

International Media Law, Policy & Practice

Moot court case 2019

Authors:

**Dr. T. McGonagle and Dr. R. Pierik
(Amsterdam Law School)**

Background

1. Following its recent Declaration of Independence in 2014, the Republic of Nergensland has become the newest member state of the Council of Europe, the European Union, the Organization for Security and Co-operation in Europe and the United Nations. It has ratified all relevant European and international human rights treaties. Nergensland has a population of 2.9 million citizens.

2. The Prohibition of False Medical Information Act entered into force in Nergensland on 1 January 2018. Article 2(1) of the Act renders a criminal offence “the intentional public dissemination, orally or via any media, of false information pertaining to any vaccination(s) listed in the National Vaccination Programme (NVP)”. The NVP was drawn up by the Ministry of Health and it aims to fight serious infectious diseases. Vaccines are only included in the NVP if there is clear medical-scientific evidence that the vaccine is safe and effective in protecting against Diphtheria, Hepatitis B, Hib disease, Measles, Meningococcal disease, Mumps, Pneumococcal disease, Polio, Rubella and Whooping cough. Some of these diseases were the major cause of death of (young) children before such vaccination programmes were introduced. According to Article 1 (‘Definitions’) of the Act, “false information” includes all sorts of false claims about the effects and side-effects of vaccinations against illnesses such as the aforementioned ones.

3. The Explanatory Memorandum to the Prohibition of False Medical Information Act clarifies that the main reason for drafting the Bill was to limit freedom of expression in order to prevent unscientific and ungrounded claims from having so much weight in public debate that they would dilute the voice of evidence-based science. Thus, the Explanatory Memorandum further explains, the Bill was drafted to address the fear that such an imbalance in public debate on vaccination issues would result in well-intentioned but sceptical parents systematically overestimating the magnitude of the risks involved, causing them to doubt whether the benefits of vaccinations do in fact outweigh their dangers.

4. Relevant excerpts from the Prohibition of False Medical Information Act include:

Article 2(2)

A conviction for an offence, as described in Article 2(1), shall lead to the imposition of a fine of up to €3,000 and/or a prison sentence of up to 12 months and/or an appropriate period of community service, to be determined at the discretion of the trial judge.

Article 3(1)

When an offence, as described in Article 2(1), is committed via print or electronic media, or a social networking service, and the false information by that fact reaches more than 50,000

citizens, the editor of the media organisation or the operator of the electronic media service or social networking service through which the false information has been disseminated shall be subject to secondary criminal liability for the principal act.

Article 3(2)

A judicial finding of secondary criminal liability, in the sense intended in paragraph 1, shall be subject to a fine of up to €5,000.

Article 11

This Act is to be interpreted in full accordance with European and international human rights and media law.

Facts

5. On 3 January 2018, Dr. Prik, a well-known anti-vaccination campaigner, participated as an invited commentator in the popular talk show, *Science Matters*, which is produced and broadcast by the commercial broadcaster, Television Today. Dr. Buis, a pro-vaccination campaigner, also participated in the same edition of the show. During the programme, which was broadcast live, Dr. Prik claimed that measles vaccinations carry an irresponsibly high risk of autism. He waved a photo of an autistic child at the camera, asking, “would you *really* want to do this to *your* child?” The child’s eyes were blocked by a black bar.

6. Dr. Prik then referred to “leading scientific research” on the subject. When pressed by the interviewer and Dr. Buis to give details of the research, he mentioned an article by Andrew Wakefield in *The Lancet* in 1998. Dr. Buis then interjected: “But we all know that Wakefield’s claim has been fully debunked; the article has been retracted by the journal, and the author has been stripped of his medical licence and has lost his academic reputation. It is simply outrageous that you and scare-mongers of your ilk continue to refer to this vaccine-autism link – it is the most damaging medical hoax of the last 100 years”. “Nonsense,” was Dr. Prik’s reply, “Wakefield was the victim of a concerted smear campaign by the establishment, which only cares about the commercial interests of the pharmaceutical industry and vaccine-manufacturers who have bought off our doctors and politicians. Wakefield was a victim – he was the only one who dared to stand up to the medical establishment and tell the disturbing truth. And he paid the ultimate price. He’s the victim here and we are all victims. Our children are victims. And all because of government censorship and propaganda.” Dr. Buis then retorted: “Oh come on, *The Lancet* retracted his article and the *British Medical Journal* dismissed his research as an ‘elaborate fraud’. No properly peer-reviewed, published research has ever corroborated the vaccine-autism link since, has it? Has it? I’m asking you, has it?” Dr. Prik referred repeatedly to “very famous studies” by “top” experts, but he did not name the experts or give the titles of the studies or details of where they were published.

7. After the show was broadcast, Television Today received 57 complaints about Dr. Prik’s statements. In a press release, Television Today characterized the complaints as alleging that Dr. Prik’s statements were “false and/or misleading”. It also stated in the same press release that it would not take any action on the grounds that the show’s “lively discussion contributed to public debate on an important and controversial societal issue that remains taboo on NPSB”.¹ Other media – print, audiovisual and online – reported on the controversy and this generated a

¹ NPSB stands for ‘Nergensland Public Service Broadcaster’, which is Television Today’s major competitor in the national television market.

lot of extra web traffic, page views and downloads for the recording of the show that was posted on *Science Matters*' website. Clips of each item in the programme, including the item featuring Drs. Prik and Buis, were posted separately on the *Science Matters* website.

8. Science Matters' communications team also made a meme of Dr. Prik waving the photo of the autistic child and asking, "would you *really* want to do this to *your* child?". The meme involved Dr. Prik repeating the action at an accelerated pace and asking his rhetorical question in a higher pitch than in the original broadcast. It was tweeted by the *Science Matters* Twitter account. The meme, which used the hash-tag #anti-vaxxfax, became a trending topic on Twitter. It featured under 'In case you missed it' in many users' feeds and *Science Matters*' account was suggested to many users under 'Who to follow'.

9. Dr. Prik spread the clip from the television programme featuring himself and Dr. Buis by tweeting the link from his personal Twitter account, accompanied by the message: "Ignore government propaganda and do your own research. Your children's health is at stake!". He also liked and retweeted *Science Matters*' meme, accompanied by the message, "Stop outbreaks of autism! Stop fake government indoctrination!" Dr. Prik has approximately 85,000 followers on Twitter.

10. Dr. Prik was prosecuted under Article 2 of the Act for his original comments in the studio debate, as perpetuated and reinforced by his subsequent tweeting of the link to the clip and its accompanying message. He was moreover prosecuted under Article 3 of the Act for secondary liability for retweeting *Science Matters*' meme. He was convicted and fined €1,500 Euros and sentenced to a week of community service.

11. Television Today (as the broadcaster of *Science Matters*) was successfully prosecuted under Article 2 of the Act for creating and disseminating the meme and under Article 3 for secondary liability for broadcasting (and making available online) the show in which Dr. Prik made the impugned comments. It was fined €5,000.

12. Twitter was found to have incurred secondary liability by facilitating the dissemination through its service of Dr. Prik's tweet and *Science Matters*' meme. It was fined €3,500.

13. Dr. Prik, Television Today and Twitter believe that their rights to freedom of expression have been violated by the above and appealed the above decisions, without success, right up to the Supreme Court, the highest judicial authority in Nergensland. Their legal teams have therefore lodged a joint application with the European Court of Human Rights. Assume, for the purposes of this moot court case, that the admissibility requirements have been met.

14. European Digital Rights (EDRi), a Europe-wide network of civil society organisations dedicated to defending digital human rights, requested and has been granted leave to, submit an *amicus curiae* brief to the European Court of Human Rights elucidating: (i) the position of internet intermediaries in the online ecosystem, and (ii) the nature of their contribution to the right to freedom of expression within the ecosystem.

Disclaimer:

This case is completely fictitious.