European Court of Human Rights: Frisk and Jensen v. Denmark

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On 5 December 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Frisk and Jensen v. Denmark. The applicants in the case were journalists with the public broadcaster Danmarks Radio (DR), and had produced the documentary "When the doctor knows best", broadcast in September 2008. The documentary concerned the treatment of pleural mesothelioma cancer at Copenhagen University Hospital, where consultant S was in charge of treatment. It focused on two types of chemotherapy medication (Alimta and Vinorelbine) used by the hospital, and followed four patients and relatives, and a narrator spoke as a voice-over. During the programme, the narrator stated that "doctors chose to treat her with a substance that has not been approved [in cases of such a diagnosis], and whose effect on pleural mesothelioma cancer is not substantiated". While "there is only one treatment which, in comparative studies, has proved to have an effect on pleural mesothelioma cancer", S "chose not to use that medication on his patients", and "the question remains: why does S carry out tests with Vinorelbine." It "turns out that S has received more than DKK 800,000 over the last five and a half years from the company F. This is the company behind the test medication Vinorelbine. The money has been paid into S's personal research account."

Following the broadcast, the hospital and consultant S instituted defamation proceedings against DR's director, and the two applicants (the journalists concerned), claiming that the programme had made accusations of malpractice. In 2010, the Copenhagen City Court found that the applicants and DR's director had violated Article 267 of the Penal Code, and sentenced them each to fines totalling DKK 10,000 (EUR 1,340), and the applicants jointly liable for costs of DKK 62,250 (EUR 8,355). The High Court of Eastern Denmark upheld the judgment, finding that the programme had given "the impression that malpractice has occurred at Copenhagen University Hospital, in that S deliberately used medication (Vinorelbine) which is not approved for treatment of pleural mesothelioma cancer; the test medication has resulted in patients dying or having their lives shortened; and the clear impression has been given that the reasons for this choice of medication (Vinorelbine) were S's professional prestige and personal finances". The applicants were ordered to pay costs to the hospital and S, totalling DKK 90,000 (EUR 12,080). The applicant journalists made an application to the ECtHR, claiming a violation of their right to freedom of

expression under Article 10 of the European Convention on Human Rights (ECHR). The main question for the ECtHR was whether a fair balance had been struck between the right to respect for private life and the right to freedom of expression, and reiterated the criteria for this assessment: the contribution to a debate of general interest; how well-known the person concerned is and what the subject of the report is; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed.

Firstly, the Court held that the programme had dealt with issues of legitimate public interest, namely that it had involved a discussion about risk to life and health, as regards public hospital treatment. Secondly, the criticism had been directed at S and Copenhagen University Hospital, who were vested with official functions, and there was a need for wider limits for public scrutiny. Thirdly, however, the Court noted that the domestic courts had found that the applicants had made allegations that S and the hospital had administered to certain patients suffering from mesothelioma improper treatment, resulting in their unnecessary death and the shortening of their lives to promote the professional esteem and personal financial situation of S., and that those accusations rested on a factually incorrect basis. The Court held that it had “no reason to call into question those conclusions”. The Court rejected the applicants’ argument the impact of the programme had had various important consequences, inter alia, a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital. The Court stated that the reason why the public demand for Alimta therapy may have increased and Copenhagen University Hospital changed its standard therapy for operable patients to Cisplatin in combination with Alimta, was that the programme, on an incorrect factual basis, had encouraged patients to mistrust Vinorelbine therapy. Fourthly, in respect of the method of the obtaining of the information and its veracity, the Court noted that the domestic courts did not dispute that the applicants had conducted thorough research, over a period of approximately one year. However, the Court held that it had no reason to call into question the High Court’s conclusion that the applicants had made accusations resting on a factually incorrect basis, of which they must be deemed to have become aware through the research material. Finally, the Court held that it did not find the conviction and sentence to have been excessive or of such a kind as to have a “chilling effect” on media freedom. Furthermore, the decision that the applicants should pay legal costs did not appear unreasonable or disproportionate. In conclusion, the Court held that the reasons relied upon were both relevant and sufficient to show that the interference complained of was “necessary in a democratic society”. Thus, there had been no violation of Article 10 of the Convention.

Judgment by the European Court of Human Rights, Second Section, case of Frisk and Jensen v. Denmark, Application no. 19657/12 of 5 December

2017

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