

Excerpts from the Court's Written Opinion

(What follows is an unofficial translation made by the Third World Action Group Berne to inform its many English-speaking supporters of the court's findings. It does not have any official status. If reproduced in whole or in part, this should be made clear.)

ON THE BACKGROUND

- "1. In May 1974 a 32-page brochure of the 'Swiss Action Groups for Development Policy' was published. It was entitled 'Nestlé tötet Babys' and was available from the 'Third World Action Group Bern' at the price of frs. 3.50. The text stated, in particular, that the Nestlé company was responsible for the death of or the permanent injury to thousands of children and that it was using unethical and immoral methods in the Third World, in particular advertising methods.
2. The company attacked in this brochure, Nestlé Alimentana SA Vevey, represented by counsel H.P. Walter, on July 2, 1974, brought charges in the Untersuchungsrichteramt Berne against person or persons unknown for defamation (Ehrverletzung) by the printing press (Art. 173 ff. of the Swiss Penal Code (Strafgesetzbuch)) and for infraction against the press laws (Art. 322, P.C.), allegedly committed by the publication of said brochure."

"KILLING" - A PUNISHABLE ACT?

"How is the incriminatory title, 'Nestlé Kills Babies', to be understood? In a legal-technical sense, the charge implies that Nestlé killed infants - intentionally or negligently.

What is decisive in this connection is the meaning that an unbiased hearer or reader in the circumstances was to give to the incriminatory utterance (Federal Court Decision 92 IV 86 f.). He will give a more narrow interpretation to the charge of killing in the sense of a premeditated act. The charge is formulated categorically, must correspondingly be understood in a narrow sense and does not admit of any attenuation. The incriminatory utterance goes far beyond the charge of moral responsibility and unmistakably accuses the Nestlé company of punishable doings. Thus, the complainant is accused of particularly dishonourable conduct (cf. Schwander, Schweiz. Strafgesetzbuch, No. 605), hence suffers a violation of the repute to which he has a legitimate claim (Stratenwerth, Schweiz. Strafrecht, Vol. I, 107).

According to an extended definition, honour is the repute which its holder may claim ethically and socially (Stratenwerth, p. 109).

The accusation of deliberate or negligent killing touches on the ethical sphere and is defamatory. It is a question of a defamatory factual statement, i.e. the killing of infants."

AGAINST BETTER KNOWLEDGE?

"Is the defamatory factual statement against a third party, 'Nestlé kills Babies', libel (üble Nachrede) according to Art. 173 P.C. or calumny (Verleumdung) according to Art. 174 P.C.?"

"Calumny and libel are premeditated offences (Vorsatzdelikte). To delimitate the facts of the case it suffices to say that for libel possible intent (Eventualvorsatz) is enough whereas this is not the case as concerns calumny (F.C.D. 76 IV 244 ff.; Stratenwerth, p. 126). The distinguishing feature is acting against better knowledge, which is required for calumny."

"According to the findings, proof cannot be furnished to the effect that the accused of the 'Action Group' made the charge of killing against their better knowledge. It is true that their main aim was to draw public attention to the problem they described by means of a title that was as effective as possible and to pillory the Nestlé company, in its capacity as a Swiss enterprise, for using, in developing countries, advertizing practices said to be unethical and immoral for powdered milk for infants, because the accused regarded these advertizing practices as the root cause of keeping mothers from breast feeding and inducing them to resort to artificial feeding of their babies. This, for hygienic and financial reasons, is said to have the result that babies fed in this way are more prone to fall ill and die than breast-fed babies. The causal chain construed by the accused, which is said to begin with Nestlé's advertizing methods for processed infant foods and to end with the physical injury to or the death of infants fed with powdered milk, shows that, subjectively, the reproach of killing was intended particularly in a moral sense. The accused believed themselves justified in drawing this conclusion from the information and documents available to them, in particular from the original English brochure, and felt obliged to concentrate on the Nestlé company, because, as members of a Swiss organization for development policy (cf. object of the association), they felt they had the moral obligation to stand up for the affected infants of underprivileged classes in developing countries and to draw public attention, especially in Switzerland, to the corporate conduct of this Swiss company. On the basis of this subjective situation, the accused cannot be reproached with making the charge of killing against their better knowledge, at least they were not aware of the untruth of their statement, which, in turn, would be the prerequisite for meeting the conditions of calumny."

THE PUBLIC INTEREST

"If, as in this case, somebody is accused or suspected in front of a third party of dishonourable conduct or of other facts likely to damage his reputation without the utterance being made against better knowledge and if the accused furnishes proof that the utterance made or disseminated by him corresponds to the truth or that he had good reason to hold it, in good faith, to be true, he is then not punishable (Art. 173, subparagraph 2, P.C.).

However, the accused is not allowed to furnish the proofs of exoneration concerning truth and good faith and is punishable for utterances made or disseminated with the intent to accuse a person of bad conduct rather than to safeguard public interests or an otherwise substantiated cause (subparagraph 3)."

"According to the very broad interpretation given here and also in F.C.D. 101 IV 294 to the safeguard of public interests as a case of legitimate motivation, the right of the public to be informed about business methods of a company of the size and the importance of the complainant must be affirmed. The accused intended, by means of a consciously provocative title, to draw public attention to the contents of the translated brochure, i.e. to the business conduct and, in particular, to the advertising methods said to be unethical and immoral of the Nestlé company as concerns infant foods in developing countries and the related consequences."

THE PROOF OF EXONERATION

"The proof of exoneration is used by a person accused of libel or of insult (Beschimpfung) to convince the adjudicating court that the utterance made or disseminated by him corresponds to the truth or that, in good faith, he considered it true and, as it were, acted bona fide. According to the type of proof, it can have different functions:

1. By establishing proof of truth the perpetrator wants to show that the person affected by the utterance cannot, in this respect, lay claim to repute; if the stated fact is true, honour cannot be violated. If the addressee of the utterance benefitted from a (too) good reputation without good reason, the defamation suit assumes the strange function of unmasking a false man of honour, i.e. the complainant.
2. Proof of good faith, on the contrary, is a proof of circum-spection: The perpetrator wants to show that he took all reasonable steps to satisfy himself that the utterance was true."

1. Concerning the Proof of Truth"a) Death of Infants

The fact-finding procedure has shown that the incorrect use of powdered milk can lead to the death or to the serious illness of infants. In the suburban slums and also in rural areas of de-

veloping countries, the hygienic prerequisites for preparing bottle milk in accordance with the producer's instructions are often absent. The use of unclean, non-sterilized bottles and teats, of dirty and unboiled water, can lead to infectious diseases and to the death of infants. Furthermore, it is known that for economic reasons powdered milk is often 'stretched'. Feeding over-diluted powdered milk can cause marasmus, a wasting deficiency disease due to protein and calorie deficiencies; this and other diseases, to which the debilitated infant is more prone, can lead to death.

In this connection, reference is made to the voluminous material of the Defence as well as to the testimony given by Prof. Jelliffe and Dr. Ebrahim.

The quality of Nestlé's powdered milk is not contested. Insufficient quantities of the product, contaminated water and lack of hygiene in the preparation of the feeding bottle are causes of the death or of the serious injury to the health of infants. Thus, it is not the product itself that leads to the death of infants in developing countries.

b) Nestlé's Baby Foods

These baby foods are admittedly good and in certain cases urgently needed, certainly in the case of orphans and of the mother being unable to breast feed. It is, however, contested in many cases where they are preferred to breast feeding where this would be possible in adequate quantities, for mother's milk is definitely better than bottle food (cf. in particular the testimony given by Prof. Jelliffe, Dr. Ebrahim and Sr. Silvia Probst). This is acknowledged even by the complainant himself and he claims that attention is drawn to this.

c) Advertizing

The material submitted shows that the Nestlé company in its leaflets, brochures, posters, etc. does refer to cleanliness and breast feeding. However, the question arises in this connection whether these references are adequate for conditions prevailing in developing countries. No answer could be obtained from the complainant's counsel as to whether the Nestlé company used the same advertizing methods in developing countries as it did in Europe. According to the evidence, the judge is of the opinion that the company went considerably further there than it does hereabouts. Advertizing is done, to the extent that the proceedings have shown, by posters in hospitals, by the distribution of colour brochures whose main emphasis concerning nutrition is on the bottle. The reference made to breast feeding in these brochures may be adequate to the western level of knowledge but it is in no way appropriate for mothers in developing countries.

It is considered proved by evidence that the Nestlé company uses health nurses who have an advertizing task and who, by their activity, have an advertizing effect. This was impressively demonstrated by the witness Dr. Ebrahim by means of a so-called gift parcel, which advertizing method he described as the most terrible. It consists of the free gift of a tin of NAN powdered milk, together with a bottle and teat and an illustrated brochure.

According to Dr. Ebrahim, the inducement to artificial feeding in the place of breast feeding can result, in as little as three days, in the drying up of the breast as a milk source due to the absence of the sucking process and to the disturbance of the hormonal stimulation, the mother thus becoming a prey to bottle milk (p. 957). (Cf. also the letter of Dr. L. Oberndorfer to the 'Action Group' of 30.5.1976, evidence no. 830 of the Defence.)

Moreover, reference is made to radio, press and poster advertising, varying in each country and adapted to the respective conditions.

What is decisive here is at whom this multiple advertising is directed. In developing countries, the person reached is a mother or an expectant mother domiciled mostly in urban slums, a woman with little education who is unable to differentiate and who is susceptible to advertising slogans.

The witness Prof. Jelliffe rejects the bottle and Dr. Ebrahim regards it as nothing but a murderous weapon. The witness Sr. Silvia Probst, who has gathered her many years' experience in rural areas in Uganda, in particular, confirms this possibility and the need for intensive instruction and counselling and the controlled distribution of bottle milk as a substitute and supplementary food. According to her, it could be a blessing where it was necessary, provided its distribution was controlled.

Summarizing, it can be said that powdered milk, whose quality is not contested, is necessary as a substitute or a supplementary food for infants who cannot be or adequately be breast fed. However, these products must be provided only if instruction, supervision and hygienic requirements are at hand. These prerequisites for the use of powdered milk in developing countries are repeatedly cited in the documents submitted, such as for instance in the quoted letter from Dr. Leni Oberndorfer to the 'Action Group' of 30.5.1976 (evidence of the Defence no. 830).

Hence, the need ensues for the Nestlé company fundamentally to rethink its advertising practices in developing countries as concerns bottle feeding, for its advertising practice up to now can transform a life-saving product into one that is dangerous and life-destroying. If the complainant in future wants to be spared the accusation of immoral and unethical conduct, he will have to change its advertising practices.

This does not, however, establish proof of negligent or intentional killing. The adequate causal connection between the sale or any other type of distribution of powdered milk and the death of infants fed with such products is interrupted by the action of third parties, for which the complainant in terms of criminal law, cannot be held responsible. In this sense, there is no negligent or even intentional killing."

2. Concerning the Proof of Good Faith

"In the documentation and the information on which the accused based themselves at the moment of translating the brochure into German and of formulating the title, i.e.

- original study in English
- article in the 'New Internationalist'

- several articles in the national and foreign press
- personal information and observations of individual members themselves,

the Nestlé company was never directly or indirectly accused of killing infants. The accusation, 'Nestlé Kills Babies', was made for the first time by this new formulation. The choice of this title was, above all, destined to be a 'peg' to draw public attention to the contents of the brochure. Whether this new formulation was justified or not was taken into account only to the extent that the alternative suggestion 'Nestlé Murders Babies' was eventually considered going too far. The duty of circumspection, which consists in taking all reasonable precautions so as to make sure of the truth of the utterance, in the opinion of the Court is conditional on:

- the circle of addresses
- the type of the accusation
- the human and specialist knowledge of those making the utterance
- the standing of those making the utterance.

Accordingly, the duty of circumspection must be all the greater the more serious the accusation and the wider its dissemination.

No doubt, the charge of killing is very serious, and the circle of addresses was very large considering that the publication had wide repercussions, also in the press. As for the accused, they are not any Tom, Dick and Harry who have thoughtlessly disseminated the defamatory utterance. On the contrary, they are people with a generally high level of education who put a high ethical value on the work they do in development research and information and who want to be taken correspondingly seriously.

By addressing as wide a public as possible by means of a formulation as spectacular and sensational as possible, the duty of circumspection, which, because of the grave charge of killing must be rigorously pursued here, was neglected. If an adequate measure of circumspection had been used, this formulation would not have come about. It was not, however, chosen against better knowledge - otherwise it would be a question of calumny - but it was chosen carelessly; in other words, the accused used too small a measure of circumspection when they decided to use the formulation 'Nestlé Kills Babies'. On the basis of the documents available to them when formulating the title, they were not justified in simply inferring this formulation.

In summary, it must be said that a defamatory statement was made and that the proof of exoneration failed, in other words that this defamatory statement is not true and proof of good faith is not established.

Objectively and subjectively, the conditions set out in Art. 173 P.C. are met. Whoever makes the charge of killing must know that it is defamatory. The utterance to a third party was intentional (Stratenwerth, p. 116). Thus, are found guilty:

- Dällenbach Christine, Enderli Andreas, Enderli Esther, Gurtner Bruno, Jenni Fritz, Jenni Viktor, Kurth Christoph, Rothegebühler Konrad, Strahm Rudolf, Loderer Brigitte und Schmocker Hans

of libel (üble Nachrede), continuously committed in May 1974 in Berne and Zurich, against the firm Nestlé Alimentana SA by the

utterance 'Nestlé Kills Babies' in the brochure of the 'Third World Action Group Berne' and in the 'safep' circular letter no. 1/74, as well as

- Püntener Richard and Wyss Walter

of libel, committed in May 1974 in Zurich, against the firm Nestlé Alimentana SA by the utterance 'Nestlé Kills Babies' in the 'safep' circular letter no. 1/74."

THE PENALTY

"Art. 173 P.C. provides a penalty of up to six months' imprisonment or a fine.

In accordance with Art. 63 P.C. the penalty is to be adjudged in conformity with the extent of guilt taking into consideration the motivation, the background and the personal circumstances. Objectively, there is grave guilt considering the charge of killing is serious, considering it reached a large circle of addresses and was directed at such and had been calculated to find a wide echo, also in the press, and considering the accused were aware that this utterance was defamatory.

Subjectively, however, other observations must be made.

The construction erected by the Defence that emergency conditions prevailed according to Art. 34 P.C. is untenable and cannot be accepted. Objective criticism is appropriate even when it is aggressive; careless and non-objective exaggeration, on the other hand, is not justified. Nevertheless, the theory of emergency concerning the accused has a true core. The members of the 'Third World Action Group Berne' are isolated with their concern and have difficulties in reaching the public; they remain within a small circle. This is the reason for running to the forefront. By means of the exaggerated, unjustified title they obtained a publicity that they could not have achieved otherwise. For the majority of them at least their concern is sincere. They recognize the problem and attempt to solve it in their own way. This way is unfortunate but does not in any way change their motivations.

The accused are all in good repute. No significant previous convictions are on record. Even if for some of the accused revolutionary considerations tending towards changing society may have played a part in the formulation of the title, it is inadmissible to totally dismiss the accused as leftist revolutionaries. What comes from the far left does not have to be bad as such. Development work is necessary, information more imperative than ever before. There must be objective criticism; it may even be aggressive, but it must keep within limits. These limits were exceeded by the accused when they chose the title of their brochure.

In consideration of all the factors relevant for adjudging the penalty, a fine of frs. 300.- each seems appropriate."