

**Case:**

BVerfGE 34, 269 = NJW 1973, 1221. Federal Constitutional Court in Proceeding Concerning the Constitutional Complaint of Publishing Company "Die Welt" and Mr. K.-H. V.

**Date:**

14 February 1973

**Judges:**

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The plaintiff is Princess Soraya, the ex-wife of the Shah of Iran. At the time in question, after her divorce from the Shah, the plaintiff resided in Germany. The defendants are the publisher and chief-editor of an illustrated weekly paper, which is distributed throughout Germany and known to specialize in sensational society stories.

In April 1961, defendants' paper carried a front-page story purporting to be the transcript of an interview with the plaintiff. The interview, which appeared to reveal much of plaintiff's private and very private life, was wholly fictitious, i.e., it was totally and freely invented by its author, a free-lance journalist. Defendants published the story without investigating whether the interview had actually taken place. In July, 1961, defendants' paper carried another story dealing with Princess Soraya, and as a part of that new story the defendants published a brief statement by the Princess to the effect that the alleged April interview had not taken place.

In the present action, plaintiff seeks damages for "violation of her personality rights." The Landgericht as court of first instance awarded her D.M. 15,000. The Oberlandesgericht (intermediate appellate court) and the Bundesgerichtshof (court of last resort in civil and criminal matters, abbr. BGH) affirmed, and the defendants brought the case before the Federal Constitutional Court by way of a constitutional complaint.

In order to understand the thrust of defendants' constitutional arguments, we must take a brief look at the development and present status of the rules of substantive law which the plaintiff successfully invoked in the courts below.

Apart from a section protecting a person's right to his name, the German Civil Code contains no specific provisions concerning the subjects which we would label as defamation or invasion of privacy. In Germany, as in France, defamation traditionally has been thought of as a crime rather than a tort. Under this traditional view, defamation actions normally have to be brought in the criminal courts, even though such an action ordinarily has to be prosecuted by the victim rather than the public prosecutor. If the defendant is convicted in such a criminal proceeding, he will be fined, or (in a very serious case) subjected to a jail sentence; but the victim cannot recover substantial damages in that proceeding.

Until after World War II, attempts to bring civil actions for defamation or invasion of privacy found little favour with the German courts. The first paragraph of § 823 of the Civil Code authorizes tort recovery only if the plaintiff can show injury to his “life, body, health, freedom, property, or some other (similar) right.” In order to bring cases of defamation or invasion of privacy within the ambit of this code provision, plaintiffs often argued that a person’s interest in his reputation and privacy should be regarded as his “personality right” and should be protected as one of the “other rights” mentioned in § 823. But throughout the periods of the Empire, the Weimar Republic and the Third Reich, the courts essentially rejected that argument.

A different judicial approach to the problem emerged after World War II, and after the adoption of the new West German Constitution, which contains the following provisions: [citation of articles 1 and 2 follows] During the 1950s the BGH, explicitly invoking these constitutional provisions, gave up the former narrow interpretation of § 823 of the Civil Code and repeatedly held that a plaintiff’s “personality right” is one of the “other rights” which are protected by § 823 against intentional or negli-gent infringement. This was an important development. It meant that—in contrast to prior law—the German courts now were treating injuries to a person’s reputation or privacy as actionable torts.

Even after this judicial breakthrough, however, a difficult issue remained to be resolved regarding the kind of damages for which recovery could be allowed under German law in cases of injury to the plaintiff’s “personality right.” The difficulty was caused by one of the Civil Code’s provisions dealing with damages. [There follows the citation of some relevant provisions of the Code, including the one of § 253 given above.]

There are a few limited and narrowly defined cases in which an express provision of written law (within the meaning of § 253) permits the victim of a tort to recover money damages for an injury to non-pecuniary interests; the prime example is the case of personal injury, with respect to which § 847 of the German Civil Code explicitly authorizes the recovery of money damages for pain and suffering. The draftsmen of the Civil Code clearly regarded this provision of § 847 as an exception to the general rule laid down in § 253: that no money damages can be recovered for an injury to non-pecuniary interests.

Neither the Civil Code nor any auxiliary statute provides for the recovery of non-pecuniary damages by a person whose “right of personali-ty” has been injured. Thus when the tort of injury to a person’s “personality right” was first developed by the German courts, it was initially thought that a plaintiff, while perhaps entitled to the publication of a retraction or to similar non-monetary relief under § 249, could not recover money damages without proof of what we would call “special damage,” i.e., loss of his job, loss of customers, or the like. The plain language of § 253 indeed appears to preclude the plaintiff in such a case from recovering “general” damages for his soiled reputation and injured feelings.

In 1958, however, the German courts broke away from this restriction seemingly imposed by § 253. The occasion was the so-called Herrenreiter case (the case of the gentleman horse-back rider). That case involved a picture of the plaintiff, a well-known equestrian, elegantly positioned on horse-back while jumping over a hurdle. Without plaintiff’s authorization, the picture was publicly and widely disseminated by the defendant as part of an advertisement promoting a

sexual stimulant. The plaintiff's "personality right" was seriously injured by this advertisement, not only because it conveyed the impression that the plaintiff had sought to commercialize his great reputation as a sportsman, but also because it implied that he needed and used sexual stimulants.

The lower courts awarded the plaintiff a substantial sum of money as damages for the injury to his reputation and feelings. The BGH affirmed, essentially on the ground that § 847 of the Civil Code should be extended by analogy to cover the case at hand. This analogy argument was question-able, because the word "only" in § 253 explicitly prohibits an analogical extension of provisions, such as § 847, which engraft exceptions upon the general rule of § 253. Recognizing this, the BGH subsequently abandoned the analogy argument; but the result reached in the *Herrenreiter* case was reaffirmed in later cases, on the ground that in many situations the tort of injury to a person's "personality right"—a tort developed in response to value judgments expressed in the Constitution—would be without an adequate remedy if the victim of such a tort could not recover money damages for the violation of his non-monetary interests.

The BGH limited the breadth of these rulings by further holding that such a cause of action for money damages should be recognized only if (a) the injury to the plaintiff's "personality right" is substantial, and (b) the defendant's act is sufficiently culpable to justify the rendition of a money judgment in a sizeable amount. According to the BGH, both conditions, (a) and (b), are clearly satisfied in a case in which a defendant, by way of large-scale promotion of his own commercial interests, has wantonly violated the plaintiff's "personality right." The repetition of such intolerable conduct, the BGH held, should be prevented by announcing a rule of tort law which makes it clear to would-be violators that such conduct is costly for them.

In the decisions dealing with this question, the BGH also pointed to the drastic technological and social changes that have taken place since the enactment of the Civil Code. The development of mass media, hardly predictable in 1900, makes the protection of an individual's personality right more important and more difficult in our day. Therefore, the BGH held, a court which takes the value system of the Constitution seriously can no longer feel bound by § 253 of the Civil Code insofar as that provision denies recovery for non-pecuniary damages even in cases of grave injuries to an individual's personality right.

The lower courts, after some initial reluctance on the part of some of them, generally followed these holdings of the BGH, which were approved, also, by the majority of the commentators. In the instant case, both the lower courts and the BGH itself based their decision on those previous holdings.

The defendants' constitutional complaint was based mainly on the following provisions of the German Federal Constitution:

Art. 5. ... Freedom of the press and freedom of reporting by broadcast and film are guaranteed  
....  
These rights are limited by the provisions of general (written) laws, by statutory measures for the protection of juveniles, and by the right of personal honour ....

Art.

20....

All of the State's power originates with the People. Such power can be exercised by the People through elections and ballots, and by special organs of the legislative, executive and judicial branches of the government.

The legislature is bound by the constitutional order. The executive and the judiciary are bound by statute and law.

In particular, the defendants argued that the substantive rule pursuant to which the lower courts ordered them to pay money damages to the plaintiff had been created by the courts in violation of the principle of separation of powers laid down in Art. 20 of the Constitution. The BGH, they argued, had acted *contra legem* when it developed the right to money damages for violation of an individual's "personality right." This, it was contended, was a usurpation by the courts of legislative power.

The defendants did not question the constitutionality of the view that the personality right of a person is one of the "other rights" mentioned in the first paragraph of § 823 of the Civil Code. Their attack was directed only against the decisional rule which—contrary to the language of § 253 of the Civil Code—permits a plaintiff whose personality right has been gravely injured to recover a money judgment for non-monetary damages.

The defendants did not deny that the recognition of plaintiff's personality right as one of the "other rights" protected by § 823 of the Civil Code was in part dictated by Arts. 1 and 2 of the Constitution. But they argued that the rights derived from Arts. 1 and 2, like other human rights protected by the Constitution, are essentially defensive in nature. For this reason, the defendants contended, it is not possible to treat those constitutional provisions as the direct foundation of a cause of action for money damages.

In addition, the defendants argued, the money judgment rendered by the courts below violated the constitutional principle of freedom of the press. In the defendants' view, the money damage rule developed by the courts and applied in this case did not constitute the kind of "general (written) law" which pursuant to Art. 5 of the Constitution may be used by the law-giver to limit the freedom of the press.)

In holding that the constitutional complaint was unfounded and that the ordinary judges were entitled to (re-interpret) § 253 the way they did in the Professor of Canon law decision the Constitutional court included in its judgment the following crucial paragraph.

"occasionally, the law can be found outside the positive legal rules erected by the state; this is law which emanates from the entire constitutional order and which has as its purpose the 'correction' of written law. It is for the judge to 'discover' this law and through his opinions give it concrete effect. The Constitution does not restrict judges to apply statutes in their literary sense when deciding cases put before them. Such an approach assumes a basic completeness of statutory rules which is not attainable in practice . . . The insight of the judge may bring to light certain values of society . . . which are implicitly accepted by the constitutional order but which

have received an insufficient expression in statutory texts. The judge's decision can help realize such ideas and give effect to such values."

**Note:**

*The German law of privacy may well prove to be of great use to practitioners as they strive to develop the English law under the impetus of the Human Rights Act 1999. The utility of German law lies not only in its richness, but also in the careful way in which German courts have balanced on ad hoc basis the competing interests of privacy and speech. This has not led to a flood of litigation nor to any real or perceived restriction of speech rights. The development of the law in Germany is also the product of the courts and is only minimally based on the Code or statutory provisions so it is both comprehensible and transplantable into English law. Finally, the growth of German material in English means, as Lord Wilberforce recently put it, that "the argument of non-availability no longer holds". Further down in the same text Lord Wilberforce, one of England's most erudite judges, added: "The German approach shows us the way, avoiding the brutal simplicity of the First Amendment, to work out a balance between the right of free speech and the right of privacy..." These remarks come from his Foreword to Professor Basil Markesinis' *Always on the Same Path. Essays on Foreign Law and Comparative Methodology*, vol. II, Hart Publishing (2001), where one can find a comparative presentation of German law in chapters 7, 8, and 11. More information on such topics as the privacy of public figures can be found in Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, Hart Publishing (1997) chapters 17, 18, and 19. The Law of privacy in England, France, Germany and Italy is also discussed (and rich further references frequently given) in chapters 1, 2, 3, 4, 5, and 7 of *Protecting Privacy*, (ed. by Basil S. Markesinis) OUP (1999). The cases reproduced in this site are annotated in B. S. Markesinis. *The German Law of Obligations*, vol. II, *The Law of Torts: A Comparative Introduction*, 4th edition by Hart Publishing (forthcoming in 2002).*

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