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Right of reply and its relation to a correction by the media

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Introduction

Under Article 28g(1) of the Civil Code any person whose personality rights have been directly affected by a statement of fact made by the media (in particular, press, radio or television, but also, depending on the circumstances, a blog) is entitled to a right of reply. The affected person can request that the media publishes a succinct reply, which must be:

- confined to the subject of the contentious statement;
- published free of charge;
- published as soon as possible;
- identified as a reply; and
- published in such a manner as to ensure that it reaches the same audience or readership as the contentious statement.

If the media company rejects the reply or otherwise fails to publish it correctly, then the reply can be enforced in court (see Articles 28g and following of the Civil Code).

In practice, however, requests to publish a reply are often not expressly rejected, but the replies are published as letters to the editor or as corrections instead of formal replies. It seems that certain media companies deal with up to 30% of all reply requests in this manner.

Facts

Independent insurance companies Sympany and ÖKK were mistakenly treated as one single company in a customer satisfaction survey published by two consumer magazines. ÖKK requested the publication of a reply and insisted on its right of reply even when the magazines proposed to publish a correction notice instead. ÖKK's clear position notwithstanding, the magazines published a correction and then rejected ÖKK's request to publish a reply. ÖKK filed a claim with a local court, requesting that the magazines be ordered to publish the reply. ÖKK prevailed before the two cantonal instances, and finally before the Supreme Court.

In view of the purpose of the right of reply – which is to permit the affected person to present his or her own view of the facts and to ensure that the media and those affected by it are all on a level playing field – it could be argued that the right of reply is satisfied if the content of the reply is published by the media, irrespective of the form of the publication. This position has been taken by several scholars and by previous cantonal court decisions. However, other scholars argue that a media company that informally publishes a reply (ie, not identified as a reply) contravenes the statutory right of reply, and cannot rely on this publication to oppose the publication of a formal reply.

Decision

The Supreme Court clarified this dispute in the present case, rejecting the view that the right of reply is lost whenever the content of the reply is published by the media in a different form. However, the court confirmed that relying on the right of reply may be deemed to be an abuse of law in terms of Article 2(2) of the Civil Code in individual cases, even though only in exceptional circumstances.

In an earlier case in 1994, the Supreme Court had stated that a person who already had the opportunity to present his or her own view (eg, in an interview) had no right to a further reply if their own view was published:

- without undue delay;
- to reach the same audience as the disputed statement;
- in direct relation to the disputed statement; and
- without an invalidating comment by the media.

However, in the case at hand the Supreme Court emphasised that the earlier case cannot be generalised because a correction – different from an interview – is still the media's own view, even though in a revised version. More generally, the right of reply can only be lost by virtue of a correction if the correction fully and accurately reflects the view of the affected person, and is published as soon as possible and towards the same audience as the corrected statement. Finally, it is relevant whether the media publishes the correction on its own or only as a reaction to the request to publish a reply. If it is a reaction, then there is the danger that the right of reply could effectively be invalidated.

Comment

The Supreme Court clarified in this decision that the right of reply is an important defence for those affected by a media statement, and that this defence cannot easily be revoked simply by publishing a correction or a letter to the editor. It remains to be seen whether media companies will abandon their earlier practice and become more open to reply requests.

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