020

» Trust is the oil on which our underfunded and creaking civil justice system depends. «

*Marcus Grant*¹

1 Grant [2017] J.P.I.L. 176.

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§ 1 - Introduction

This thesis deals with one of the central pillars of civil pleadings: the obligation of truth. For any judge in any legal system the reliance on facts presented to the court is essential. Only where correct facts are accessible legal questions can come to correct judgments. Against this backdrop, this dissertation will compare the obligation of truth as stipulated in UK law and German law. The choice for comparing particularly these two systems results from the main difference between the legal systems. While Germany, with its Roman Law tradition is a shelter of statute law² the UK is the initial origin of common law.³ In the common law system general rules are derived from single cases. In statute law, however, abstract rules try to cover undefined single cases. Accordingly, courts have to interpret the rules in light of the present case. Regarding these differences, a comparative analysis of the practical differences of the obligation of truth and the legal consequences of infringing this obligation will be conducted.

1. Main research questions

Comparing the obligation of truth in both legal systems, requires a three-step approach:

Firstly, the theoretical scope of the rules must be enquired by reviewing the case law as well as the respective literature. This inter alia comprises the interpretation of the “truth” within one of the main research questions: When is the “threshold of untruth” reached? How do the systems treat statements mentioning assumptions, speculations, allegations, exaggerations rather than tangible, hard facts? Can statements already be categorised as ‘false’ on the account that they are only unprovable? How do courts deal with allegations that are ‘shots in the dark’?

The second research area will be the comparison of the legal consequences: What are the differences between contempt of court proceedings in England as compared to the criminal act of process fraud in Germany?

Eventually, it shall be answered which system is more suitable to arrive at the “better decision”. Prima facie, this obviously seems to be the English system. However, people could be anxious to file a reasonable lawsuit

2 In particular, forced by Anton Friedrich Justus Thibaut and Friedrich Carl von Savigny, see Becker/Jung, *Grundkurs BGB*, 10th Ed., pp. 4 et seq.

3 Baker, *Introduction to English Legal History*, 5th Ed. 2019, pp. 1 et seq.

because the only declarations they can provide are allegations which cannot rely on any actual knowledge of the truth.

2. Overview

Both, the Civil Procedure Rules (CPR) of England and Wales (hereafter: England/UK) and the German Code of Civil Procedure (CCP) state, that the parties of civil proceedings have to make their declarations to the facts truly.⁴ As all legal systems are interested in factual-based court decisions it is not astonishing that – at first sight – the obligation of telling the truth seems to be very similar in England and Germany. However, other rules which shall secure making only true statements are different in both legal systems: In brief, in Germany there is not much more than the criminal prohibition of fraud, section 263 German Criminal Code. The requirements are strict and hardly to prove in the special case of process fraud which may be committed by lying in court. In England, the CPR stipulates inherent consequences for false statements. *E.g.*, CPR r.32.14 states that proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. This leads to the preliminary conclusion that untrue submissions prove more “dangerous” for a party in England than in Germany.

a. England

According to CPR r.22.1(3) an applicant who wishes to rely on matters set out in his application notice as evidence, the application notice must be verified by a statement of truth. The same applies to case statements, witness statements and other submissions. Practically, all documents filed to court must be verified with a corresponding paragraph “I believe that the facts stated in this claim/application/statement are true.”⁵

That raises the question of what makes a statement true or false. In many cases a person knows whether she tells a lie or the truth. Nevertheless, a party cannot be sure about his allegations in any event, *e.g.*, when a buyer of a good wants to file a lawsuit against the seller because he is persuaded that the seller caused a defect. Thus, there might be a thin line between the truth and the untruth. According to the wording of CPR r.22.1(4) a party putting forward the document verified by a statement of

4 See section 138 CCP, CPR r.22.1.3.

5 Vos, *Civil Procedure: The White Book*, 2019, Sec. A, para. 16.2.8.

truth must believe that the facts stated in the document are true. Thus, the main criteria for making a false statement is the personal and subjective persuasion of the facts being true.

Making an untrue statement may have several consequences, *e.g.*, (a) CPR r.32.14: proceedings for contempt of court; (b) CPR r.44.16(1): orders for costs to the full extent; (c) Criminal Justice and Courts Act section 57(2): dismissal of a personal injury claim.

b. Germany

Section 138 CCP requires the parties to make their declarations fully and completely and obliges them to tell the truth. Each party is to react in substance to the facts alleged by the opponent. Facts that are not expressly disputed are to be deemed as having been acknowledged, section 138 para. 3 CCP.

However, there are differences in the accompanying rules and especially in the consequences. The German Law does not highlight the relevance of the truth as many times as the CPR. It is common sense that only a certain lie is prohibited in court.⁶ A party may neither lie when she knows the truth nor may she deny allegations from the other party when she knows that they are true. However, a party may state facts even if she has doubts whether they are true.⁷ In case of unclear facts a party can make allegations which are beneficial for herself.⁸ Thus, a lawyer can without any consequences file a lawsuit on the basis of his client's information. He does not have to verify anything and in most of the cases there will be no risk apart of losing the case. This can lead to overacting a case for tactical reason.

Consequences are possible where a serious lie is stated against a party's better knowledge. The party can be charged for the criminal act of (attempted) fraud, section 263 German Criminal Code. This requires, *inter alia*, an error of the judge by the false statement, a positive judgment for the lying party as well as a fraudulent intention.⁹

6 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 2.

7 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 2; Greger, *Zoeller: ZPO*, 31st Ed. 2016, sec. 138, para. 3; Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 2.

8 *Bundesgerichtshof* [1985] WM 736; *Bundesgerichtshof* [1986] NJW 246; *Bundesgerichtshof* [1988] NJW-RR 1529.

9 Krell [2012] JR 102.

3. Structure

The general structure follows the formulated steps and is split into three main sections: the first part comprises an analysis of the English law (obligation of truth and consequences for harming this obligation). After that, the same evaluation will be undertaken with respect to the German law. In order to answer the question on the scope of the obligation of truth and the accessible rules to enforce this obligation, both legal systems have to be assessed individually. The last part will compare both systems and highlight both the advantages and disadvantages.

§ 2 - Methodology

All aforementioned research questions shall be assessed with respect to comparative law. The purpose of such comparative law is to examine salient differences and relationships between law of different countries.¹⁰ The main aim of this dissertation is to assess what both legal systems can learn from each other.¹¹ There may be aspects which can be implemented in the other system and lead to an improvement.

1. Choice of the legal systems to be compared

As is the case in many other comparative papers,¹² the choice of the legal systems to be compared was based on two aspects: Knowledge of language and knowledge of the legal system. I am working as a lawyer in Germany; during my legal education (similar to pupillage in England), I spent several months in the legal department of a British authority.¹³ In the course of this time I worked with solicitors and barristers in family proceedings. Thus, I am able to compare both systems from both a practical and a theoretical point of view. Having profound knowledge of the German language and legal system, the comparative analyse comes at first hand. It is therefore not necessary to rely on the few existing English publications about German law also in view of the fact that this approach is criticised by the literature.¹⁴

However, these two main reasons are not the are not an exhaustive enumeration of reasons for the chosen analysis. The British and the German law is also compared due to the entirely different roots of both systems: Common law and statute law. Following several proceedings in British courtrooms differences in the procedural habits occurred to me, *e.g.*, the distinction between Solicitors and Barristers, the role of the judge, who has a higher reputation in England (in Germany one can be a judge right after the legal exams), or the case management powers of the court (in Germany courts have to work around what is presented to them). Taken together, this was the main motivation to compare a central pillar of all

10 Grechenig/Gelter [2008] HICLR 295.

11 Van Hoecke [2015] LaM 2.

12 Van Hoecke [2015] LaM 2.

13 Leeds City Council.

14 Flanagan/Ahern [2011] ICLQ 1; Van Hoecke [2015] LaM 2.

legal systems: the obligation of truth.

2. Structure and Approach

There is not only one method to compare legal systems.¹⁵ Any comparative enquiry combines several possible approaches. This dissertation will mainly conduct a *functional analysis*¹⁶ as one selected legal problem (ways to ensure that the truth is told in court) – not a special rule¹⁷ – shall be examined with regard to English and German Law: According to Zweigert/Kötz, in law one can merely compare concepts which serve the same purpose and the same function.¹⁸ However, certain elements of the *structural method*¹⁹ are adopted, as the enquiry asks for solutions of both legal systems on the level of micro comparison, *i.e.* the comparison of a single problem.²⁰

Thus, legislation, case law and literature of England and Germany firstly will be examined separately²¹ and in a descriptive²² manner. Subsequent thereto, the comparative part will set out both similarities and differences. The final part will delve into answering the functional question:²³ Which law is better suited to secure compliance with the obligation of truth and what can both systems learn from each other? In this respect, *common-core method* and the *law-in-context method* do have an impact.²⁴ A comparison inevitably requires an elaboration of what the core of the obligation of truth is and in which legal framework it is embedded.

15 Summary at Van Hoecke [2015] LaM 2.

16 Zweigert/Kötz, *An Introduction to Comparative Law*, 3rd Ed. 1998, pp. 31 et seq.

17 Bien, *Rechtsvergleichung* (Presentation), 2017, para. IV.

18 Zweigert/Kötz, *An Introduction to Comparative Law*, 3rd Ed. 1998, p. 33.

19 Samuel, *An Introduction to Comparative Law Theory and Method*, 2014, p. 81.

20 Bien, *Rechtsvergleichung* (Presentation), 2017, para. I; van Hoecke [2015] LaM 2.

21 Samuel, *An Introduction to Comparative Law Theory and Method*, 2014, p. 88.

22 Summary at Van Hoecke [2015] LaM 2.

23 Bien, *Rechtsvergleichung* (Presentation), 2017, para. IV.

24 Van Hoecke [2015] LaM 2.

§ 3 - The obligation of truth in the British CPR

The obligation to tell the truth in UK civil procedure law is stated in particular in CPR r.22.1. According to this provision, all relevant documents in civil court proceedings (CPR r.2.3, r.5) have to be verified by a statement of truth, especially statements of the parties and witnesses.²⁵ This is practically realised by the bottom-line added to each statement: “I believe the facts stated in this statement/pleading are true” which also has to be signed by the serving person.²⁶

The parties and their legal representatives have extensive obligations regarding the documents to be filed. All paperwork and other materials in relation to the lawsuit – irrespective of their positive or negative nature – have to be disclosed to the court (CPR Pt 31).

1. Background of the rule

CPR r.22.1 was enabled by the Civil Procedure Act 1997 c. 12, s. 2 and adopted in 1999. The main purpose of the rule was to eliminate “fishing expeditions”, *i.e.* claims in which a party has no honest belief, yet hopes that positive facts eventually turn up during the proceedings.²⁷ As there was no similar rule in the County Court Rules of 1984 such “shots in the dark”, *i.e.* the wild spreading of allegations and hoping for a positive outcome, established as a continuous practice in courtrooms.

The obligation of truth has an impact to several other rules of the CPR. This owes to its validity for all documents connected to court proceedings, more specifically: (see CPR r.2.3) a claim form, a Pt 8 claim form, particulars and amendments of claim (CPR Pt 17), a defence, a Pt 20 claim, a reply to defence (CPR r.2.3) as well as further information stated in relation to any of these documents (CPR r.18.1)

As these documents are partly filed pre-trial, statements of truth shall encourage the parties to agree to settlements in an early stage of the case.²⁸ If the obligation of truth would only apply to trial-documents, exaggera-

25 Vos, *Civil Procedure: The White Book*, 2019, Sec. A, para. 22.1.2.

26 Bailey/Bowers/Hampton/Hodge/Hughes, *Handbook for Litigants in Person*, 2012, para. 8.5.

27 *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 W.L.R. 1731, Ch D.

28 *Zurich Insurance Co Plc v Hayward* [2011] EWCA Civ 641; [2011] C.P. Rep. 39.

tions would be made pre-trial and settlements would be inhibited due to the lack of an factual basis.

2. Statements

“Statements” in the procedural view are, *inter alia*, the pleadings of the parties such as claim, defence and their particulars (CPR r.2.3, r.7). In the Practice Form N1 (Claim form CPR Pt 7) the statement of truth is already pre-formulated,²⁹ which shows how serious the CPR takes the obligation of truth. This results from the fact that all of these statements can be brought forward as evidence in the litigated case,³⁰ when a party summons herself as a witness and confirms her prior testimony.³¹

Thus, there has to be a special regard to the scope of the obligation of truth, in particular concerning “party-documents”, filed to the court by each, claimant and defendant. In this respect, the right to legal hearing (article 6 of the Human Rights Act - “fair trial”) must be taken into account.

3. The meaning of the “truth”

According to CPR r.22.1(4) a statement of truth is a statement that “the party putting forward the document” believes that facts stated in the document are true. Thus, the therewith laid down notion of truth does not refer to the objective truth but merely the subjective truth, that is, facts and allegations the party is convinced of. This results from the interpretation of the word “believes”. In accordance with this interpretation, literature holds that the purpose of r.22.1(1)(a) is not to exclude the opportunity of submitting allegations to the court, as long as they base upon a factual basis.³² In other words, one could say that the parties are not obliged to tell the real truth but their statements have to be veridical. This view is confirmed by the provision, stipulating the consequence of a false statement. CPR r.32.14(1) states that proceedings for contempt of court may be brought against a person if he makes [a statement] without an *honest belief in its truth*. Thus, it depends on the inner view of whether a fact is true or not. In

29 <https://www.gov.uk/government/publications/form-n1-claim-form-cpr-part-7>.

30 CPR Practice Direction 32, para. 20.1: A witness statement is the equivalent of the oral evidence, which that witness would, in case it were called, give in evidence.

31 Bailey/Bowers/Hampton/Hodge/Hughes, *Handbook for Litigants in Person*, 2012, para. 8.8.

32 Vos, *Civil Procedure: The White Book*, 2019, Sec. A, para. 22.1.2.

Nield v Loveday is was held that “knowing what you are saying is false” violates the obligation of truth.³³

Of course, this raises the issue that the subjective dimension of a case is hardly provable.³⁴ Moreover, there are uncertain cases in which the truth is not relevant or in which it is difficult to tell whether the presented truth is in accord with the requirement of being “veridical”.

The opportunity to present the subjective truth, *i.e.*, being veridical is absolutely imperative to gain the right to a hearing, as guaranteed by article 6 of the Human Rights Act (“fair trial”). Otherwise it would be impossible to file a lawsuit about matters in which the claimant is not an expert. *E.g.*, damages for malpractice could not be claimed without the preliminary expert assessment of a doctor. It is not the purpose of court proceedings to deal with only objectively true facts. To some respect, the duty of a court is to find the truth, *e.g.*, by ordering an expert’s report in case of technical, medical or other difficult matters. Therefore, it is inevitable to allow the parties to make allegations, positive for them, as long as they do not lie.

a. Consistently presented facts

Jolowicz states that untrue facts, which are consistently presented by both parties should be accepted to be true and the decision shall be made based upon these facts: “If the parties wish their dispute to be decided on agreed, assumed or even purely imaginary facts, that is their affair.”³⁵ While this argument seems convincing at first sight, it has been, however, as of yet not been confirmed by any judgement. This may result from the fact that judges do not enquire whether the presented facts are true, when both parties tell the same story. Only in cases of collusion, specifically aiming to harm a third party who does not participate in the proceedings, there might be a different view. It remains to be seen how the courts will deal with this question.

In this respect, it does not make any difference whether the facts are (a) presented by both parties, (b) if they are presented by only one party and the other one agrees or (c) the other party does not deny. It is a common rule that facts are deemed to be true if they are not denied expressly.³⁶

33 *Nield v Loveday* [2011] EWHC 2324 (Admin).

34 See below para. II. 4. a. cc.

35 *Jolowicz* [2008] C.L.J. 510.

36 *Bailey/Bowers/Hampton/Hodge/Hughes, Handbook for Litigants in Person*, 2012, para. 8.30.

b. Pleading factual alternatives

In case different pleadings are submitted— signed with a statement of truth – of which only one is possible, it was held that this behaviour does not violate the obligation of truth when both alternatives are based on evidence.³⁷ In the relevant cases, the defendant had denied the claim by submitting evidence. Instead of relying on the original claim, the plaintiff based his claim on this newly presented evidence. Even though only one pleading could be true it was found that the purpose of CPR r.22.1(1)(a) is not to prevent a party from her liability when her own evidence might establish a cause of action against her.³⁸

c. Omission

The untruth can be told by omission as well. In case of failure to disclose relevant facts or documents, the obligation of truth is harmed.³⁹ *Examples*: non-disclosure of relevant pre-existing medical conditions; a post-traumatic incident that might break the chain of causation. Thus, a party may not conceal relevant facts from the court, even if these prove negative for her desired outcome.

d. Exaggeration

The “threshold of untruth” is reached when a party is exaggerating and inflating the claim against her own better knowledge. Almost all relevant decisions were made in car accident cases.⁴⁰ These cases sometimes are discussed as “fraudulent”⁴¹ and “dishonest”⁴² claims. Thus, it is obvious

37 *Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993; [2003] 1 W.L.R. 2557; *Clarke v Marlborough Fine Art (London) Ltd (Amendments)* [2002] 1 W.L.R. 1731, [2001] 11 WLUK 483; *Kelly v Chief Constable of South Yorkshire* [2001] EWCA Civ 1632, [2001] Po. L.R. 399, [2001] 10 WLUK 640.

38 *Kelly v Chief Constable of South Yorkshire* [2001] EWCA Civ 1632, [2001] Po. L.R. 399, [2001] 10 WLUK 640.

39 Grant [2017] J.P.I.L. 176.

40 *Ul-Haq v Shah* [2009] EWCA Civ 542; [2010] 1 W.L.R. 616; [2009] 6 WLUK 180 (CA (Civ Div)); *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 (CA); *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] C.P. Rep. 13; [2009] 11 WLUK 542 (CA (Civ Div)); *AXA General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112.

41 Zuckerman [2011] C.J.Q. 1; see below para. III. 4. b. bb.

42 Grant [2017] J.P.I.L. 176; Dixon/McQuarter [2016] J.P.I.L. 121; see below para II.3.

that the obligation of truth is harmed.

In *Ul-Haq v Shah* it was found to be untrue claiming damages for a passenger who was not in the car at all.⁴³ In *Lane v Shah*, the claimant's daughter was sent to prison for signing statements of truth to support an exaggerated injury claim. Although the injured mother was working part-time, her 22-year-old daughter signed a statement that contained the words "Mum has not returned to work yet."⁴⁴

In *AXA Insurance Plc v Masud*⁴⁵ a man had brought personal injury proceedings against his employer following an accident at work. He had stated a net loss of £ 214.000 in earnings, which was an exaggeration of around £ 180.000.

e. Carelessness

In *Berry Piling Systems Ltd v Sheer Projects Ltd* it was held that a statement made with no care about whether it is true or false is treated as being false.⁴⁶ Thus, it is prohibited to make "shots into the dark" in the mere hope that other evidence in favour of the party will appear.

f. Fundamental dishonesty

However, exaggerating a statement may not automatically be deemed as fundamentally dishonest. A distinction must be made between harming the obligation of truth and filing a claim based upon fundamental dishonesty. The term "fundamental dishonesty" is not only mentioned in the CPR but also in the Criminal Justice and Courts Act. CPR r.44.16(1) states that "orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest". According to section 57(1) of the Criminal Justice and Courts Act the court has to dismiss a personal injury claim when it "is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim".

However, providing a clear-cut definition for dishonesty is difficult. It seems to be common sense that dishonesty is far beyond a simple exaggeration.

43 *Ul-Haq v Shah* [2009] E.W.C.A. Civ 542.

44 *Lane v Shah* [2011] E.W.H.C. 2962 (Admin); [2012] A.C.D. 1.

45 *AXA Insurance Plc v Masud* [2019] E.W.H.C. 497 (QB).

46 *Piling Systems Ltd v Sheer Projects Ltd* [2013] EWHC 347 (TCC).

generation of a claim.⁴⁷ The distinction between these two terms can of course prove difficult in some cases. Notwithstanding, a distinction eventually depends on the judge's assessment, as the person who has the overview over the individual case.⁴⁸ Accordingly, it was possible that in *Brighton and Hove Bus and Coach Co Ltd v Brooks* dishonesty was interpreted to be equated with fraud.⁴⁹ This understanding obviously provides more legal certainty, yet raises the question as to why the term "fraud" is not expressly employed in the corresponding legislative acts. Thus, it might be more in accordance with the difference of the wording to distinguish different interpretations of dishonesty and fraud. Ultimately, dishonesty could be more than a mere exaggeration but is subject to a less strict definition than fraud.

Nevertheless, this question does not necessarily need to be answered, as "dishonesty" is accompanied by the word "fundamental". This is defined as "foundational base" or "essential component" of the claim.⁵⁰ In this respect it depends on the specific circumstances of the claim whether a dishonesty can be classed as fundamental or not: (1) If the falsely presented fact is relevant for the decision and essential for the success of the lawsuit it is fundamental, and only in this case a fundamental dishonesty is affirmed. (2) The attempt to convince the court of an (exaggerated) claim is admissible, as this only represents the claimant's subjective point of view, i.e. his conviction about the stated claim in a veridical way. The following cases demonstrate that there is a fine line between fundamental dishonesty and simple exaggeration:

In *Patel v Arriva Midlands Ltd*⁵¹ a personal injury claim was found to be fundamentally dishonest where the claimant, who had been injured in a car collision, had presented to the neurological experts instructed in the claim as unable to move or communicate, but surveillance cameras showed him walking around.

In *Smith v Ashwell Maintenance Ltd*⁵² a gas engineer had sustained an ankle injury after falling into a hole at work. Although there had been a degree of overstatement of his pain and its effect on him, he was not found

47 *Widlake v BAA Ltd* [2009] E.W.C.A. Civ 1256; [2010] C.P. Rep. 13; Dixon/McQuarter [2016] J.P.I.L. 121.

48 *Widlake v BAA Ltd* [2009] E.W.C.A. Civ 1256; [2010] C.P. Rep. 13.

49 *Brighton and Hove Bus and Coach Co Ltd v Brooks* [2011] E.W.H.C. 2504 (Admin).

50 Dixon/McQuarter [2016] J.P.I.L. 121

51 *Patel v Arriva Midlands Ltd* [2019] E.W.H.C. 1216 (QB)

52 *Smith v Ashwell Maintenance Ltd* [2019] 1 W.L.U.K. 541

to be fundamentally dishonest. He had merely engaged in such conduct in order to convince, rather than deceive medical experts as to his injury, following the employer's vigorous attempts to avoid a full compensation.

g. Preliminary conclusion

Concluding the obligation of truth, the CPR permits to file objectively true facts to the court as well as allegations which a party merely assumes to be true (subjective truth). The obligation of truth is violated in the event that exaggerations or other facts against the party's better knowledge (lies) are presented. Such lies may rise to fundamental dishonesty when they are relevant for the success of the claim. Categorising statements from absolutely true to absolutely false, the following ascending order can be made: objective truth > subjective truth > exaggerations against better knowledge > fundamental dishonesty > fraud; finding that only the first two would be permissible in civil proceedings. An exception is only made in cases of consistently presented facts by both parties: if a lie is not disputed by the other party it is accepted to be true. However, in many cases one can hardly say with certainty whether the thresholds for the different categories are met. There are no clear criteria to distinguish clearly between the categories. Practise shows, that courts seem to predominantly rely on clear evidence to ensure that, *e.g.*, a statement was exaggerated against better knowledge. Only in case of clear and obvious statements against better knowledge, statements were found to infringe CPR r.22.1(4).

However, the rules securing the truth in civil proceedings are relevant, as a statement of truth is regular evidence in court. Accordingly, a party would be able to prove almost anything. For this reason, other rules must guarantee that this is not pursued in an excessive manner.

4. Consequences of harming the obligation of truth

CPR r.22.1(4) would be a "toothless tiger" if no consequences for an infringement the obligation of truth were to be stipulated. Civil and criminal consequences are ordered when untrue statements, according to the interpretations provided for above, are filed to a civil court. While the most commonly applicable rule seems to be "contempt of court", there are numerous other possible consequences to be aware of.

a. Civil consequences

Civil consequences for an infringement of the obligation of truth are the strike out of the statement, the strike out of the claim, negative effects for

the court costs and – most significantly – the initiation of proceedings for contempt of court.

aa. Strike out

According to CPR r.3.4(2)(b) the court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings. A statement violating the obligation of truth is consequently not taken into account for the court's judgment.

The court also has the opportunity to strike out the entire claim by a judgment on the merits.⁵³ In this respect "strike out" refers to a full termination of the proceedings and prevents wasting financial and personnel resources on proceedings in which the claimant has forfeited the right to have his case decided.⁵⁴ However, striking out a claim is a very rarely occurring scenario and was refused several times, even in massively over-acted personal injury cases.⁵⁵ The Supreme Court ruled in *Summers v Fairclough Homes* that cases could only be struck on exceptional circumstances. The principle of fair trial (article 6 of the Human Rights Act) would only allow this "draconian step" as a "last resort" in cases of severe attempts to deceive the court and when the damage for the party is minimal.⁵⁶

bb. Costs

According to CPR r.1.1 the court has the overriding objective to deal with cases justly and at proportionate cost. Thus, the party who loses the case bears the costs.

In case of fundamental dishonesty⁵⁷, orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court, CPR r.44.16(1).⁵⁸ This rule only applies in personal injury cases, CPR r.44.13. In these circumstances, a claimant who is awarded damages against an unsuccessful defendant has to pay out of that

53 Ahmed, *Thresholds for strike-out*, 19.10.2015, www.lawgazette.co.uk.

54 *Masood v Zahoor* [2009] E.W.C.A. Civ 650.

55 *Summers v Fairclough Homes* [2012] 1 W.L.R. 2004; *Masood v Zahoor* (Practice Note) [2009] E.W.C.A. Civ 650; *Arrow Nominees Inc v Blackledge* [2000] B.C.L.C. 167.

56 *Summers v Fairclough Homes* [2012] 1 W.L.R. 2004.

57 See above para. II. 3. f.

58 *Dixon/McQuarter* [2016] J.P.I.L. 121.

amount any adverse costs ordered for a successful defendant in the same proceedings.⁵⁹ Regularly, these costs may be enforced only to the extent that the aggregated amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant, CPR r.44.14(1). Only in case of fundamental dishonesty, orders for costs made against the claimant may be imposed on the claimant to the full extent.

cc. Dismissing the claim

Only in personal injury claims, fundamental dishonesty⁶⁰ has another dimension. According to Criminal Justice and Courts Act section 57(2), an otherwise valid claim has to be dismissed when the court is certain on the balance of probabilities that the claimant has been fundamentally dishonest.⁶¹ The purpose of the Act is hence to raise the parties' awareness for the obligation of truth in injury cases which can be overacted easily.⁶² The claimant is not granted any form of damages or compensation when his statements are found to be dishonest. However, it has to be emphasized that the defendant, who regularly would be responsible for wrongdoing, is released from his responsibility when there is also wrongdoing by the claimant.⁶³ This is remarkable, as it would also be a conceivable solution to simply cut down the damages to the amount of factually suffered harm. Section 57 states an inner-procedural penalisation for serious exaggeration for the purpose of deterring parties from overacting.

dd. Contempt of court

Contempt of court can be either civil or criminal.⁶⁴ The distinction does not depend on the nature of the court to which the contempt was presented. It rather depends on the nature of the way of conduct. Disobedience to a procedural rule is not a crime, regardless of an applicability of criminal or civil procedure rules.⁶⁵ CPR r.32.14 is the most common approach of

59 *Cartwright v Venduct Engineering Ltd* [2018] E.W.C.A. Civ 1654; [2018] 1 W.L.R. 6137, CA.

60 See above para. II. 3. f.

61 In detail Dixon/McQuarter [2016] J.P.I.L. 121.

62 Dixon/McQuarter [2016] J.P.I.L. 121.

63 "two wrongs make a right" approach, Dixon/McQuarter [2016] J.P.I.L. 121.

64 *R. v O'Brien* [2014] UKSC 23.

65 *JSC BTA Bank v Solodchenko & Ors* [2011] EWCA Civ 1241; *R. v O'Brien* [2014] UKSC 23.

civil contempt.⁶⁶

A contempt of court is generally given in constellations where someone unfairly influences a court case, in particular by disobeying or ignoring a court order.⁶⁷ The latter is the most prominent consequence for contravening procedural directions. This is because Continental European law systems do not have similar rules for such wrongdoings.⁶⁸ Contempt of court is of English origin and therefore only applies in common law systems.⁶⁹

According to CPR 32.14(1) proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. The procedure is set out in CPR part 81. The principal legislation is fixed in the Contempt of Court Act 1981.

aaa. False statement – additional requirements

Whether a statement is true or false depends on the abovementioned requirements. However, it was held in *Nield v Loveday* that two prerequisites must be met: (1) a party is aware that what she is saying is false; (2) a party has to know that what she is saying is likely to interfere with the course of justice.⁷⁰ In other words, it is not sufficient to make a false statement against one's better knowledge. Additionally, the party has to be aware of violating an essential procedural rule. This accordingly sets out the requirement of a double intent of the party to be proved.

bbb. Burden and standard of proof

Both requirements and the intent have to be proved by the party alleging the offence. This is regularly the opponent.⁷¹ Although it is a civil contempt, the criminal standard of proof applies.⁷² The allegation must be proved beyond reasonable doubt.⁷³ This results from the nature of the

66 Greenberg, *Westlaw Insight: Contempt of court*, 03.05.2019, p. 6.

67 <https://www.gov.uk/contempt-of-court> (accessed 31 July 2019).

68 Apart of Belgium, see Article 181 Belgian Judicial Code.

69 <https://www.britannica.com/topic/contempt-law> (accessed 31 July 2019); Countries: Australia, Canada, Hong Kong, India, England/Wales, Singapore and in the United States.

70 *Nield v Loveday* [2011] E.W.H.C. 2324 (Admin).

71 *Nield v Loveday* [2011] E.W.H.C. 2324 (Admin).

72 *Nield v Loveday* [2011] E.W.H.C. 2324 (Admin).

73 CPR Practice Direction 81, para. 9.

sanctions, respectively either an imprisonment or fine.⁷⁴ Both are basically criminal penalties. According to CPR Practice Direction 81, para. 9 the Human Rights Act requires a criminal standard of proof due to the possibility that a person may sentenced to imprisonment.

However, regarding the burden of proof – in particular, double intent – a party faces severe difficulties in proving the application for contempt of court. That is why an application for contempt of court only was only granted in cases in which the violation of the truth was obvious: Claimant not in the accidental car,⁷⁵ lie about the ability to work,⁷⁶ false medical report.⁷⁷

However, the difficulty of proof was set out in *Walton v Kirk*. It was found that inconsistencies between a statement of truth and video evidence do not automatically constitute a contempt of court. It rather depends on the degree and the circumstances of exaggeration. In particular, the presence of a “knowingly” false made statement has to be proved.⁷⁸

ccc. Proceedings

CPR part 81 and in particular r.81.16-18 sets out applications and proceedings in relation to contempt of court for making a false statement of truth.⁷⁹ According to CPR r.81.10 a committal application is made by an application notice which is explained in CPR part 23. The application must be made to the court where the claim was initiated by filing an application notice to the court’s hearing centre.⁸⁰ In special cases, courts that have the power to commit for contempt may deal with the matter of their own initiative.⁸¹ The application notice must contain the grounds for the committal application.⁸² This is, according to CPR Practice Direction 81, para. 5.2. *inter alia*, the identification of the statement said to be false, the explanation as to why it is false and why the person issuing the statement was positively aware that the statement was false at the time it was made. Any act of contempt must be identified separately and numerically sup-

74 Greenberg, *Westlaw Insight: Contempt of court*, 03.05.2019, p. 6.

75 *Ul-Haq v Shah* [2009] E.W.C.A. Civ 542.

76 *Lane v Shah* [2011] E.W.H.C. 2962 (Admin); [2012] A.C.D. 1.

77 *Liverpool Victoria Insurance Co Ltd v Khan* [2016] EWHC 2590 (QB).

78 *Walton v Kirk* [2009] EWHC 703 (QB); [2009] 4 WLUK 107 (QBD Manchester).

79 Grant [2017] J.P.I.L. 176.

80 CPR r.23.2; r. 23.3.

81 CPR r.81.16(b).

82 CPR r.81.10(3).

ported by affidavits, containing all the evidence relied upon.⁸³

After the request is made it depends on the judicial authority of court how the application is handled: In proceedings before a county court a committal application in relation to a false statement may be made only with the permission of a single judge of the High Court or by the Attorney General.⁸⁴ If a High Court, a Divisional Court or the Court of Appeal is in charge of the proceedings in which the false statement was made, the permission of this court or of the Attorney General is sufficient.⁸⁵

In practice, contempt of court proceedings often have commercial reasons. In high value claims, committal applications are (1) made to play mind games with to opponent: the applicant hopes that his opponent makes mistakes in his statements because he presents his facts too “carefully”. (2) Regularly, another court or the Attorney General gets involved for permitting the application which shall discomfort the court dealing with the claim.

ddd. Sentence

The potential penalties are set out in the Contempt of Court Act 1981. According to section 14 (1) there is basically no restriction and limitation of the court’s power to sentence a person with imprisonment for contempt of court. However, the committal shall be for a fixed term which shall not exceed two years. Furthermore, a fine can be imposed. Section 14 (2) states that there is basically no limit to the amount of the fine, yet it shall not exceed the upper boundary of £ 2,500.

In serious cases, the courts do not refrain from using their power to send a plaintiff or defendant to prison for false statements. In *Lane v Shah* a mother, a father and their daughter lied about the mother’s ability to work in the course of a personal injury proceedings, following a car crash.⁸⁶ The mother was sentenced to six months’ imprisonment, the father and the daughter got three months’ imprisonment each. In *Nield v Loveday* the court ordered sentences of imprisonment for severely exaggerated damages in another personal injury claim:⁸⁷ Mr Loveday claimed that a car accident had given him a painful soft tissue injury so that that he could neither work nor drive. Furthermore, he stated that he needed a wheelchair

83 CPR r.81.10(3).

84 CPR r.81.18(3).

85 CPR r.81.18(1).

86 *Lane v Shah* [2011] E.W.H.C. 2962 (Admin); [2012] A.C.D. 1.

87 *Nield v Loveday* [2011] E.W.H.C. 2324 (Admin).

frequently as he could barely walk. His wife supported these disabilities by a statement of truth. However, a private investigator found out that Mr Loveday could walk without any problems. Mr Loveday was sentenced to 9 months imprisonment. He was released after 4 ½ months under the Criminal Justice Act 2003 section 258. His wife was given a 6 month⁷ sentence, suspended for 18 months.

b. Criminal consequences

Criminal consequence for a false statement can be penalisation for perjury. This crime establishes stricter requirements than the civil consequences. Thus, in respect of a false statement perjury does occur as frequently as civil wrongdoings.

At first sight also the offence of fraud could be fulfilled. However, a glance at the Fraud Act 2006 there are only special case groups that do not include giving a false statement to a (civil) court.

aa. Perjury

For false statements the Perjury Act 1911 may apply. According to section 1(1) a person shall be guilty of perjury if he has lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true. In case of a conviction thereof the person shall be liable to either a penal servitude for a term, not exceeding seven years, or to imprisonment.

The conviction for perjury may fail due to several factual circumstances: The main aspect is that the person has to be a witness or an interpreter. However, a party who filed a pre-hearing statement not necessarily has to call herself as a witness.⁸⁸ Furthermore, not any testimony will be given under oath. Thus, only filing a false statement will not automatically be the committal of perjury.

The Perjury Act was also restricted by case law. In *HM Advocate v Coulson* it was held that not every lie amounts to perjury.⁸⁹ The court repeated the above stated requirements but added the requirement that someone is only guilty of perjury when his lie is “relevant to the issues in

88 Bailey/Bowers/Hampton/Hodge/Hughes, *Handbook for Litigants in Person*, 2012, para. 8.8.

89 *HM Advocate v Coulson* [2015] HClAC 49.

that trial or civil proceedings”.⁹⁰ Accordingly, a criminal court dealing with perjury cases has to assess which facts are relevant for a decision of another court. *Example*: A witness is lying about the colour of a jacket which the defendant was wearing during a car crash. This is not perjury unless the colour of the jacket was relevant to identify the defendant.

bb. Fraud

According to the Fraud Act 2006 fraud is only committed by false representation, by failing to disclose information and by abuse of position. None of these case groups are suitable to apply to false party statements in court. Nevertheless, most of the exaggerated/abusive claims mentioned above are often referred to as “fraudulent claims”.⁹¹ Taking a closer look, it appears that all cases of dishonesty, contempt, omission, etc., which are based on false statements, are collectively subsumed under the terming “fraudulent”. Thus, there is no special punishment for these types of actions in court. The different types of infringing the obligation of truth rather have to be assessed by examining the requirements of the various rules/acts described above.

c. Legal representatives

Even if a false statement of truth is undertaken with the aid of a Solicitor, he must not fear any consequences. Chapter 4 of the Solicitors Regulation Authority (SRA) provides that the protection of confidential information is a fundamental feature of the solicitor-client relationship.⁹² A Solicitor has to keep the client’s affairs confidential. Thus, there will be no evidence for supporting statements against better knowledge.

5. Summary UK

The obligation of truth and the ordered consequences for an infringement are difficult to assess due to a twofold argumentation. First and foremost, it is not easy to assess whether a statement is true or not. Facts in court have to be presented with honest belief in its truth. However, the knowledge of a person is hardly provable. Thus, only in case of obvious

90 *HM Advocate v Coulson* [2015] HCJAC 49.

91 Zuckerman [2011] C.J.Q. 1; Sime/French, *Blackstone’s Civil Practice 2013: The Commentary*, para. 33.14.

92 de Kluyver/Dunny, *Legal Privilege & Professional Secrecy in England & Wales*, 2019, <https://tinyurl.com/y3v5ruur> (downloaded 14.08.2019).

difference between statements and other evidence a lie can be detected.

In the second step, there are several consequences: Dismissing or striking out a claim, cost shift, contempt of court, perjury. Apart from the false statement, all of these consequences are subject to additional requirements, *e.g.*, for the degree to which the identification of the truth is impaired or additional requirements as to the addressees of the rules.

§ 4 - The obligation of truth in the German CCP

The obligation of truth is mentioned only once in the CCP. Section 138 CCP obliges the parties to make declarations as to facts and generally stipulates the obligation to tell the truth. This shall both guarantee a fair trial and protect the administration of justice.⁹³

This obligation has to be seen in the light of one major difference between German and British civil procedure law: the *principle of party presentation* whilst the judge has no case management powers.

1. Presenting facts to the court

The principle of party presentation is one of the main pillars in German civil procedure law. It is almost the opposite of “disclosure” which is among the main principles of English civil procedure law.⁹⁴ According to this principle, all facts of a civil lawsuit must be presented by the parties themselves.⁹⁵ As a consequence, the court may principally not take other facts into account.

The reason for this principle is that the parties themselves – not the judges – are understood as “lords of the trial”. This results from the general principle of private autonomy which guarantees anybody to create his private legal relationships according to his individual preferences.⁹⁶

Facts presented by the parties are not evidence of the case. They rather set the facts and circumstances of the case, which then has to be substantiated by evidence in case the opposing party denies these.

a. Facts presented consistently by both parties

Thus, the court has to rely upon the facts provided by both parties consistently, even if they are not “really” true. There is usually no public interest to get “real” facts in case of private litigation. This is understood as the *formal truth*.⁹⁷

Example: The parties are litigating a car accident which happened on a

93 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 1.

94 See above para. III.

95 *Bundesverfassungsgericht* [1995] NJW 40; *Bundesgerichtshof* [1998] NJW 156; Reichold, *Thomas/Putzo: ZPO*, 38th Ed. 2017, sec. E-I, para. 2.

96 Becker/Jung, *Grundkurs BGB*, 9th Ed. 2016, pp. 11 et. seqq.

97 Saenger, *Saenger: ZPO*, 7th Ed. 2017, sec. E, para. 67.

winter day at 7 pm. Both parties tell the court that the crash happened at daylight although it was already dark. Still, the court has to make its judgment by taking the daylight into account even if the judge is in doubt of the lighting conditions according to the time stated by the parties.

The formal truth is only valid for facts, not for legal opinions (*da mihi facta, dabo tibi ius*).⁹⁸ Nevertheless, there are exceptional cases in which consistently provided facts may not presumed to be true. (1) Section 291 CCP states that facts that are common knowledge with the court need not be substantiated by evidence. Thus, the court can endeavour a correction, if facts provided by the parties are obviously false.⁹⁹ (2) In case of collusion when the litigating parties want to damage a third party.¹⁰⁰

b. Facts presented by only one party

Section 138 para. 3 CCP states that facts that are not expressly disputed are to be deemed as having been acknowledged, unless the intention to dispute them is evident from the other declarations made by the party. Hence, it makes no difference whether a presented fact is just undisputed or confirmed by the opponent.

c. Disputed facts

As in case of undisputed facts, the truth is interpreted as the *formal truth*, the “objectively correct truth” only becomes important when a submission of a party is disputed. Disputing regularly requires to react in substance to the facts alleged by the opponent (section 138 para. 3 CCP) which does not merely state that denying the opponent’s submission is sufficient, but an alternative scenario must be presented. Disputing facts by “lack of knowledge” is only possible where facts are in question that were neither actions taken by the party itself, nor within its ken (section 138 para. 4 CCP). In other words, disputing a submission concludes the presentation of an alternative version of the story, unless the disputing party has no knowledge of the scenario.

2. Scope of section 138 para. 1 CCP

In its application scope, section 138 CCP regards all oral or written

98 *Bundesgerichtshof* [1994] NJW 2547.

99 Saenger, *Saenger: ZPO*, 7th Ed. 2017, sec. E, para. 66.

100 *Higher Regional Court of Duesseldorf* [1998] NJW-RR 606; Reichold, *Thomas/Putzo: ZPO*, 38th Ed. 2017, sec. 138, para. 7, 9.

submissions, pleadings or applications made to the court.

a. Personal addressees

Personal addressee of section 138 CCP are only the parties themselves, *i.e.*, the plaintiff, the defendant and their lawyers.

There are special rules for witnesses and experts. As opposed to English law, witnesses do not have to file written statements to the court but give their testimony only orally. According to section 395 CCP the witness and the expert (see section 402 CCP, in reference to section 395 CCP) shall be instructed to tell the truth prior to the examination. If a witness or an expert gives a false testimony – which includes negligently violating the truth,¹⁰¹ *e.g.*, by guessing without exact knowledge, he is guilty of an offence. Section 153 of the German Criminal Code states liability to imprisonment from three months to five years for a witness or expert who gives false unsworn testimony before a court. Section 154 of the German Criminal Code states a minimum penalty of a one-year imprisonment for false oath. However, in the vast majority of trials no witness or expert has to swear an oath.

b. The meaning of “truth” regarding section 138 CCP

Regarding the principle of party presentation, the interpretation of the term “obligation to tell the truth” in section 138 CCP is in particular relevant in case of facts disputed by the other party. As the rule applies both for the parties and their lawyers it is questionable whether it has the same or different scopes for plaintiff, defendant and the legal representatives.

aa. General requirements for all addressees

The obligation of truth prohibits a presentation of facts against one’s better judgement, *i.e.*, it is illegal to lie.¹⁰² Of course, the truth as a matter of fact practically always has a subjective impact.¹⁰³ In most of the cases, objective and subjective truth will diverge in court. Nevertheless, if a party is convinced of false facts which result, *e.g.*, from amblyopia or defective

101 *Bundesgerichtshof* [1965] NJW 770; *Higher Regional Court of Hamm* [2006] IBR 1070.

102 Kern, *Stein/Jonas: ZPO*, 23th Ed. 2017, sec. 138, para. 4; Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 2.

103 Thurnher/Roed/Schmidinger, *Geschichte der Philosophie XIII*, 2002, pp. 37 et. seqq.

hearing, the presentation of these facts does not constitute an infringement of the obligation of truth. Section 138 only requires subjective persuasion of the facts presented, not the consistency of an allegation and the objective circumstances.¹⁰⁴

The opportunity of presentation is not limited to “hard facts”. A party can also make allegations though she is not convinced about them to be true but considers them to be possible.¹⁰⁵ The purpose of this extensive interpretation of the obligation of truth results from the idea that a party must be able to file a lawsuit while she is not aware of certain facts or able to find out relevant circumstances.¹⁰⁶ In particular, this uncertainty appears in four case groups: (1) a party relies on perceptions of a witness which appear to be false; (2) a party is not able to state whether a mechanical defect is caused by the opponent as she has no technical knowledge; (3) some relevant circumstances did not appear yet or are merely hypothetical, *e.g.*, in case of claiming for lost profits in the future, section 252 of the German Civil Code; (4) a claim requires a special personal attitude of the other party, such as intent.

In all of these cases, it is possible to file a lawsuit based on mere allegations. The party can present such favourable assumptions to the court.¹⁰⁷ However, the party has to disclose the basis of her hypothesis.¹⁰⁸

The line between the obligation of truth and simple guessing or speculating is controversially discussed when a “fishing expedition” is made, *i.e.*, when there are presented allegations without any substance or indications. Regarding those “shots in the dark” literature and case law provides for different opinions on whether this constitutes an infringement of the obligation of truth.¹⁰⁹ On the one hand, the allegation is not against one’s better judgment. On the other hand, it is random, discretionary with no point of reference. Notwithstanding, at least in the daily court practice, fishing expeditions are regularly not deemed to harm section 138 CCP but are eventually rejected based on the lack of substance.¹¹⁰ This means that

104 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 2.

105 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 2; Greger, *Zoeller: ZPO*, 31st Ed. 2016, sec. 138, para. 3.

106 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 3.

107 *Bundesgerichtshof* [1985] WM 736; *Bundesgerichtshof* [1986] NJW 246; *Bundesgerichtshof* [1988] NJW-RR 1529.

108 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 3.

109 Pro: *Bundesgerichtshof* [1986] NJW 246; con: *Bundesgerichtshof* [1988] NJW-RR 1529; Leipold, *Stein/Jonas: ZPO*, 23th Ed. 2017, sec. 284, para. 74; Chudoba, *Der ausforschende Beweisantrag*, 1993, pp. 88 et. seq.

110 See Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 6.

the allegation is not taken into account for the judgment. This behaviour may result from the fact that for civil procedure law it is not decisive whether an allegation is considered to be unsubstantial or untruthful.¹¹¹ In this regard, only the criminal consequences may vary, but in cases of fishing expeditions a party does not have to fear being sanctioned for the infringement of a criminal offence.

In some instances, the circumstances of a lawsuit can change in the course of the proceedings or an allegation made in uncertainty finally turns out to be false. *Example:* A landlord terminates the tenancy of a student due to intended owner-occupation (section 573 para. 2 no. 2 of the German Civil Code) as he desired to use the flat for accommodating his diseased mother. The tenant refuses to leave, so the landlord files an action for eviction. During the trial the landlord's mother dies, which is why the reason for termination is cleared. In this or similar constellations, the obligation of truth includes to inform the court about any changed circumstances, as the obligation of truth applies for the entire course of the trial, not only to the specific moment in which a fact is presented.¹¹²

The obligation of truth in section 138 CCP is accompanied by the parties' duty "to make their declarations as to the facts and circumstances fully and completely". A party has to file all information which are presumably relevant for the court's decision. Thus, the obligation of truth is also violated when a party withholds information, either because they potentially lead to a negative judgement or due to other tactical reasons.¹¹³

There is no difference between plaintiff and defendant. Both are required to present their facts truly in the above-mentioned manner. The burden of proof is regularly on the party who makes allegations to her own favour.¹¹⁴

Proving the allegations is the next step. A party can prove her presented facts with all admissible types of evidence: expert, witness, document, judicial inspection, examination of a party.¹¹⁵ An Affidavit is no typically

111 Kern, *Stein/Jonas: ZPO*, 23th Ed. 2017, sec. 138, para. 15; Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 7

112 *Bundesgerichtshof* [1999] NJW 2804; Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 5; Krell [2012] JR 102.

113 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 5; *Higher Regional Court of Cologne* [2005] MDR 186.

114 Reichold, *Thomas/Putzo: ZPO*, 38th Ed. 2017, sec. Vorb 284, para. 17 et. seqq.

115 Overview: Reichold, *Thomas/Putzo: ZPO*, 38th Ed. 2017, sec. Vorb 284, para. 12 et. seqq.

evidence brought forward in regular claims, only in urgent procedures.¹¹⁶ If an allegation appears to be false or unprovable, the party has not violated section 138 CCP after all.

bb. Disputing facts

There is basically no difference between presenting facts and disputing them. As a party may make uncertain allegations, the opponent can dispute them when he is not certain about them either. Disputing facts against one's better judgement is illegal. Disputing by way of a "shot in the dark", *i.e.*, simply denying a fact presented by the opponent without any reference or alternative story does not violate the obligation of truth. However, the consequence is stated by 138 para. 3 CCP: "Facts that are not expressly disputed are to be deemed as having been acknowledged [...]". Thus, the allegation is not need to be proved.

One exception of the obligation of truth, in particular by disputing, is discussed controversially: Is it acceptable to dispute a committed criminal act, when a civil lawsuit is filed for compensation? *Example*: A has stolen B's mobile phone. B files an action for surrendering the phone. A disputes a criminal act and says – untruthfully – that it was gift. Most authors and some courts advocate, that A – even if he would confess a crime – is not allowed to lie because he would be able to accept the claim and thus could "escape from the allegation".¹¹⁷ However, the highest courts seem to hold another view.¹¹⁸ According to the principle *nemo tenetur se ipsum accusare*¹¹⁹ nobody is obliged to confess a committed crime. This shall not only apply in criminal courts but also extends to civil courts.¹²⁰ As the *nemo tenetur*-principle is more important than the obligation of truth, in cases of criminal allegations the potential perpetrator should be able to lie in civil court. After all, it has to be clear that according to the prevailing opinion it is irrelevant whether a criminal conviction was given before

116 Sec. 920 para. 2, 936, 294 CCP.

117 *Higher Regional Court of Munich* [2008] NJOZ 617; *Labour Court of Hesse* [2002] BeckRS 30449938; *Schrader/Thoms/Mahler* [2018] NZA 965; *Reitz* [2017] NZA 273.

118 *Bundesverfassungsgericht* [1981] NJW 1431; *Bundesgerichtshof* [2004] NJW-RR 1001

119 Deducted of Article 6 Convention for the Protection of Human Rights and Fundamental Freedoms; in Germany: sections 136 (1), 243 (5), 55 of the German Code of Criminal Procedure.

120 *Bundesverfassungsgericht* [1981] NJW 1431.

filing the civil lawsuit¹²¹ nor is a criminal verdict binding on a civil court.¹²² The obligation of truth does not depend on a conviction which can only be evinced in the course of the criminal proceedings.

cc. Legal representatives

The obligation of truth also applies to the lawyers.¹²³ As there is not difference between Solicitors and Barristers in Germany, any lawyer (“Rechtsanwalt”) is able to represent a party in almost any civil, criminal and administrative court.

However, his personal obligation to tell the truth is not as far reaching as the parties’ duty. A lawyer basically may believe what he is told by his client¹²⁴ and is entitled to file this exact information to the court by marking written or oral submissions. He is not obliged to enquire the information, neither by his own research nor by hiring an investigator. Even if the lawyer is in doubt about his client’s story, he can use the information without violating section 138 CCP.¹²⁵ Only in case of strong doubts, *e.g.*, logical inconsistencies or contradictions between presented documents and the story the client told him, he is obliged to request clarification.¹²⁶ If the story of the client turns out to be untrue, the lawyer is not entitled to present it to the court.¹²⁷

This results from his position as independent organ of the jurisdiction, who is on the one hand a legal representative of a client but on the other hand has to guarantee a fair trial to both parties as well as the court.¹²⁸ Section 43a para. 3 of the Federal Lawyers Act states that a lawyer “must not behave with lack of objectivity in professional practice”. This includes, *inter alia*, the conscious dissemination of untruths.

Once the lawyer has knowledge of his client’s full story he underlies the same obligation of completeness. In particular, he violates section 138 CCP when he withholds information or disputes facts for tactical reasons

121 Schrader/Thoms/Mahler [2018] NZA 965; Reitz [2017] NZA 273.

122 *Bundesgerichtshof* [2018] NJW-RR 1534; similar intention *Bundesgerichtshof* [1952] NJW 1148.

123 Greger, *Zoeller: ZPO*, 31st Ed. 2016, sec. 138, para. 6; Reitz [2017] NZA 273.

124 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 4.

125 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 4.

126 Reitz [2017] NZA 273.

127 *Bundesgerichtshof* [1952] NJW 1148.

128 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 1; Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 4.

against his better knowledge.¹²⁹

The opportunity to articulate different legal opinions – also against the case law of the highest courts – does not violate the obligation of truth either. Even if a lawyer claims that there are judgements which support his opinion, though these do not actually exist, he does not harm section 138 CCP¹³⁰ as the research of such decisions is within the responsibility sphere of the judge (*iuria novit curia*).¹³¹

3. Consequences of harming the obligation of truth

Although there are no procedural consequences equating to the “contempt of court” in England, harming the obligation of truth can be sanctioned by way of criminal law and substantiate damage claims in civil law. However, the requirements are strict and neither criminal nor civil consequences can be litigated in the same lawsuit in which the infringement of section 138 CCP is prosecuted. In any event, a new legal action has to be filed.

a. Criminal offence: Section 263 German Criminal Code

Section 263 GCC rules the punishment of fraud: (para. 1) “Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.” (para. 2) “The attempt shall be punishable.”

As there is no special rule for process fraud, presenting facts untruthfully in court can only be penalised under the condition of section 263 GCC. Thus, the strict requirements of para. 1 or at least the prerequisites of the attempt (para. 2) have to be fulfilled.

Put briefly, the offence of an fraud requires (1) pretending of false facts by the offender, (2) causing an error, (3) disposition of benefits (4) reducing and damaging the fortune of the victim, (5) general intent, (6) special intent of obtaining an unlawful material benefit, (7) with no justification and (8) culpability of the perpetrator.¹³² The fraud in legal proceedings is not readily subsumable under these stated requirements, as e.g., three

129 *Bundesgerichtshof* [1952] NJW 1148.

130 *Higher Regional Court of Koblenz* [2001] NJW 1364.

131 *Schroeder* [1958] JR 106.

132 *Fischer, Strafgesetzbuch*, 64th Ed. 2017, sec. 263, para. 14 et. seq.

actors are involved in the offence: plaintiff, judge and defendant.

aa. Pretending false facts

Whether a fact is “false” does not depend on the criteria of section 138 CCP in the first place. The appearance of a false fact must be assessed from an objective point of view. The objective untruth, *i.e.*, when a different story can be proved, is false according to section 263 GCC. Of course, a restriction to the extent of section 263 CCP – or even narrower – is made by the other requirements.

Regarding just the “false facts” section 138 CCP lays down a narrower scope than section 263 GCC. It prohibits, *inter alia*, presenting or disputing facts against better knowledge. Thus, in almost all cases of an infringement of section 138 CCP, pretended false facts according to section 263 GCC are given.

Not out of question is only the case when circumstances change during the trial and the party does not inform the court about the new situation.¹³³ According to section 13 GCC a criminal offence by omission (*i.e.* doing nothing, failure, neglect, silence etc.) is only committed and punishable when there is a legal responsibility to avert the offence by acting. Hence, it is questionable whether section 138 CCP states such a legal responsibility. This is denied by the highest court, as section 138 only protects the administration of justice not the opponent.¹³⁴ Furthermore, there is no special trust-relation between plaintiff and defendant which is required for an omission-offence.¹³⁵

bb. Causing an error

Presenting false facts to the court may cause an error of the judge. However, this is not the only possible development as the reply of the other party is unpredictable and the judge might not believe the presented facts at all. Thus, any scenario following a false fact has to be explored.

A presented fact is considered to be irrelevant for the decision by the court: In many trials, a lot of facts, not relevant for the judgment, are presented. *E.g.*, in a claim for the payment of a purchased book its number of pages is mentioned, though this does not matter for the claim’s assessment. In these cases, the judge will not consider whether the number of

133 Meinecke [2016] NZWiSt 47.

134 *Bundesgerichtshof* [1999] NJW 2804.

135 Krell [2012] JR 102; Meinecke [2016] NZWiSt 47.

pages is true or false. Hence, he cannot be in an error. Even though there would be more or less pages than submitted – which would be a violation of section 138 CCP – this does not constitute a process fraud.¹³⁶ It might also not qualify as an attempt when the presenting party knows that the fact is irrelevant.

Plaintiff presents a relevant false fact, defendant does not dispute: In this case, an objective error of the judge is caused. *Prima facie*, this is irrelevant in civil procedure due to the principle of party presentation which only requires the formal truth.¹³⁷ Nevertheless, as a party does not know whether a fact is disputed or not, a false submission could qualify as an attempt of causing an error.¹³⁸

A relevant false fact is disputed by the opponent or a true fact is disputed against the better judgment of the opponent. After the hearing of evidence the court believes the lie: In these constellations, the error of the judge is obvious. It does not matter whether there are other reasons for the court's decision. A "concurrent cause" is sufficient. The reliance of the court on the lie next to other relevant (and true) facts is adequate for causing an error.¹³⁹

A relevant false fact is disputed by the opponent or a true fact is disputed against the better judgment of the opponent. After the hearing of evidence the court does not believe the lie: As there is no error, this is only an attempt¹⁴⁰ of causing one.

A true fact is disputed against better knowledge and the judge orders the hearing of evidence. Afterwards he is not sure whether or not the fact is proved ("non liquet"). Hence, he makes a decision according to the burden of proof: the disputing party wins the case because the opponent was not able to prove his version: As the judge is in doubt about the denial no error is caused.¹⁴¹ It could only constitute an attempted fraud, regardless of the fact that the disputing party potentially does not strive to convince the judge at all but is only aiming for a burden of proof-decision. Although the judge is simply not sure whose version is right he shall be in an error about the possibility of the untrue version as due to the obligation of truth from section 138 CCP the disputing party states that she does not

136 Meinecke [2016] NZWiSt 47.

137 Kretschmer [2004] GA 458; see also above III.1.

138 Krell [2012] JR 102.

139 Satzger, *Satzger/Schluckebier/Widmaier: StGB*, 4th Ed. 2019, sec. 263, para. 86; Krell [2012] JR 102.

140 For the further requirements of an attempt see below para. III. 3. a. hh.

141 Krell [2012] JR 102; Koffka [54] ZStW 45.

dispute against better knowledge.¹⁴²

cc. disposition of benefits

Benefits are disposed by the judgment which orders the disposal. As a civil lawsuit is in most cases filed because one party refuses to make a payment to the opposing party, the judgment orders the payment by way of a successful action. This highlights the special issue of a process fraud. The order of disposition is made by the court, not by the party whose assets are reduced. Three parties are involved in the fraud. Basically, this constellation is approved by case law and the literature.¹⁴³ Nevertheless, it is common sense that the judge's disposition has to be attributed to the damaged party.¹⁴⁴ This is not self-explanatory, as the judge is a neutral and impartial organ of the legal administration.¹⁴⁵ Hence he cannot be "the player of one team".¹⁴⁶ However, he has the legal power to order the disposal of benefits, compliant to the court's orders, to the party who is ordered to make a payment after the opponent caused an error by presenting false facts.¹⁴⁷

dd. Reducing and damaging the assets of the victim

At first sight one could think that the disposition is made when the real payment is completed. Still, as the judgement states an obligation, the risk of a damage amounts to the same value as the payment itself. From an economical view, the victim's assets are reduced then. Although the decision must be executed, there is no remedy which is likely to stop the bailiff. This is why case law and literature alike commonly state that the judgment itself reduces and damages the assets of the victim.¹⁴⁸

142 Kindhäuser, *Kindhäuser/Neumann/Paeffgen: NK-StGB*, 5th Ed. 2017, sec. 263, para. 191; Krey/Hellmann, *Strafrecht*, 17th Ed. 2015, para. 421a; other opinion Krell [2012] JR 102.

143 *Bundesgerichtshof* [18] St 221; *Bundesgerichtshof* [1997] NStZ 32; Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 263, para. 79 et. seqq.

144 *Higher Regional Court of Celle* [1994] NJW 132; Kretschmer [2004] GA 458; Krell [2012] JR 102.

145 Sec. 25 of the German Judges Act: "The judge is independent and only bound by the law."

146 "Team theory", see *Bundesgerichtshof* [18] St 221; Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 263, para. 82.

147 Satzger, *Satzger/Schluckebier/Widmaier: StGB*, 4th Ed. 2019, sec. 263, para. 128; Krell [2012] JR 102.

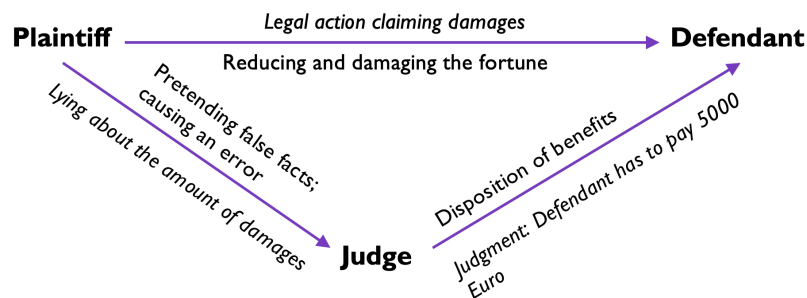
148 *Bundesgerichtshof* [1992] NStZ 233; Fischer, *Strafgesetzbuch*, 64th Ed. 2017,

The same applies to the dismissal of an action based on an infringement of the obligation of truth by the defendant.¹⁴⁹ He saves expenses although the claim is substantiated. This reduces the claimant's assets, who would be the real creditor. Furthermore, according to sections 91 et. seqq. CCP any ruling contains a decision about the charges (of the court and the lawyers) which regularly have to be borne by the losing party. Thus, a plaintiff has to pay the court and his opponent's legal representative. A ruling about these expenses is also suited to damage the harmed party's assets.

ee. Objective requirements overview

The objective requirements of the process fraud are met in different relationships between the parties and the court. *Exemplary constellation:* The plaintiff files a lawsuit based on lies. The judgement grants him a payment of 5000 Euro.

This scenario of course is possible the other way around when the defendant disputes true facts and the action is dismissed.



ff. General and special intent

Like in almost any other criminal offence, the perpetrator must show general intent, section 15 GCC. Intent refers to (a) the rough knowledge of the requirements of the offence and (b) the willingness to commit the offence.¹⁵⁰ In this respect, three different types of intent are recognised: (1) Committing an offence on purpose (*dolus directus 1st degree*); (2) direct

sec. 263, para. 172; Kretschmer [2004] GA 458; Koffka [54] ZStW 45.

149 Krell [2012] JR 102.

150 *Bundesgerichtshof* [7] St 363; *Bundesgerichtshof* [36] St 1; Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 15, para. 4; Otto [1996] JURA 468.

intent (*dolus directus 2nd degree*): the perpetrator knows that he commits a crime even though he is not interested in succeeding; (3) conditional intent (*dolus eventualis*): the perpetrator considers his acting possibly to commit an offence but approves of the negative consequences.

Concerning the process fraud, the intent has an important limiting impact. According to para. III. 3. a. aa. (“pretending of false facts”), facts can be deemed false when they are objectively untrue. Section 138 CCP permits a party to present facts, though she is not convinced about their correctness, but considers them to be possible.¹⁵¹ If these allegations appear to be false after the hearing of evidence, the first requirement of section 263 GCC is met without intent. This does not conclude any penalisation.¹⁵²

Besides the general intent, section 263 GCC also requires a special intent of obtaining an unlawful material benefit. This does not prove problematic in cases of process fraud as the perpetrator aims to reap the benefit of his opponent’s damage.¹⁵³ This benefit is the immediate consequence of the judge’s disposition.

The major issue of the intent as a subjective “internal affair”, which only depends on the will of the perpetrator, is the provability. According to section 261 of the German Code of Criminal Procedure the court shall decide on the result of the evidence taken, according to its free conviction as gained from the hearing as a whole. The jurisdiction deduces from this rule that a proof requires a sufficient certainty based on life experience which does not raise rational doubts.¹⁵⁴ Regarding the obligation of truth it has to be assessed, *e.g.*, whether a party made an allegation against her better judgment or left out relevant negative facts. Thus, the intent of a party can be affirmed where the evidence exhibits the contradiction of an allegation and the truth although it has been found that the party knew the evidence. *Example*: One party denies the existence of a purchase agreement for a car although the contract was made before a notary and each party was handed a notarised copy.

Almost impossible to prove is a lawyer’s intent to commit a process fraud. This owes to the fact that he is neither obliged to enquire the story his client presents nor is it in case of missing negative facts possible to prove that these were knowingly withheld by the lawyer.

151 See above III. 2. b. aa.

152 Meinecke [2016] NZWiSt 47; Koffka [54] ZStW 45.

153 Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 263, para. 187.

154 *Bundesgerichtshof* [2002] NStZ-RR 243; *Bundesgerichtshof* [2004] NStZ-RR 238.

gg. Illegitimacy and culpability

Illegitimacy and culpability are constitutive requirements of any crime. Illegitimacy comprises that an offence violates the legal system¹⁵⁵, in particular because the infringement is not justified¹⁵⁶, *e.g.*, due to self-defence, section 32 GCC. Culpability is the personal responsibility and liability for an offence.¹⁵⁷ *Inter alia*, according to section 20 GCC any person who is incapable of appreciating the unlawfulness of their actions shall be deemed to have acted without guilt. Incapability can especially result from drug or alcohol consumption. A blood alcohol level of more than 2,0 ‰ requires the court to consider insanity.¹⁵⁸ From 3,0 ‰ onwards a person is usually not deemed guilty for the committed offence.¹⁵⁹

Both reasons to avoid a conviction are rather irrelevant regarding the process fraud. In this respect, there is just one scenario which can lead to not committing a crime: the *consent*. When the offence requires acting against the will of the victim, *e.g.*, by damaging his assets, the objective requirements are not met when this is undertaken with the victim's consent.¹⁶⁰ Regarding the constellation of process fraud, this occurs when the formal truth is inconsistent to the objective truth: One party presents objectively false facts which are not disputed by the opponent. Consequently, the fact is deemed to be acknowledged, section 138 para. 3 CCP. Thus, the court may also rely on this fact as being formally true.¹⁶¹ If the non-disputing party loses the case due to the acknowledged untrue fact, the offence of process fraud is dismissed.¹⁶² However, as the initially lying party cannot reliably assess the consent it might also be classed as an attempted process fraud.¹⁶³

hh. Attempt

When a submission which infringes the obligation of truth does not lead to a positive judgement for the "lying" party, this can still constitute the

155 *Bundesgerichtshof* [2] St 194.

156 Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. Vor 13, para. 43 et. seqq.

157 *Bundesgerichtshof* [2] St 194; Jacobs [118] ZStW 831.

158 *Bundesgerichtshof* [1995] StV 407; *Bundesgerichtshof* [37] St 235; Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 20, para. 21.

159 Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. 20, para. 19 et. seqq.

160 Fischer, *Strafgesetzbuch*, 64th Ed. 2017, sec. Vor 32, para. 3a et. seq.

161 See above para. III. 1. b.

162 Meinecke [2016] NZWiSt 47; Eisenberg, *Festschrift Salger*, 1995, p. 25.

163 Meinecke [2016] NZWiSt 47.

offence of an attempted process fraud which is equally as sanctionable as the completed fraud, section 263 para. 2, sections 22, 23 GCC. An attempted criminal offence requires (1) the intent to commit the offence and (2) to take steps which will immediately lead to its completion. The penalisation corresponds with the completed offence but may – according to section 23 para. 2 GCC – be subject to a more lenient sanction.

The requirement of intent is as difficult to assess as for the completed offence as set out in section 263. Regarding the attempt the same difficulties regarding the provability occur. The second requirement (take steps to completion) is to be understood as “crossing the starting line” of the crime and endangering a protected interest, good or right.¹⁶⁴ This is in any event given when one objective requirement (e.g. pretending false facts¹⁶⁵) is already met. According to the prevailing opinion this is fulfilled by any oral or written submission filed to court which can also happen pre-trial.¹⁶⁶ Although pre-trial submissions only become valid once they are referred to in the hearing, the court takes some of its decisions (e.g. summoning witnesses) based on such pre-trial documents. Thus, the error may be caused pre-trial.

Regarding the difficulties of a completed process fraud, some constellations can be an attempt anyway. The main issue remains to prove a party’s or lawyer’s intent.

The presented false facts are considered to be irrelevant for the decision: As no error of the judge is caused as he did not even assess the facts, an attempted process fraud is committed when the presenting party is persuaded that the facts are relevant for the judgement.

After presenting false facts the opponent does not deny by consent: As the initially lying party cannot know whether her submission is going to be disputed, an attempted fraud is committed. However, in these cases a prosecution is rather unlikely because nobody will be aware of the committed crime for as long as nobody notifies the court of a false submission.

Despite of false facts, the lying party loses the case: This can occur in two scenarios: (1) The judge does not believe the facts, e.g., after hearing of evidence or (2) he believes them but the judgment benefits the other party based on other reasons which are also relevant. In these cases, an attempted fraud is committed.

164 *Bundesgerichtshof* [2011] NStZ 517; *Bundesgerichtshof* [1989] NStZ 473.

165 *Bundesgerichtshof* [2011] NStZ 400; Puppe [1989] JuS 362.

166 *Higher Regional Court of Bamberg* [1982] NStZ 247; *Higher Regional Court of Munich* [2206] NJW 3364; Meinecke [2016] NZWiSt 47; Seier [102] ZStW 563; other opinion Krell [2012] JR 102.

ii. Gaps of culpability

Regarding the issues of the strict fraud-requirements, there seem to be some legal loopholes regarding culpability. Though the behaviour objectively violates section 138 CCP it is not punishable. Neither parties nor lawyers have to fear any consequences.

Omission: In case of changing circumstances during the trial, the obligation of truth would require correction. However, section 263 GCC – according to the prevailing opinion – does not.¹⁶⁷ Thus, leaving the court to base the trial on an incorrect story is not punishable. If the judgement is based on such a changing story, the court of appeals can take the new facts into account, section 529 CCP.

Known irrelevance: When a party knows that the facts presented are irrelevant for the decision but try to confuse the court with high amounts of information, this conduct is not punishable.

Withholding information by a lawyer: In many cases lawyers do not tell the court the whole story of their clients due to tactical reasons. Example: There is a written real estate agent contract between a property-owner and an agent until June 2019. In April, the parties orally agreed to terminate the contract. In May, the owner finds a buyer and sells his property without the agent. The agent became aware of the transaction and files a lawsuit for his agent fees. In the complaint, his lawyer bases his claim on the written contract. He does not mention the oral termination though his client informed him about this fact. Even if the owner can prove that the contract was terminated, the lawyer will hardly be prosecuted for process fraud as it is rather impossible to prove that he had certain knowledge about the agreement.

Furthermore, there are scenarios which would neither be punishable nor do they actually violate section 138 CCP: Fishing expeditions and simply disputing facts by “shooting in the dark” are constantly observed unpleasant behaviours in German court rooms. They might have the consequence of rejection as they are unsubstantial (section 138 para. 2 CCP). Nevertheless, lawyers still daily display such behaviour as there are no sanctions. Thus, some judges are misled by a clever shot in the dark.

In general, (civil) courts are very lenient in filing criminal charges, in particular against lawyers. There might be charges against parties for an attempted fraud in severe cases. However, lawyers are hardly accused, especially as there is always the possibility and excuse that his client simply told him a wrong story.

167 See para. III. 3. a.

b. Civil law consequences

Infringing the obligation of truth can furthermore have consequences for the actual lawsuit: The obvious result of section 138 CCP is that the lie is not taken into account for the judgement. Regularly, a relevant requirement for the claim is therefore missing. The claim will be dismissed and the claimant has to pay the incurred court costs.¹⁶⁸ If a claim is exaggerated (*e.g.*, damages are overstated), the claimant loses the claim partly and has to bear the costs in relation of win/loss.¹⁶⁹ *Example:* Plaintiff (A) claims that his car had damages of 10,000 € after an accident caused by the defendant (B). If it then turns out in trial that the damages were only 8,000 €, A has to bear 20 % of the court costs.

Furthermore, as regards the presentation of untrue facts¹⁷⁰ the judge may be lead to not find other (true) allegations trustworthy either, section 286 CCP.¹⁷¹ If the court or the other party detects the process fraud after the judgement is already issued, the lawsuit can be resumed pursuant to section 580 no. 4 CCP.

The process fraud can of course justify an action for damages pursuant to section 826 of the German Civil Code (Intentional damage contrary to public policy) or section 823 para. 2 of the German Civil Code which guarantees damages for a victim of a criminal offence.¹⁷²

A lawyer who commits or attempts a process fraud (*e.g.* by withholding information for tactical purposes) has to pay damages to his client according to section 280 of the German Civil Code for breach of contract:¹⁷³ He violates a contractual duty to act legally in court.

c. Other consequences

A lawyer will also face consequences of the bar¹⁷⁴ when he breaches an essential duty such as infringement of the obligation of truth, sections 43a, 74, 113 of the Federal Lawyer Act. According to section 114 of the Federal Lawyer Act he can, *inter alia*, get a warning, sentenced a fine of up to 25.000 Euro or can experience suspension or withdrawal of his admission.

168 Sec. 91 para. 1 CCP.

169 Sec. 92 para. 1 CCP.

170 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 7.

171 Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 15.

172 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 8; Fritsche, *Muenchener Kommentar ZPO*, 5th Ed. 2016, sec. 138, para. 15.

173 *Higher Regional Court of Cologne* [2005] MDR 168.

174 Stadler, *Musielak/Voit: ZPO*, 12th Ed. 2015, sec. 138, para. 8.

4. Summary Germany

Whether a party is telling truth is not easily assessible as there are many case groups under section 138 CCP which have to each be evaluated individually. Nevertheless, it is at any rate prohibited to present facts against one's better knowledge. Still, this does not imply that allegations may not be made. A party can present facts which she is convinced about even if there is no absolute certainty about these facts.

The consequences are relatively limited. A civil court does not take untruthful facts into account for its judgment. Furthermore, a party may be convicted for (process) fraud. However, the requirements for committing this "triangular fraud" are very strict and difficult to prove. Thus, lies or at least dubious allegations and disputing facts rarely exhibit other consequences than being dismissed in the trial. Thus, for many lawyers such practices often prove worthwhile.

§ 5 - Comparative analysis

British and German law have entirely different roots. As the legal system of England is primarily based on case law which was codified in acts and statutes, the German law is based on legislation which is subsequently to be interpreted by courts. This makes a functional comparison of legal questions difficult.¹⁷⁵ Preliminary, the statute based German system seems to be more classified and organised while common law seems to be more fragmented. Nevertheless, after examining the different frameworks it seems to be the other way around regarding the obligation of truth in civil courts. In Germany, a history of numerous single decisions has been established under one rule, while the scope is hardly disputed under the CPR.

The overriding aim of the comparative enquiry shall be to answer the question of which system is better suited to secure that claimant and defendant are telling the truth in civil proceedings.¹⁷⁶ Therefore, the results of the descriptive outline above shall be compared, in particular, regarding the differences between the systems.

1. Statements of the parties

The differences already occur regarding the legal nature of the parties' statements/presentation given to the court. A statement signed with a statement of truth is regarded evidence in England.¹⁷⁷ In Germany, however, parties cannot be a witness in their own case.¹⁷⁸ Presented facts are only understood as "party presentation" which has to be proved by evidence when disputed by the opponent. Proving a fact is neither possible by statements of truth nor by way of an affidavit.¹⁷⁹

Thus, facts and statements of the parties have more importance and weight in England as they are the main pieces of evidence. Partially, no further verification like witnesses, deeds or other official records is needed. In Germany, the party presentation only serves the purpose of telling

175 See above para. II.2; Zweigert/Kötz, *An Introduction to Comparative Law*, 3rd Ed. 1998, p. 33.

176 Bien, *Rechtsvergleichung* (Presentation), 2017, para. IV.

177 CPR Practice Direction 32, para. 20.1.

178 That's why after a car crash a lawyer sues the insurance company as well as the driver – he cannot give evidence by being a witness.

179 Reichold, *Thomas/Putzo: ZPO*, 38th Ed. 2017, sec. Vorb 284, para. 12 et. seqq.

the court the circumstances of the case.

2. *Obligation of truth*

The obligation of truth is very similar in both legal systems. Presenting facts against better knowledge violates the obligation both systems. In this respect, the main aspect is, that a party has to be personally convinced about the made statements. In particular, the same treatment of consistently presented or undisputed facts has to be emphasized: If the same lie is told by both parties, it is deemed to be true (“formal truth”). There are only three main differences.

The first difference is evident in cases of carelessness/fishing expeditions. If a party makes allegations in the uncertainty as to whether they are true or false these statements are being treated as false according to English law.¹⁸⁰ In Germany, a “shot in the dark” might be dismissed due to lack of substance but will neither be treated as untrue nor will it result in criminal consequences.

Secondly, in case of pleading factual alternatives of which only one is possible, the treatment is different in both systems. In England, this behaviour does not violate the obligation of truth when both alternatives are based on evidence.¹⁸¹ In Germany, filing a lawsuit based on alternative explanations is not permitted.¹⁸²

The third – and probably most significant – difference is that there are more “levels of untruth” in England whilst in Germany a fact is either true or not. Depending on how severe the stated untruth is,¹⁸³ different consequences can be ordered.

3. *Consequences*

The main differences appear regarding the consequences for false statements. While in Germany, there are mainly two alternative consequences, in England there are more possible options.

180 *Piling Systems Ltd v Sheer Projects Ltd* [2013] EWHC 347 (TCC).

181 *Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993; [2003] 1 W.L.R. 2557; *Clarke v Marlborough Fine Art (London) Ltd (Amendments)* [2002] 1 W.L.R. 1731, [2001] 11 WLUK 483; *Kelly v Chief Constable of South Yorkshire* [2001] EWCA Civ 1632, [2001] Po. L.R. 399, [2001] 10 WLUK 640.

182 *Bundesgerichtshof* [2011] MDR 812.

183 See under para. V. 3. b. aa.

a. Methodical approach

This makes it challenging to compare the single rules. Thus, the methodical approach of a functional analysis has to be the overriding aspect.

Accordingly, initially the level of distinction has to be defined. As the rules cannot be compared readily, it seems apt to compare the group of inner-procedural penalties on the one hand and the consequences outside the proceedings on the other hand. Inner-procedural penalties regard all consequences which apply within the same trial in which a false statement is made. Consequences outside the trial in turn regard all penalties which may be the outcome of another separate trial on, *e.g.*, criminal sentences.

b. Inner-procedural penalties

Violating the obligation of truth can lead to several inner-procedural consequences. In this category belong monetary aspects or the success of the claim itself.

aa. The claim

As it seems to be apparent that an infringement of the obligation of truth automatically results in a loss of the lawsuit this is neither a fixed consequence in England nor in Germany. Nevertheless, it has an impact in most cases.

In Germany, a party loses the claim when the dishonestly presented fact is relevant for the decision. According to section 138 para. 2 CCP an untrue fact is not taken into account for the judgment. As the untrue fact is treated as “not existent”, this requirement is missing for the claim, and is therefore dismissed. Notwithstanding, when the fact is irrelevant to the desired claim a win is still possible.

In England, the consequences go beyond that. The court can strike out the untrue statement (CPR r.3.4(2)(b)) which is similar to the German rule. The statement is not taken into account and the success of the claim depends on the remaining evidence. However, in case of severe infringements of the obligation of truth the court can – as a last draconian step – strike out the entire claim as well.¹⁸⁴ In special cases of personal injury claims there is a further consequence: If a party fundamentally dishonest an otherwise valid claim has to be dismissed.¹⁸⁵ For this rule German law

184 *Summers v Fairclough Homes* [2012] 1 W.L.R. 2004.

185 Criminal Justice and Courts Act section 57(2).

does not provide for an equivalent provision. There are no special rules for single case groups.

bb. Costs

Differences can also be noted regarding the rules on costs. While in England there are rules which take the level of untruth into account, in Germany there is only one cost rule which applies broadly for all civil lawsuits. Of course, the principle is the same: the losing party is obliged to bear the entire incurred legal and court costs.

In England, by acting fundamentally dishonest in personal injury cases orders for costs against the claimant may be enforced to the full extent of such orders with the permission of the court, CPR r.44.16(1).¹⁸⁶ Again, there is a special rule for personal injury cases, as the legislator might have detected a special potential of abusing such claims.

This is not an issue in Germany. If a claim is overacted in respect of the costs the claimant loses the claim partly and has to carry the costs in relation of win/loss, section 92 para. 1 CCP. This rule shall discourage the claimant to demand exaggerated compensation.

c. Consequences outside the proceedings

As the inner-procedural consequences only vary in some selected characteristics, the other consequences differ widely and are thus difficult to compare. In this respect, the functional approach rather requires to compare the requirements of the consequences as compared to the different rules in force. In particular, regarding the intent of a party, there may be differences.

aa. Different rules

In brief, there is only one relevant consequence in Germany: Committing an (attempted) process fraud, section 263 GCC. In England, a party can be convicted for contempt of court and perjury. In Germany, one party factually cannot commit perjury as she cannot be a witness in her own case.

Regarding the legal representatives, German lawyers have to fear far more severe consequences for misconduct than their English colleagues. As there is no “legal privilege” in Germany, a lawyer can also commit

186 Dixon/McQuarter [2016] J.P.I.L. 121.

process fraud as well. Solicitors and Barristers are barred from being persecuted for a committed offence as their misconduct is not provable. Documents between lawyers and clients are confidential.

bb. Requirements and outcomes

Regarding the nature of the rules, it appears that proceedings for contempt of court are more connected to the original trial. The application can often be made right in the proceedings while in Germany a process fraud needs an entirely separated process started by the prosecutor's office.

Furthermore, just violating the obligation of truth is neither sufficient to be convicted for contempt of court nor for process fraud. For both infringements, the most relevant issue is to prove the intent of a party. In Germany, the intent for committing pretending false facts to the court to cause an error and get benefits requires a sufficient certainty based on life experience which does not raise rational doubts by the court (criminal standard of proof).¹⁸⁷ In England/Wales, the criminal standard applies, too. Accordingly, making a false statement and the intent of doing so must be proved beyond reasonable doubt.¹⁸⁸ This will only be possible in cases, in which clear evidence for better knowledge of a party is presented.

Apart from this, there are more legal gaps of culpability in Germany. There are two main gaps, which are treated differently under the CPR: (1) *Fishing expeditions*. As shots in the dark violate the obligation of truth in England which can cause proceedings for contempt of court, there is no criminal consequence in Germany.¹⁸⁹ (2) *Omission*.¹⁹⁰ Sections 13 and 263 of the German GCC state no duty to make clarifications after a change of circumstances. An originally veridically made statement can turn untrue after a party gains better knowledge following the presentation of the respective fact to the court. Then there is no obligation to correct it.¹⁹¹

One gap of culpability applies in both systems: If an untrue statement is made under knowledge that it is irrelevant for the court's decision, no offence is affirmed.¹⁹²

187 *Bundesgerichtshof* [2002] NStZ-RR 243; *Bundesgerichtshof* [2004] NStZ-RR 238.

188 CPR Practice Direction 81, para. 9.

189 See above para. IV. 3. a. aa.

190 Grant [2017] J.P.I.L. 176.

191 *Bundesgerichtshof* [1999] NJW 2804.

192 ENG: *Nield v Loveday* [2011] E.W.H.C. 2324 (Admin); *HM Advocate v Coulson* [2015] HCJAC 49; GER: Krell [2012] JR 102.

The possible sanctions differ slightly: In Germany, fraud can be punished with imprisonment not exceeding five years or a fine which depends on the incomes of the perpetrator. In England/Wales, contempt of court shall be punished by imprisonment not exceeding two years or a fine not exceeding £ 2,500. A person committing perjury shall be liable to penal servitude for a term not exceeding seven years, or to imprisonment.

4. Advantages and disadvantages of both systems

Two main principles in both systems diverge to such extent that one can hardly assess whether one of them is better suited. This is firstly true for the principles of disclosure in England and party presentation in Germany. According to the CPR all documents connected to the lawsuit must filed to the court. In Germany, the parties can decide themselves which documents etc. they submit. Secondly, any submission verified by a statement of truth is evidence in England. In Germany, this is only a “party presentation” and has to be proved by evidence.

At first sight, one could think that the English system reminds the parties about the importance of their statements. However, being a witness in his own case does not seem sensible from the German perspective. No one can or will be completely objective in his own lawsuit. In this way, the German principle avoids a conflict of interests. Still, the obligation of truth does not reach much further in one or the other legal framework. The only difference is that parties in Germany cannot commit perjury.

Significantly different are only the consequences. It appeared that the two main (and annoying!) behaviours of the parties can lead to proceedings for contempt of court while they do not cause any consequences in Germany: fishing expeditions and omission. Regarding these two gaps of culpability in Germany, the connection between the original civil lawsuit and proceedings for contempt of court is an evident benefit of the English law. The association of the obligation of truth and contempt of court in a single legislation act (CPR) avoids the initiation of a new, complex criminal trial which is however, necessary in Germany. The GCC has other requirements, in particular regarding omissions.¹⁹³

5. What can the systems learn from each other?

The obligation of truth is similar in both the English and German legal system. Still, an equivalent rule to contempt of court is missing in the

193 Section 13 GCC.

German CCP. Infringements against the obligation of truth have to fulfil the strict requirements of fraud. A consequence in the civil procedure rules would be helpful to facilitate taking actions against infringements of the procedural obligation of truth. This course of action would enable a closer connection to the initial trial and avoid occurring gaps of culpability. In particular, as an infringement of the obligation of truth is more than bothersome for any judge and opposing party.¹⁹⁴

Of course, it is hard to state whether such a rule could effectively prevent a party from infringing the obligation of truth more than the already existent rules. Nevertheless, a straightforward connection of the original process and the consequences could raise the parties' awareness for the consequences of lying in court.

194 Meinecke [2016] NZWiSt 47; Grant [2017] J.P.I.L. 176; Zuckerman [2011] C.J.Q. 1.

§ 6 - Summary

The obligation of truth in the English and German civil procedure law is not as different as it seems at first sight. Making false statements and submissions in civil court is prohibited when this is conducted against better knowledge. While there are differences in the general understanding of a parties' role in the proceedings as well as regarding the legal nature of submissions to the court, this does not affect the scope of the obligation of truth significantly.

The differences in the consequences are rather of a systematic nature. In England, the infringement of the obligation of truth can lead to actions for contempt of court which is a CPR-rule. In Germany, there is only the criminal prohibition of fraud which orders similar consequences (imprisonment or fine). However, such a process fraud leaves gaps of culpability which could be closed by adopting a rule, similar to contempt of court.

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