

Damage Awards for Infringement of Privacy—The German Approach

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I.	INTRODUCTION	16
II.	RECENT DEVELOPMENTS IN THE JURISDICTION OF THE GERMAN FEDERAL COURT (BGH)— <i>CAROLINE VON MONACO</i>	18
	<i>A. The Pre-Caroline I Jurisdiction of the BGH</i>	19
	<i>B. The BGH's Reasoning in Caroline I</i>	21
	<i>C. The Change of Approach</i>	22
III.	THE EFFECTS OF THE <i>CAROLINE I</i> DECISION	25
	<i>A. The Subsequent Case Law—Refining the Boundaries</i>	25
	<i>B. The Reception in German Legal Literature</i>	32
IV.	RESTRICTIONS—ART. 5 <i>GRUNDGESETZ</i> AND THE DOCTRINE OF THE “HORIZONTAL EFFECT” OF BASIC RIGHTS IN GERMAN LAW	37
V.	THE INCORPORATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) INTO ENGLISH LAW	42
VI.	CONCLUSIONS: THE SIGNIFICANCE OF GERMAN LAW FOR ENGLISH LAW	44

There are few topics in the contemporary legal arena which are as heatedly debated in so many different countries as the adequate protection of an individual's right to privacy and its relationship to the freedom of speech and the press. As is usually the case when fundamental values conflict, striking an acceptable balance seems difficult, if not impossible. The U.S. courts, particularly the Supreme Court, tend to emphasize the protection of free speech provided for in the First Amendment. German courts, in contrast, have over the last few decades developed a technique of weighing the competing interests at stake in an ad hoc manner, balancing in each case the seriousness of the intrusion on the plaintiff's privacy against the value or importance of the particular information being disseminated. A

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series of recent judgments by the German Federal Court have underlined THE FACT that judges in Germany are not willing to grant unlimited rights to the press at the price of the individual's right to privacy.

The author describes the latest developments in Germany in this field and shows how the recognition of a right to privacy in German law has not curbed the freedom of the press. He argues that both values must be understood as integral parts of a free and democratic society, which complement rather than restrict one another. He further gives a short account of the recent incorporation of the European Convention of Human Rights into English law and highlights the possible implications this could have on the emergence of an English law of privacy.

Although this Article is primarily aimed at the English reader it will also be of interest to the American reader who has followed the controversy, fuelled by the death of the Princess of Wales, concerning the ever increasing intrusive newsgathering methods employed by the press, against which some states have taken action, such as California, by the enactment of its Paparazzi Harassment Act 1998.

I. INTRODUCTION

The media scene of the present day is characterised by an ever-growing supply of information. The plethora of sources of information¹ causes an increasingly ruthless struggle for the attention of consumers for a share of the market and for viewing and circulation figures. However, the victims of this struggle are rarely the competing publishers themselves but rather the objects of their reporting—public figures as well as less prominent individuals—who are dragged into the public spotlight without their consent and frequently in violation of their rights to privacy.

In German law this development has been opposed for a long time by academics and, most notably, by the higher courts wishing to do justice to the increasing importance of privacy rights. Although the German Civil Code (*Bürgerliches Gesetzbuch—BGB*) protects only some aspects of the right to privacy,² and bars compensation for

1. According to P. Schwerdtner, *Persönlichkeitsschutz im Zivilrecht*, in KARLSRUHER FORUM 1996: SCHUTZ DER PERSÖNLICHKEIT 43 (E. Lorenz ed., 1997), the number of German magazines competing for the attention of the readership has almost doubled within the last ten years (658 in 1996 as opposed to 349 in 1986). This is of course partly due to German reunification.

2. Cf. section 12 Bürgerliches Gesetzbuch [BGB] (right to one's name); sections 22-24 *Kunsturheberrechtsgesetz* (KUG) [Act on Artistic Creations] (right to one's image).

nonpecuniary loss (except where expressly provided by law³), the courts have over time created a “general right of personality” (*allgemeines Persönlichkeitsrecht*) based on fundamental principles of the German “Basic Law” (*Grundgesetz—GG*) and developed through case law.⁴ A number of remedies are available to enforce this right, ranging from the right to a counter-statement⁵ by the person whose right is affected to the award of damages for nonpecuniary loss.

The position under English law is, at first sight, quite different. Under English law there exists presently no separate and general right to respect for one’s private life (whether it be called a right to privacy or a right of personality), and such protection as there is tends to be piecemeal and incomplete.⁶ Thus, an aggrieved person must frame his other action under the heading of an existing tort—defamation, trespass, nuisance, passing off, malicious falsehood—or have recourse to other concepts such as breach of confidence, contempt of court or copyright infringement. If he fails in this attempt he will be without a legal remedy.⁷ As in Germany, several initiatives, seeking to introduce a broad statutory right to privacy have failed within the last few decades.⁸ This was partly because it was felt that such a right would be too difficult to define, and partly because its introduction would significantly undermine the freedom of the press.⁹

3. Section 253 BGB (“For a loss which is not a pecuniary loss, compensation in money may be demanded only as provided by law.” (Tilman U. Amelung trans.).

4. Two governmental initiatives for legislative reform failed because of reservations raised in public as a result of hostile press reportings. See *Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits—und Ehrenschatzes vom 18. 8. 1959*, BT-Drucksache III/1237 and *Referentenentwurf eines Gesetzes zur Änderung und Ergänzung schadensersatzrechtlicher Vorschriften* (Bundesjustizministerium, January 1967).

5. A counter-statement is a statement by the victim of the infringement which contradicts, for example, a published article.

6. See, e.g., B. Neill, *Privacy: A Challenge for the Next Century*, in *PROTECTING PRIVACY* 1, 2 (B.S. Markesinis ed., 1999); E. Barendt, *Privacy as a Constitutional Right and Value*, in *PRIVACY AND LOYALTY* 1 (P. Birks ed., 1997); B.S. MARKESINIS, *THE GERMAN LAW OF OBLIGATIONS, VOLUME II: THE LAW OF TORTS: A COMPARATIVE INTRODUCTION* 416 (3d ed. 1997); B.S. Markesinis, *Our Patchy Law of Privacy—Time to Do Something About It*, 53 *MOD. L. REV.* 802, 805 (1990); R. Redmond-Cooper, *The Press and the Law of Privacy*, 34 *INT’L & COMP. L.Q.* 769 (1985).

7. See *Tolley v. Fry*, 1 K.B. 467, 478 (C.A. 1930); Lord Bernstein of Leigh v. Skyviews & Gen. Ltd., Q.B. 479, 488 (1978); *Kaye v. Robertson*, F.S.R. 62, 66 (1991). The Press Complaints Commission (PCC), the main press self-regulation body, has no powers to impose penalties for a failure to comply with its Code of Conduct or to order any payment of compensation to the victim.

8. See generally R. WACKS, *PRIVACY AND PRESS FREEDOM* 3-10 (1995).

9. See YOUNGER COMMITTEE ON PRIVACY, *REPORT OF THE COMMITTEE ON PRIVACY*, 1972, Cmnd. 5012, at 10-12; CALCUTT COMMITTEE ON PRIVACY AND RELATED MATTERS, *REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS*, 1990, Cmnd. 1102, ch. 12, at 46-53.

It is unclear to what extent attitudes have changed in the intervening period.¹⁰ However, English law faces an event which is likely to mark the beginning of a new era in privacy law: the incorporation of the European Convention on Human Rights (ECHR) into British domestic law including Article 8 of the Convention protecting an individual's right to respect for his private and family life.¹¹ In the opinion of Lord Bingham, the Lord Chief Justice, the development of a law of privacy through individual cases before the courts will be an inevitable consequence of this incorporation.¹²

It has been pointed out that "the debate about a possible future of a tort of privacy would best be advanced through a careful study of how other systems which recognise the tort have fared in practice."¹³ English law is on the eve of a legal development which may well be comparable with the development that began in post-war Germany and has not yet come to an end. This Article will describe the current state of the German law of privacy with special reference to the recent debate rekindled by the Federal Supreme Court (*Bundesgerichtshof*—BGH) concerning the way of calculating damages in cases of infringement of privacy. A careful analysis, will reveal that protection of privacy and freedom of speech are not irreconcilable rights.

This analysis will first address the requirements and purposes of damages awards. It will then focus on the reception of the BGW's case law in German legal writing and in the press. Finally, the restrictions on the award of damages will be examined.

II. RECENT DEVELOPMENTS IN THE JURISDICTION OF THE GERMAN FEDERAL COURT (BGH)—CAROLINE VON MONACO¹⁴

In Germany the need for effective protection of personality became increasingly evident in the course of the twentieth century. Two factors are commonly said to have had a crucial impact on the BGH's decision to deviate from the constant refusal of the Imperial Court (*Reichsgericht*—RG) to recognise a *general* right of

10. In the *Daily Telegraph* (London), Feb. 5, 1998, at 1, the Prime Minister is reported to have said that "the Government had not reached any final views on the introduction of new rules on press intrusion."

11. The Human Rights Act 1998 came into force on October 2, 2000.

12. See THE TIMES (London), Oct. 9, 1997, at 12.

13. B.S. Markesinis & N. Nolte, *Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places*, in PRIVACY AND LOYALTY 113, 131 (P. Birks ed., 1997).

14. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 128, 1 = Neue Juristische Wochenschrift (NJW) (1995) 861 (Caroline I).

personality.¹⁵ First, as a result of the utter contempt for human values shown by the Nazi regime, there was a desire to restore fundamental values like human dignity and personal freedom, values enshrined in the Constitution of 1949 (*Grundgesetz—GG*). Secondly, it was clear that technological progress had increased the dangers of unauthorized intrusions into the private sphere of others through the use of various surveillance devices.¹⁶

The development of the general right of personality in post-war Germany has been described frequently and comprehensively both in German¹⁷ and English.¹⁸ Nevertheless, for the sake of coherence and a better understanding of the main part of this Article, a short summary of that development will be provided first.

A. *The Pre-Caroline I Jurisdiction of the BGH*

The post-War development commenced in 1954 when the BGH delivered its ground-breaking *Schacht* decision.¹⁹ The plaintiff, an attorney, had written a letter to a weekly periodical, demanding that certain corrections be made in an article concerning his client, Schacht, a former President of the Reichsbank under Hitler. Without replying, the periodical printed this letter as a “Letter to the Editor” with omissions which made it seem as if the plaintiff had taken a personal stance on the matter. The plaintiff claimed an encroachment upon his personality rights and successfully demanded the correction

15. E.g., Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 69, 401 (403); RGZ 79, 397 (398); RGZ 94, 1.

16. This reason had already been named by Samuel D. Warren & Louis D. Brandeis in their famous article *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). For the present awareness in the U.S. of intrusion into the private sphere by means of modern technologies see L.B. Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1999); Comment, *Privacy, Technology, and the California “Anti-Paparazzi” Statute*, 112 HARV. L. REV. 1367 (1999).

17. From the numerous German publications on the *General Right of Personality* the following are selected: H. HUBMANN, DAS PERSÖNLICHKEITSRECHT (2d ed. 1967); P. SCHWERDTNER, DAS PERSÖNLICHKEITSRECHT IN DER DEUTSCHEN ZIVILRECHTSORDNUNG. OFFENE PROBLEME EINER JURISTISCHEN ENTDECKUNG (1977); P. Schlechtriem, *Inhalt und systematischer Standort des allgemeinen Persönlichkeitsrechts*, DEUTSCHE RICHTERZEITUNG [DRiZ] 65 (1975); H. Ehmann, *Zur Struktur des Allgemeinen Persönlichkeitsrechts*, JURISTISCHE SCHULUNG [JuS] 193 (1997).

18. A comprehensive representation, including a translation in full of the leading German decisions on the subject, can be found in B.S. Markesinis, *The German Law of Obligations, Volume II: The Law of Torts: A Comparative Introduction* 376 (3d ed. 1997); see also H. Stoll, *The General Right to Personality in German Law*, in PROTECTING PRIVACY 29 (B.S. Markesinis ed., 1999); W. Lorenz, *Privacy and the Press—A German Experience*, in BUTTERWORTH LECTURES 1989-1990, at 79 (1990); K. Zweigert & H. Kötz, *Introduction to Comparative Law* 724 (Tony Weir trans., 2d rev. ed. 1992).

19. BGHZ 13, 334 (*Schacht-Briefe*), translated in Markesinis, *supra* note 18, at 376.

of this misrepresentation by a suitable retraction. The BGH held that since the *Grundgesetz* had recognized the inviolability of dignity (Art. 1(1) GG) as well as the right to free development of personality (Art. 2(1) GG), the general right of personality had to be regarded as a constitutionally guaranteed, fundamental civil right to be respected by everyone in daily life.

This rule was reaffirmed and extended in the equally important case of the *Gentleman Rider*.²⁰ There, the plaintiff's picture was taken in a riding tournament. It was then used without his consent in advertising the defendant's product, which was reputed as being able to improve sexual potency. The BGH held that the plaintiff's general right of personality had been infringed and awarded DM 10,000 as damages for nonpecuniary loss, contrary to the express statutory rule in § 253 BGB.²¹ The judges took the view that the protection of the human personality as a fundamental constitutional value would be largely illusory without a right to compensation in private law, and that therefore, it would be intolerable to refuse compensation for this nonpecuniary harm. The award of damages was however restricted to cases of serious injury to personality where no other remedy providing adequate redress could be found.

By deriving from the Constitution a general right of personality as an absolute right, the BGH touched upon a controversial issue of constitutional law. The basic rights guaranteed by the *Grundgesetz* essentially protect the citizen against excessive state power. It is, however, far from self-evident that the same guarantees exist as between private individuals. This important issue will be addressed below in the context of the constitutional right to free speech and the doctrine of the so-called "horizontal effect" of basic rights in German law.

The question of damages for nonpecuniary loss arose again in a case concerning a fictitious interview with Princess Soraya, the ex-wife of the Shah of Iran, and a well-known figure of international society. This time the Constitutional Court (*Bundesverfassungsgericht*—BVerfG) was given the opportunity to rule on the matter.²² Reviewing the BGH's decision in the same case,²³ the Court affirmed the strong need for protection of the human personality. The Court held that the award of nonpecuniary damages

20. BGHZ 26, 349 (*Herrenreiter*), translated in Markesinis, *supra* note 18, at 380.

21. Section 253 BGB.

22. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 34, 269 = NJW (1973) 1221 (Soraya).

23. Bundesgerichtshof [BGH] NJW 685 (1965).

for infringements of privacy was not contrary to the Constitution as it served the enforcement and effective protection of an individual's dignity and personality rights which lay at the core of the constitutional order itself. This constitutional approval of the BGH's position was the last link in a chain of decisions which led to the full recognition of nonpecuniary damages for infringements of personality as part of the German legal order.

B. The BGH's Reasoning in Caroline I

Almost to the day, thirty years after its decision in *Soraya*, the BGH was again called upon to render a decision in an action for damages for an infringement of the private sphere of a member of the high nobility. The defendant, a German tabloid, had published an allegedly "exclusive interview" with the plaintiff, Princess Caroline of Monaco. The article was headed "Caroline—she speaks for the first time—of sadness, of hate for the world, of her search for happiness" and was illustrated with private photos of the Princess and her family. In fact, the interview was entirely fictitious.

The Court held²⁴ that the defendant had seriously infringed the Princess's general right of personality. Her right to self-determination of her appearance in public²⁵ was violated in an "objectively" grave manner by the false attribution of comments which she indisputably had not made. The magazine deliberately exploited the Princess's private life to promote its own commercial interests. This reckless "forced commercialisation" (*Zwangskommerzialisierung*) of her personality demanded a special award of damages. Although the Court did not go as far as advocating a restitutionary approach, it pointed out that the magazine's profit derived from the infringement of another person's right, was a factor which could legitimately be taken into account when assessing the plaintiff's damages. The BGH dismissed the defendant's appeal and referred the case to the Hamburg Court of Appeal for final determination. The Court of Appeal,²⁶ following the BGH's findings, reconsidered the amount of nonpecuniary damages (originally fixed at 30,000 DM) and awarded

24. BGHZ 128, 1 (12).

25. The concept of self-determination of one's own appearance was developed by the *Bundesverfassungsgericht* in BVerfGE 35, 202 (*Lebach*), translated in Markesinis, *supra* note 18: 'Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof.'

26. OLG Hamburg, NJW (1996) 2870.

the Princess 180,000 DM damages for nonpecuniary loss, the highest amount ever for the infringement of the general right of personality.²⁷

C. *The Change of Approach*

Caroline I caused a considerable stir in German legal literature.²⁸ According to settled case law,²⁹ once an infringement of the general right of personality is established, the victim of the infringement can claim damages for nonpecuniary loss if the invasion of his right is “serious.” Here the motives of the defendant, the seriousness of his fault, and the mode and extent of the harmful invasion are relevant considerations. Special emphasis is placed on the factor of “satisfaction.” A nonpecuniary loss can hardly be expressed in figures, and thus, true compensation in the sense of *restitutio in integrum* is difficult. Therefore the award of damages must take into account that the tortfeasor owes the injured person satisfaction for the harm done. However, the award of damages is a remedy of last resort, that is, there must not be any other remedy providing adequate redress. The BGH confirmed these principles,³⁰ but it did not stop there. It introduced an additional factor, to be taken into consideration when determining the seriousness of this special case of infringement of personality, namely *the forced commercialisation of the plaintiff’s personality for purposes of furthering the defendant’s own economic interests*.³¹ To make sure that the compensatory award forms a real counterpart to the defendant’s attempt to profit, the court relied on a factor which, viewed from the traditional German perspective, appears to be an alien element in the context of civil liability. According to Court, the specific nature of the claim calls for consideration of the factor of *deterrence* when calculating damages.³² The size of the award should be such as to *deter* the tortfeasor from further infringements of the plaintiff’s rights.³³ Such deterrence

27. It is, however, important to add that this award covered three separate publications, see *infra* Part III.

28. See R. Gerhardt, *ZRP-Rechtsgespräch*, ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 366 (1996): “A new epoch of damages for non-pecuniary loss;” W. Seitz, *Prinz und die Prinzessin—Wandlungen des Deliktsrechts durch Zwangskommerzialisierung der Persönlichkeit*, NJW (1996) 2848: “A judgment . . . that shakes the dogmatic foundations.”

29. See BGHZ 26, 349 (Herrenreiter); BGHZ 39, 124 (Fernsehansagerin); BGHZ 128, 1 (Caroline I).

30. BGHZ 128, 1 (12).

31. BGHZ 128, 1 (16).

32. BGHZ 128, 1 (16).

33. Erich Steffen who presided over the BGH chamber that decided *Caroline I*, later coined the expression: “Damages for pain and suffering should be painful for the publisher.” Gerhardt, *supra* note 28, at 366.

requires a substantial increase in the sums awarded so far for infringements of privacy.

This approach has not met with general approval. As mentioned above, the notions of “prevention” and “deterrence” are traditionally associated with objectives of criminal law. According to the orthodox position, it is for the criminal law to punish, and for the law of damages to compensate for loss unlawfully caused.³⁴ By introducing the factor of deterrence in cases of infringement of privacy, the BGH arguably crosses the borderline between compensation and punishment and has therefore, been criticized for blurring the distinction between civil law and criminal law.³⁵ However, without examining in detail the relationship between damages and punishment in German law, it can be shown that the principle of deterrence is not as alien to the German law of privacy as it may seem. In fact, as early as 1961,³⁶ the BGH pointed out that, without the award of nonpecuniary damages, the law would surrender both the most effective and often the only means of safeguarding the respect for the human personality. Similarly, the Constitutional Court justified the award of nonpecuniary damages in *Soraya*,³⁷ inter alia, on the ground that its deterrent effect could provide for the greater observance of journalistic ethics by the press.³⁸ What is new about *Caroline I* is the fact that the Court *expressly* mentions “deterrence” as a factor which has to be taken into account in awarding and in calculating damages. Other courts have followed this lead.

The Hamburg Court of Appeal has made clear that the principles developed by the BGH should be taken seriously. Referring to the amount of DM 180,000 awarded to Princess Caroline it announced dryly that “the question of whether or not even higher amounts should be awarded” would depend on “the media’s future conduct.”³⁹

What does all this mean for the press? Without a doubt, certain forms of sensational journalism are intolerable. But it is no less indisputable that freedom of expression and freedom of the press rank

34. H. LANGE, SCHADENSERSATZ 9 (2d ed. 1990); H.J. Hirsch, *Zur Abgrenzung von Strafrecht und Zivilrecht*, in Festschrift für Karl Englisch zum Siebzigsten Geburtstag 304 (1969).

35. Cf. C.W. Canaris, *Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts*, in Festschrift für Erwin Deutsch 85 (H.-J. Ahrens et al. eds., 1999); Seitz, *supra* note 28, at 2848.

36. See BGHZ 35, 363 (367) = NJW (1961) 2059 (*Ginseng*).

37. BVerfGE 34, 269.

38. See also OLG Karlsruhe, NJW (1973) 851 (853) (regarding a different context).

39. OLG Hamburg, NJW (1996) 2870 (2872).

among the noblest of constitutional values.⁴⁰ Are these fundamental freedoms in danger of being unduly restricted by the BGH's recent decision?

It is a well-established principle of German law that both the general right of personality and freedom of expression are essential aspects of the democratic order, with the result that neither one can claim precedence in principle over the other.⁴¹ Hence, in case of a conflict, the divergent interests ought to be weighed carefully against each other. Accordingly, in *Caroline I* the BGH has confirmed its constant practice,⁴² albeit in dictum, that damages may not reach such an amount as to curtail excessively the freedom of the press.⁴³ Yet a perfect balance may often not be possible. In such cases it must be determined, having regard to all the surrounding circumstances of the individual case, which interest merits priority.

In *Caroline I* the BGH put the Princess' right to privacy first. The following Part explores the effect of this decision on subsequent case law. Can we detect a general tendency of the courts to give priority to privacy at the expense of freedom of expression? Can *Caroline I* be said to have established a new "trend?" As will be illustrated, the answer to the first question is in the negative, but the answer to the latter remains uncertain. Too few cases have been decided to date to give a comprehensive reply. But the analysis of some recent decisions on the matter in the first part of the next section will show that the courts are not inclined to deprive the media of their basic rights. This view is supported by German legal literature and by the reaction of the Press, which will be analysed in the second and third part, respectively, of the next section.

40. Cf. BVerfGE 7, 198 (208) (*Lüth*), and the Court's reference to J. Cardozo ("the matrix, the indispensable condition of nearly every other form of freedom").

41. See BVerfGE 35, 202 (*Lebach*), in Markesinis, *supra* note 18, at 390; BVerfGE 54, 208 (*Böll/Walden*); BVerfGE 54, 148 (*Eppler*). Compare the decision of the United States Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) where the Supreme Court held that "[r]especting the fact that press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society,' . . . [w]e continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." It seems, however, that in reality, as Professor Anderson has recently noted, privacy law in the United States resolves virtually all conflicts between privacy and freedom of speech/information in favour of the latter. See D.A. Anderson, *The Failure of American Privacy Law*, in PROTECTING PRIVACY 139, 140 (B.S. Markesinis ed., 1999).

42. Cf. BGHZ 73, 120 (123); BGH, NJW (1997) 1371 (*Markwort/Titanic*).

43. See BGHZ 128, 1 (16).

III. THE EFFECTS OF THE *CAROLINE I* DECISION

A. *The Subsequent Case Law—Refining the Boundaries*

In order to analyse the subsequent case law, it is necessary to recall the criteria set up by the BGH for the award of gain-related, nonpecuniary damages. As seen above, the court requires (1) a “grossly negligent” infringement of the plaintiff’s right of personality and (2) that the defendant’s *aim was to further his own commercial interests*. The first criterion refers to a certain category of *fault*, the second looks at the defendant’s *motives*. From the court’s notion of “forced commercialisation” one can, in addition, derive a third element, that reappears in later cases: (3) the defendant’s *deliberate disregard of the plaintiff’s express, contrary will*. This criterion refers to the *mode* of the infringement.

In the following section some recent decisions will be examined in order to clarify these criteria and their impact on the quantum of damages awarded. Thereby a distinction shall be made between “pure” privacy cases, which involve no defamatory element, and cases in which the defendant infringed the plaintiff’s general right of personality by defaming the plaintiff. Although the latter category does not necessarily involve an infringement of the defendant’s right of privacy, it becomes relevant to the question of whether there has been a general increase in the award of damages for infringements of the right of personality.

About a year after the *Caroline I* judgment was delivered, three further cases concerning Princess Caroline of Monaco came before the BGH in quick succession.⁴⁴ In *Caroline II* the Princess sued the defendant publisher over front page headlines in two of his magazines which suggested that she suffered from breast cancer. The court held that details about a person’s state of health concerned his or her private sphere. Quite apart from the fact that the Princess indisputably did not suffer from cancer,⁴⁵ the court applied *Caroline I* and considered that the crucial factor was that the defendant had exploited the Princess’s personality in order to further his own

44. BGH, NJW (1996) 984 (*Caroline II*); BGH, NJW (1996) 1128; BGHZ 131, 332 (*Caroline III*); BGH, NJW (1996) 985 (*Caroline’s son*). For the sake of simplicity these decisions will hereafter be referred to as *Caroline II*, *Caroline III* and *Caroline’s son*.

45. In general, the truth or falsity of the published facts is irrelevant in privacy cases. This seems to be true for the common law as well, see WACKS, *supra* note 8, at 48: “The gravamen of the complaint in a ‘privacy’ case is not that the information published is false, but that it has been published at all.” Yet, in German law, the falsity of the published facts can come into play in the determination of the *seriousness* of the infringement.

commercial interests. This “ruthless forced commercialisation” justified nonpecuniary damages amounting to DM 100,000.

The court’s reasoning in a case concerning the son of Caroline of Monaco also focused on the element of forced commercialisation of the plaintiff’s rights.⁴⁶ The plaintiff, the Princess’s eldest son Andrea, sought compensation for the harm he had suffered following the publication of a series of photos in the defendant’s magazines. The BGH held that the publication of the pictures in question, showing the plaintiff going about his “everyday” activities, did not by itself constitute an infringement of his right of privacy sufficiently serious to justify the award of nonpecuniary damages. However, the court found that the seriousness of the infringement lay in the fact that the defendant had deliberately and repeatedly ignored the plaintiff’s express, contrary will with a view to furthering his own commercial interests. The plaintiff was thus entitled to damages for his nonpecuniary loss.⁴⁷

Besides the criteria discussed so far, the *Caroline* cases offer another interesting explanation of the increasing willingness of German courts to award nonpecuniary damages in cases where the intrusion on privacy consists of an infringement of the plaintiff’s “right to his/her own image” (*Recht am eigenen Bild*).⁴⁸ Unlike the cases of “written” publications, where the plaintiff may be entitled to a “disclaimer” (*Widerruf*) or a “correction” (*Richtigstellung*), effective protection against an unauthorized publication of one’s own picture can only be secured by an action for nonpecuniary damages.⁴⁹ This argument touches upon the problem of the effectiveness of legal protection upon which the credibility of the legal order is based.⁵⁰ Moreover, it is closely linked to the important factor of *deterrence* which comes into play once the requirements for the award of

46. BGH, NJW (1996) 985 (*Caroline’s son*). BGHZ 131, 332 (*Caroline III*) (concerning the publication of photographs of Caroline having dinner with her boyfriend in a secluded part of a French garden restaurant). The decision is of great significance for the *scope* of legal protection under the German law of privacy of public figures, see Markesinis & Nolte, *supra* note 13, at 113. The question of nonpecuniary damages was however not raised before the BGH. I shall thus not deal with this decision further.

47. The case was sent back to the Court of Appeal for the quantification of damages. The BGH did not consider DM 20,000 to be excessive.

48. See Sections 22-24 *Kunsturheberrechtsgesetz* (KUG) [Act on Artistic Creations].

49. BGH, NJW (1996) 985 (1986); see also BGH, NJW (1996) 1131 (*Lohnkiller*); OLG Bremen, NJW (1996) 1000 (*Willi Lemke*).

50. The argument is of course not new; see BVerfGE 34, 269 (*Soraya*) where the Constitutional Court held that the award of nonpecuniary damages aimed at the *effective protection in civil law* of the human personality and its dignity which are in the center of the constitutional system of values.

nonpecuniary damages are fulfilled. It appears from the *post-Caroline* cases that this factor has had the greatest impact on the amounts of nonpecuniary damages awarded in these cases.

It has been noted above that a distinction should be made between defamation and privacy cases. However, especially in German law, the demarcation line is often difficult to draw.⁵¹ Theoretically, one can see the difference between defamation and privacy, not least because the former involves *false* facts whereas the latter involves the revelation of *true* facts. Yet, in German law, the dividing line has been blurred by the construction of the “general right of personality” as an all-embracing right which protects against all forms of intrusion on personality⁵² and, moreover, by the courts’ desire to move defamation actions out of the province of the criminal law.⁵³ The result is that, as far as calculation of damages is concerned, German courts no longer distinguish between “defamation” and “privacy.”⁵⁴ Thus, Wacks’ assertion regarding the American law, that an action in defamation frequently provides a means of protecting the plaintiff’s “privacy,”⁵⁵ is probably true for German law, too. The concepts of “defamation” and “privacy” are closely associated and consequently a certain overlap exists in the case law.

In a case called *Silence of the Shepherds*, a Catholic priest sought nonpecuniary damages from the publishers of a tabloid for the publication of a picture of him in connection with a report about alleged sexual offences by Catholic priests against minors.⁵⁶ The decision of the Koblenz Court of Appeal, in favour of the plaintiff, was based on two grounds. First, the defendant had infringed the plaintiff’s “right to his own image”⁵⁷ and thereby encroached upon his right of personality. Secondly, this infringement justified the award of nonpecuniary damages because the publication had put the priest in a false light. In other words, while the court’s finding that the defendant had committed the “tort of privacy” was founded on the unauthorized publication of the plaintiff’s picture, the court relied on

51. Interestingly, in a case note on *Caroline I*, the decision is discussed jointly with the English defamation case of *Charleston v. News Group Newspaper Ltd.*, 2 All E.R. 313 (1995); see 2 EUR. REV. PRIVATE L. 237 (1997).

52. See BGHZ 24, 72 (78); BGHZ 30, 7 (11).

53. Compare sections 186, 187 Strafgesetzbuch [StGB] [Penal Code] and section 823(2) BGB.

54. Defamation, however, will as a rule mark the case as more serious and, therefore, attract higher damages (see below).

55. WACKS, *supra* note 8, at 89.

56. OLG Koblenz, NJW (1997) 1375 (*Schweigen der Hirten*—the somewhat peculiar name of the case stems from the title of the publication in question).

57. See sections 22-24 (KUG) [Act on Artistic Creations]

the falsity of the facts to determine the amount of nonpecuniary damages.

This Article is concerned with the requirements, objectives, and size of damage awards for infringement of privacy. As seen above, the German courts apply the same principles in calculating damages, regardless of the nature of the “tort” at issue. This is substantiated by the fact that the courts have used the BGH’s reasoning in the privacy cases of *Caroline I*⁵⁸ and *Caroline II*⁵⁹ also in genuine defamation cases.⁶⁰ Thus it seems appropriate to examine some defamation cases, too, in order to obtain a complete answer to the question whether there has been a noticeable increase in the amount of nonpecuniary damages awarded in privacy cases.

In *Stern-TV*⁶¹ the defendants broadcast a TV programme concerning the plaintiff, the medical director of a large hospital. On the basis of public criticism of the plaintiff’s professional skills, the defendants reported a number of alleged cases of severe malpractice. On a more careful investigation, however, they could have discovered that the public allegations had been proved false in proceedings before the General Medical Council. The broadcast resulted, *inter alia*, in the plaintiff’s dismissal from the hospital. The plaintiff successfully claimed damages for his pecuniary⁶² and nonpecuniary losses. Considering the case in the light of *Caroline I*, the BGH held that the factor of deterrence had to be taken into account to the same extent as the fact that the broadcast had severely damaged the plaintiff’s reputation as a doctor. Together these factors justified an award of nonpecuniary damages higher than the DM 50,000 awarded to the plaintiff by the Court of Appeal of Köln. The BGH thus remanded the case to the lower court for a new assessment.

In another defamation case, the Bremen Court of Appeal increased the original sum awarded by the District court from DM 20,000 to DM 30,000.⁶³ The plaintiff was a well-known figure in the field of sports and politics in Bremen. In his memoirs the defendant, former President of the Hamburg Bureau for Protection of the

58. BGHZ 128, 1.

59. BGH, NJW (1996) 984.

60. See BGH, NJW (1997) 1148 (*Stern-TV*); OLG Bremen, NJW (1996) 1000 (*Willi Lemke*); OLG Koblenz, NJW (1997) 1375 (*Schweigen der Hirten*).

61. BGH, NJW (1997) 1148.

62. The *pecuniary* loss, which the plaintiff suffered (and which is recoverable under section 823(1) BGB) resulted mainly from the loss of income following his dismissal (see also OLG München, NJW (1988) 915 (*Nacktbader*)). As this article is concerned with *nonpecuniary* losses I shall not dwell upon this question any further.

63. OLG Bremen, NJW (1996) 1000 (*Willi Lemke*).

Constitution (*Landesamt für Verfassungsschutz*), revealed the plaintiff's activity as an intelligence agent. While this was true in principle, the defendant generated the false impression that the plaintiff had also worked for the Soviet KGB. The court accepted the validity of the *Caroline* criteria in the context of an action for defamation. Not only did the plaintiff put the defendant into a false light, but he had also published his book without the plaintiff's consent thereby deliberately disregarding the opposing interests of the latter. Although the court did not expressly mention the element of deterrence, it applied *Caroline I* and stressed that the very purpose of Arts. 1 and 2 of the Basic Law justified a higher award of nonpecuniary damages.⁶⁴

The case law considered thus far may cause some concern to the English common lawyer who is confronted with the possible introduction of a tort of privacy into the English legal order. Are German courts muzzling the press? Is the right to privacy the beginning of the end of the right to free speech? Three points can be made in order to allay these fears.

(1) First, the comparison of the sums that have been awarded in *Caroline I* and the cases which have followed it with those awarded in the past demonstrates that the figures have not gone up excessively. For instance, in *Caroline I*, the Princess of Monaco was awarded DM 180,000 by the Hamburg Court of Appeal⁶⁵ for three separate publications. Although it is not made clear how this sum breaks down in relation to the individual publications, it is arguable that it was calculated proportionately, namely DM 60,000 for each publication. In *Caroline II* the BGH held that a sum of DM 50,000 per publication would "not go beyond the scope of what was adequate for an effective prevention."⁶⁶ Nonpecuniary damages on this scale, however, have not been unknown both in privacy and in defamation cases prior to the *Caroline* decisions. Well-known is the case of *Prince Bernhard of the Netherlands*⁶⁷ who, thirty years ago, was awarded DM 50,000 for defamatory allegations in a tabloid. Some years later, a prominent German politician obtained DM 50,000 for the defamatory assertion that he had tried to bribe members of the opposition party.⁶⁸ And only a few months prior to the BGH's decision in *Caroline I* the Court of

64. *Id.* at 1001.

65. OLG Hamburg, NJW (1996) 2870.

66. BGH, NJW (1996) 984 (985).

67. OLG Hamburg, Archiv für Urheber-, Film-, Funk- und Theaterrecht [UFITA] (1971) 322.

68. BGH, NJW (1977) 1288.

Appeal of Karlsruhe granted the German tennis player Stefanie Graf DM 60,000 for the disparagement in a pop song that insinuated an incestuous relationship between Graf and her father.⁶⁹

Thus, damage awards for infringements of personality can hardly be said to have increased excessively. On the contrary, even though the courts seem determined to go to the upper-limits of the existing scale of nonpecuniary damages in cases where the plaintiff's personality has been exploited deliberately for the promotion of the defendant's commercial interests,⁷⁰ they are not prepared to extend significantly the scope of damages beyond what has been awarded in the past. Thus, the fears that freedom of expression and freedom of the press may be overly restricted by the size of damage awards, appear to be unfounded. However, one should add that, at this stage, it is not clear whether the same "restraint" will be shown in the future.⁷¹

(2) Secondly, the cases show that the courts have not interpreted *Caroline I* as a licence to award damages for nonpecuniary loss in an uncontrollable and indiscriminate manner. Rather, damages are understood as a remedy of last resort for they may only be awarded if (a) the infringement is serious and (b) if no other remedy providing adequate redress is available.⁷² With regard to the latter, it has consistently been held that the protection of privacy would be patchy and inadequate without the award of damages.⁷³ As to the seriousness of the infringement, the *Caroline* decisions show the tortfeasor's motives, the mode of the interference, and the degree of fault to be relevant factors. The courts take these criteria seriously. This is demonstrated by cases where the quantum of damages originally awarded was reduced on appeal.

69. OLG Karlsruhe, NJW (1994) 1963.

70. BGHZ 128, 1 (16) (*Caroline I*); OLG Hamburg, NJW (1996) 2870 (2874):

It is essential to increase in a considerable manner the amount of damages for an infringement of the right of personality in the form of a forced commercialisation of the victim's personality in order to guarantee a sufficiently deterrent effect. In this case it is not disproportionate . . . if the 'sanctioning risk' (*Sanktionsrisiko*) is increased in accordance with the specific nature of the infringement.

71. In a recent decision by the District Court of Hamburg (not reported) Prince Ernst August of Hanover was awarded DM 100,000 for infringements of his right to his own image. However, this covered 15 different publications. See FRANKFURTER ALLGEMEINE ZEITUNG, May 9, 1998, at 33.

72. BGHZ 26, 349 (Herrenreiter), in Markesinis, *supra* note 18, at 380.

73. BGH, NJW (1971) 698 (699); NJW (1985) 1617 (1619); BGHZ 128, 1 (16) (*Caroline I*); see also M. Prinz, *Geldentschädigung bei Persönlichkeitsrechtsverletzungen durch die Medien*, NJW (1996) 953.

In the recent *Rotlichtfürst* (“prince of the red light district”) case, the plaintiff who was a well-known estate agent in Saarbrücken was accused of having been a “pimp” and “prince of the Saarbrücken red light district” in an article which was published by the defendant in his local newspaper. In court these allegations could not be proved. At first instance the plaintiff was awarded DM 20,000 for the infringement of his right of personality. On appeal this sum was reduced to DM 7,000. The Court of Appeal of Saarbrücken held that, considering both the small circulation of the newspaper in question and the possibility that the allegations were true,⁷⁴ the publication could not be said to constitute an infringement sufficiently serious to justify the award of a higher sum.⁷⁵

Similarly, in the aforementioned *Silence of the Shepherds* case, the quantum of damages was reduced by the Koblenz Court of Appeal from initially DM 30,000 to DM 20,000.⁷⁶ Referring to *Caroline I* the court took the view that, in case of a *deliberate* infringement of the right of personality for commercial purposes, the sum awarded by the court of first instance would not go beyond what was reasonable. In the case before it, however, the court had to take into account that the defendant could only be held liable for “*gross negligence*.”

The German courts seem thus able to react flexibly to different forms of infringements according to the significance of the interference, the manner of the publication, and the degree of fault. It may even be permissible to conclude that, because of this flexibility, damages provide a means of compensating the victim for his nonpecuniary loss which places less restriction on the freedom of expression and the freedom of the press than a “counter-statement” (*Gegendarstellung*) or a “correction” (*Richtigstellung*) which the press undertaking may possibly be forced to print on the front page of the published product.⁷⁷

(3) Thirdly, the courts hardly restrict freedom of speech where it matters most, i.e. the political arena.⁷⁸ Thus, only a few cases can be found where the courts have prevented someone from expressing an

74. This confirms the validity of the assertion made *supra* that the truth or falsity of the published facts can be relevant for the determination of the seriousness of the infringement. See *supra* note 45 and accompanying text.

75. OLG Saarbrücken, NJW (1997) 1376 (1379).

76. OLG Koblenz, NJW (1997) 1375.

77. See the recent decision of the *Bundesverfassungsgericht*, Beschluss vom 14.1.1998, NJW (1998) 1381, where the Court confirms that the freedom of the press does not demand that the front pages of magazines be kept free of counter-statements or corrections.

78. See Markesinis & Nolte, *supra* note 13, at 129.

opinion in a political context.⁷⁹ The majority of the cases which come before German courts concern gossip published in the popular press. These stories are often simply not of public interest, and this may be true even if a so-called public figure is involved.⁸⁰ In such a case, however, the intrusion on another person's private sphere will rarely be justified.⁸¹

Let us then return to the questions raised at the end of the last section. Can we detect a general tendency of the courts to give priority to privacy at the expense of freedom of expression? Can the *Caroline I* decision be said to have established a new "trend?" It is submitted that the tentative answers given above remain valid: The cases show that the courts have *not* adopted a policy of according general priority to the right of personality. This is backed by German academic writings.⁸² In so far as objections are raised against *Caroline I* they are mainly of a doctrinal nature, and it is to these that I shall now turn.

B. *The Reception in German Legal Literature*

To the extent that *Caroline I* is criticised, legal writers' criticisms are directed less at the result reached than at the methodological and doctrinal considerations with which the BGH justified the new approach. Thus, as the presiding judge at the Munich Court of Appeal, observed: "The result—an increase of damages for deliberate infringements of the law—is fine. It is the method which is doubtful."⁸³ There are four main objections:

- (i) Deterrence introduces punitive elements into the civil law and thus blurs the distinction between the criminal and the civil law.
- (ii) The taking into account of the profits made by the defendant blurs the distinction between the law of delict and the law of restitution.
- (iii) The increase in the award of damages for infringement of the right of personality leads to a potential commercialisation of personality rights. Individuals are thereby encouraged to "sell" their personality rights.

79. See BVerfG, NJW (1987) 2661 (*Strauss caricature*). But see BVerfGE 82, 43 (*Strauss placard*) and BVerfGE 82, 272 (*Zwangsdemokrat*).

80. Cf. Markesinis & Nolte, *supra* note 13, at 123-24 ("[N]ot everything which interests the public should be published in the public interest.").

81. See *infra* Part IV.

82. See *infra* Part III.B. In fact, as far as "defamation" is concerned, the prevailing academic view seems to be that a much higher status should be given by the courts to the "right of personal honour" than is the case right now. Cf. P.J. Tettinger, *Das Recht der persönlichen Ehre in der Wertordnung des Grundgesetzes*, JURISTISCHE SCHULUNG (JuS) 769 (1997); R. Stürmer, *Die verlorene Ehre des Bundesbürgers—Bessere Spielregeln für die öffentliche Meinungsbildung?*, JURISTENZEITUNG (JZ) 865 (1994).

83. Seitz, *supra* note 28, at 2848.

(iv) The increase in the award of damages for infringement of the personality unduly restricts the constitutional guarantees of freedom of expression and freedom of the press, enshrined in Art. 5(1) *Grundgesetz*.⁸⁴

(i) According to the orthodox position modern legal systems distinguish between compensation for injury done and punishment of the wrongdoer. Whereas compensation is generally effectuated in the framework of private law, punishment is, as a rule, a public sanction to be imposed on the wrongdoer in accordance with criminal law.⁸⁵ The writers advocating this position assert that a crossing of the line in the context of the law of privacy would not only result in excessive awards of damages, similar to the American model, but also blur the distinction between the civil law and the criminal law.⁸⁶ The majority of legal writers, however, do not agree with this analysis.⁸⁷ According to one scholar, the strict distinction between damages and punishment is inconsistent with legal reality, orientated towards practical needs. Particularly in the field of personality rights, punitive elements cannot be eliminated completely if the effective protection of those rights is to be guaranteed.⁸⁸

Another observer points out that confining damage awards to the objectives of compensation and satisfaction is a prime reason which has facilitated the almost unsanctioned infringement of personality rights by the press over the last few years.⁸⁹ As long as the awards had merely symbolic significance, the press could actually conclude that “tort did pay!” The limited effectiveness of the remedies available against infringements of personality is further stressed by those who refer to the uniform nature of the action for nonpecuniary damages, which requires an integral approach rather than a division into different functions.⁹⁰ Deterrence is thus only one relevant factor among several, according to which liability is determined.

Punishment and deterrence as functions of the civil law do not sound unusual to the English lawyer who is familiar with the remedy of exemplary damages, which serve the purposes of retribution,

84. This point, although raised here, will be discussed separately in Part IV.

85. H. Stoll, ‘Remedies,’ in XI INT’L ENCYCLOPEDIA OF COMP. L. ch. 8-103.

86. Cf. Seitz, *supra* note 28, at 2848.

87. Canaris, *supra* note 35, at 105-08; H.P. Westermann, *Geldentschädigung bei Persönlichkeitsverletzung—Aufweichung der Dogmatik des Schadensrechts?*, in EINHEIT UND FOLGERICHTIGKEIT IM JURISTISCHEN DENKEN 137-43 (I. Koller et al. eds., 1998); P. Schwerdtner, *Persönlichkeitsschutz im Zivilrecht*, in KARLSRUHER FORUM 1996: SCHUTZ DER PERSÖNLICHKEIT 43 (E. Lorenz ed., 1997); P. Schlechtriem, ANMERKUNG ZU BGH, JZ 362, 364 (1995); H. Stoll, HAFTUNGSFOLGEN IM BÜRGERLICHEN RECHT 55 (1993); J. Rosengarten, *Der Präventionsgedanke im deutschen Zivilrecht*, NJW (1996) 1935; M. Prinz, *Geldentschädigung bei Persönlichkeitsrechtsverletzungen durch die Medien*, NJW (1996) 953.

88. STOLL, *supra* note 87, at 55, 65. For a comparative analysis of the idea of punishment in private law, see Stoll, *supra* note 85, ch. 8-103.

89. Prinz, *supra* note 87, at 953.

90. SCHWERDTNER, *supra* note 87, at 39.

deterrence and satisfaction.⁹¹ However, under English law these can only be awarded where the facts satisfy one of the three categories enunciated by the House of Lords in *Rookes v Barnard*.⁹² The second category is of particular interest here. According to the House of Lords, exemplary damages should be available where a tortfeasor's conduct was calculated to make a profit which might well exceed the compensation payable to the plaintiff. Although in the past, most cases in this category have related to the wrongful eviction of tenants,⁹³ a case of defamation recently came before the Court of Appeal.⁹⁴ The requirements for the award of exemplary damages in this case bear a striking resemblance to the criteria established by the BGH in *Caroline I*. The court required that the defendant had "no general belief in the truth of what he had published" (*cf. deliberateness or gross negligence*); that he had been motivated by "a cynical calculation that publication was to his mercenary advantage" (*cf. "ruthless commercialisation of the plaintiff's personality for the promotion of one's own economic interests"*); that "the sum awarded by way of compensatory damages was insufficient to achieve the punitive and deterrent purpose underlying exemplary damages" (*cf. "no other remedy available providing adequate redress"*).⁹⁵ Even the sum awarded as exemplary damages (£50,000)⁹⁶ came close to the award in *Caroline I*. It remains questionable, however, whether the Princess of Monaco would have been able at all to fit her case into the "pigeonhole" of the tort of defamation.

The Law Commission believes that the law of exemplary damages is in need of reform.⁹⁷ For German law it can nevertheless provide an example of the integration of punitive elements into the civil law which is worthy of consideration. At any rate, *Caroline I* seems to reflect the development of the law on a European level.⁹⁸

91. Law Comm'n: *Aggravated, Exemplary and Restitutionary Damages* (LawCom No 247, 1997) para. 4.1.

92. *Rookes v. Barnard*, [1964] App. Cas. 1129. The categories are (1) oppressive, arbitrary or unconstitutional action by servants of the government; (2) wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and (3) where such an award is expressly authorized by statute.

93. Law Comm'n, *supra* note 91, para. 4.15 with reference to *Drane v Evangelou*, 1 W.L.R. 455 (1978).

94. *John v. Mirror Group Newspaper Ltd.*, Q.B. 586 (Eng. C.A. 1997).

95. *Id.* at 617.

96. The sum of £275,000 awarded by the jury in the first instance was held to be manifestly excessive on appeal.

97. Law Comm'n, *supra* note 91, at 94.

98. *Cf. C. VON BAR, GEMEINEURÖPÄISCHES DELIKTSRECHT* 603 (1996).

(ii) The question whether deterrence should be relevant to the assessment of nonpecuniary damages is closely linked to the question, raised (but ultimately rejected) by the BGH in *Caroline I*, whether the award of nonpecuniary damages should include an account of profits. In other words, if deterrence is the aim to be pursued, should the disgorgement of the profit be the way of achieving it?

The problem has yet to be settled. The BGH has explicitly rejected an account of profits in *Caroline I* even though it held that the magazine's profit arising from the interference was a factor which could be taken into account when determining damages.⁹⁹ This approach is questionable. It blurs the line between the law of delict and the law of restitution. Most legal authors therefore favour a restitutionary approach¹⁰⁰ which they consider to be more consistent with prevailing doctrine.¹⁰¹ The restitutionary route faces two problems, one of which has already been overcome. In *Herrenreiter*¹⁰² the court held that a claim in restitution was precluded because the plaintiff did not experience any pecuniary disadvantage and there was thus no pecuniary shift of the kind envisaged in § 812 BGB. This point is no longer maintained.¹⁰³ The second problem concerns the evidentiary difficulties of determining the relevant profit. Quite obviously, more than one factor (i.e. the infringement of the plaintiff's rights) determines the tortfeasor's actual gain. It may even be that the tortfeasor has not made any profit at all. It has, therefore been suggested that the increase of the newspaper's circulation or the prices paid by the publisher for the published material be taken into account.¹⁰⁴ Yet, unless one applies some kind of "objective test," this approach is likely to result in different amounts of damages for equally serious infringements of the right of personality. Otho Schlechtriem proposed a simple estimate of the defendant's profit.¹⁰⁵ With regard to the factor of deterrence they argue that a reckless commercialisation of the right of personality as in *Caroline I* can only

99. BGHZ 128, 1 (16).

100. Section 812(1) BGB: a second alternative is "restitution for interference with another's right" (*Eingriffskondiktion*).

101. Schlechtriem, *supra* note 87, at 364; Canaris, *supra* note 35, at 87 *passim*; Westermann, *supra* note 87, at 143.

102. BGHZ 26, 349 (*Herrenreiter*), in Markesinis, *supra* note 18, at 380.

103. It is settled law now that it is not a condition of a claim in unjust enrichment that the plaintiff has suffered a loss: BGH, NJW (1992) 2084 (*Fuchsberger*); *see also* Canaris, *supra* note 35, at 89-90.

104. Prinz, *supra* note 87, at 956.

105. Schlechtriem, *supra* note 87, at 364 (referring to section 287(1) ZPO, which provides for the discretion of the court to estimate the damage in case of controversy as between the parties); *see also* Canaris, *supra* note 35, at 96-97.

be prevented by a full account of profits. In support of this argument, reference has been made to other legal systems which have integrated such considerations.¹⁰⁶

Although the majority of legal writers support the restitutionary approach the courts are hesitant to adopt it. In their view, the main concern in these cases is the adequate compensation of the plaintiff for the nonpecuniary loss he suffered, not the reversing of the defendant's unjust enrichment. In other words, the remedies available for infringements of the right of personality are "plaintiff-sided" (concerned with the plaintiff's loss), not "defendant-sided" (concerned with the defendant's gain).

(iii) The controversy between German legal scholars and the courts mirrors a more general problem concerning the nature of personality rights. Personality rights increasingly develop into pecuniary rights, meaning that rights which were originally conceived as purely nonpecuniary have developed into rights which can be valued in money.¹⁰⁷ This process of "commercialisation" has often been criticised on the grounds that it results in a commercialisation of the private sphere, and that it encourages individuals to "sell their personality." It has been argued that an increase of damages for infringements of the right of personality promotes this tendency.

However, I believe that the controversy about the advantages and disadvantages of nonpecuniary damages must be seen against the background of a transformed media and legal culture. To the extent that the commercial gain becomes increasingly important to many publishing and broadcasting companies, infringements of personality rights become necessarily commercialised too. The realization that a nonpecuniary right has attained a "market value" as a result of a socio-cultural development must lead to the conclusion that the owner of the right, is entitled to its "marketing." Commercialisation in this context can thus be described as the willingness of the owner of a nonpecuniary right to allow the marketing of such a right for a certain price. In case that a personality right is marketed without its owner's consent it is only appropriate to indemnify the owner for the lost chance to market the right himself.¹⁰⁸ This approach leads to

106. *Cf.* *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (holding that the "interest which underlies protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of good will.").

107. *Cf.* H.P. GÖTTING, *PERSÖNLICHKEITSRECHTE ALS VERMÖGENSRECHTE* (1995).

108. In the United States, this line of thought has led to the recognition of the 'right to publicity.' *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995): "One who appropriates the commercial value of a person's identity by using without consent the person's

questions as to the quantum of the indemnification and whether the entire profit made by the defendant from the use of the right is due its owner. As seen above, the latter question has yet to receive a definite answer. Some authors reject the restitutionary approach on the ground that it would result in an “undeserved windfall” for the owner of the right. Assuming this to be a valid argument against an account of profits, this objection could be overcome, for example, by the establishment of a “press fund” for the indemnification of individuals whose personality rights have been infringed by the press.¹⁰⁹

(iv) Privacy and free speech are often regarded as the great antipodeans in the field of Human Rights. The foregoing sections show that this contrast is not as sharp as it may seem. We shall now turn to the relationship between the general right of personality and freedom of speech in the jurisprudence of the German *Bundesverfassungsgericht*.

IV. RESTRICTIONS—ART. 5 *GRUNDGESETZ* AND THE DOCTRINE OF THE “HORIZONTAL EFFECT” OF BASIC RIGHTS IN GERMAN LAW

It has been argued that privacy and freedom of expression are not irreconcilable. Nevertheless the protection of one person’s personality and privacy can mean that another person’s freedom of speech is curtailed. The “right freely to express and disseminate [one’s] opinion” is guaranteed by Art. 5(1)GG.¹¹⁰ According to the courts, this right which permits discourse and intellectual interaction is indispensable for a free and democratic state.¹¹¹ However, as both free speech and privacy are understood as constitutional values, in principle neither can claim precedence over the other.¹¹² Hence, if a person’s right to privacy clashes with another person’s freedom of expression, the competing values will have to be balanced. Before we turn to the principles developed in this respect by the courts, we must ask how constitutional rights have come to play any role in relationships between private individuals.

name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in sections 48 and 49.”

109. See also the solutions proposed by Canaris, *supra* note 35, at 87-99, and Seitz, *supra* note 28, at 2850.

110. Article 5(1) GG: “Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures, and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.”, translated in D.P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 506 (4th ed. 1997).

111. See BVerfGE 5, 85 (205); BVerfGE 7, 198 (208).

112. See *supra* Part II.C.

As noted above, the original function of the basic rights guaranteed by the *Grundgesetz* was to protect the individual against excessive state power. However, in modern society it soon became apparent that such rights could be violated just as much by individuals or other private entities with economic or social power as by the state. Thus, some courts and legal writers felt the need for a “constitutionalisation” of certain areas of private law.¹¹³ This was to be achieved by a *Drittwirkung der Grundrechte*, that is, “third-party effect given to constitutional directives in their application to private law relations.”¹¹⁴ Since the question whether the basic rights enshrined in the *Grundgesetz* can be invoked by one individual against another is not answered by the Constitution itself, it has been, and still is to some extent, the subject of an ongoing dispute. Due to limited space only a very brief overview can be given.¹¹⁵

The Constitutional Court first ruled on the matter in the famous *Lüth* case.¹¹⁶ In 1950 Erich Lüth, a press official (acting, however, in a private capacity) called for a boycott of a film made by Veit Harlan, a film director, who had become notorious during the Nazi period for directing anti-Semitic films. In the first instance Harlan was granted an injunction against Lüth. After the Hamburg Court of Appeal rejected his appeal, Lüth complained to the *Bundesverfassungsgericht* asserting a violation of his constitutional right to free speech under Art. 5(1)GG. The judges took the view that the *Grundgesetz* erected an “objective system of values” (*objektive Wertordnung*) that permeated the whole culture and influenced the application and interpretation of law in general.¹¹⁷ Thus, § 826 BGB,¹¹⁸ on which the

113. The issue was first addressed in 1954 in BArbGE 1, 185. There H.C. Nipperdey, then President of the Federal Labour Court, favoured a *direct* horizontal effect of constitutional rights (*unmittelbare Drittwirkung*). While the majority of legal writers now favour an *indirect* horizontal effect (*mittelbare Drittwirkung*), the *Bundesverfassungsgericht* declined to give its view on the matter, cf. BVerfGE 7, 198 (204).

114. See J. Fleming, *Libel and Constitutional Free Speech*, in *ESSAYS FOR PATRICK ATIYAH* 333, 334 (P. Cane & J. Stapleton eds., 1991). In the following, the term “horizontal effect” will be used.

115. The reader may be referred to the growing literature in English: e.g., B.S. Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q.R. 47 (1999); S. Enchelmaier & B.S. Markesinis, *The Applicability of Human Rights as Between Individuals Under German Constitutional Law*, in *PROTECTING PRIVACY* 192 (B.S. Markesinis ed., 1999); Fleming, *supra* note 114.

116. BVerfGE 7, 198, translated in Markesinis, *supra* note 18, at 352.

117. See BVerfGE 7, 198 (205) (*Ausstrahlungswirkung*—‘radiating effect’ of the basic rights).

118. Section 826 BGB: “A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.”, translated in S.L. GOREN, *THE GERMAN CIVIL CODE* (1994).

injunction against Lüth was founded, had to be “read in the light of [the] significance [of Art. 5(1)GG] and had to be construed so as to preserve the special value of this right, with a presumption in favour of freedom of speech in all areas, particularly in public life.”¹¹⁹ Although, according to the wording of Art. 5(2)GG, “general laws” (*allgemeine Gesetze*) set bounds to the right to free speech, these laws had, themselves, to be interpreted against the backdrop of the *Grundgesetz*. Thus, any limiting effect of the “general laws” was, itself, limited (theory of “reciprocal effect”: *Wechselwirkungslehre*). The Court therefore removed the injunction.

Lüth is one of the most important German decisions on the significance of the basic rights under the Constitution and, most notably, on the interpretation of Art. 5 GG. However, what is interesting for the relationship between free speech and privacy is that the court made clear that Art. 5(1)GG could not claim general priority over other legitimate interests. The Court stated:

In this sense the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which deserve protection against freedom of opinion. There has to be a “balance of interests”; the right to express an opinion must yield if its exercise infringes interests of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.¹²⁰

Thus, the judicial task is one of weighing conflicting values. This was confirmed by the Second Senate of the court in *Soraya*,¹²¹ where the Court recognised the creation of a new “constitutional right of privacy sounding in damages.”¹²² The complaining publisher, which had published the fictitious interview, asserted, *inter alia*, an unconstitutional restriction of the freedom of the press (Art. 5(1)2GG). In its judgment, the Court tried to set up some guidelines for the balancing process. Turning around its reasoning in *Lüth*, the *BVerfG* began by emphasising that the general right of personality could not claim absolute precedence over press freedom; rather the latter, depending on the merits of the individual case, could exercise a limiting effect on claims contingent on the general right of personality.¹²³ However, in balancing the freedom of the press against

119. BVerfGE 7, 198 (208), translated in Markesinis, *supra* note 18, at 357.

120. BVerfGE 7, 198 (210), translated in Markesinis, *supra* note 18, at 210.

121. BVerfGE 34, 269.

122. Markesinis, *supra* note 115, at 56; see *supra* Part II.A.

123. BVerfGE 34, 269 (282).

other constitutionally protected values, the judge could take into account whether the impugned matter is one of serious public interest, published by the press in order to inform the public in a serious and pertinent way, or whether the publication serves only the satisfaction of the public's craving for gossip.¹²⁴

The principles enunciated in *Lüth* and *Soraya* have been elaborated and reaffirmed many times since then. Lack of space precludes a closer examination. I shall therefore try to summarize some of the criteria which have gradually emerged to help systematize the balancing process.

It appears from the cases that in principle freedom of speech or freedom of the press prevails where the motives for the infringement of the other person's personality rights are the pursuit of informing the public and forming public opinion.¹²⁵ Conversely, the right to privacy prevails where the publisher was driven by the wish to commercialise the plaintiff's personality for the promotion of his or her own economic gain.¹²⁶ Protection under Art. 5(1)GG can in general not be claimed if the published facts are untrue¹²⁷ or obtained by illegal means.¹²⁸ On the other hand, where the information is already in the public domain, or where the plaintiff has exposed himself deliberately to public curiosity, the courts will be reluctant to accord privacy protection.¹²⁹ Most notably, political speech, understood as an essential aspect of the "free democratic state order" (*freiheitlich-demokratische Staatsordnung*),¹³⁰ will, in general, be given precedence over other constitutional values like, for example, personal honour (Art. 1(1)GG).¹³¹ Yet if the informational value of a publication is marginal, privacy may win the day.¹³²

As German courts weigh the competing interests in an *ad hoc* manner, the enunciation of definite principles is difficult. Consequently, the German approach has been criticised for hindering the predictability of decisions and, thus, promoting legal uncertainty. Experience seems to show however that, especially in the sensitive

124. See *id.* at 283.

125. See BVerfGE 7, 198 (*Lüth*); BVerfGE 66, 116 (*Wallraff*).

126. See BVerfGE 34, 269 (*Soraya*); BGHZ 128, 1 (*Caroline I*).

127. This includes cases of "fabricated" interviews (*Soraya*, *Caroline I*) and misquotes (BVerfGE 54, 108).

128. See BGHZ 73, 120 (*Kohl/Biedenkopf*); BVerfGE 66, 116 (*Wallraff*).

129. Cf. Landgericht Berlin, NJW (1997) 1155 (*Porn Actor*).

130. See BVerfGE 7, 198 (208) (*Lüth*).

131. Thus the courts have constantly held that "in public debate, criticism, even in exaggerated and polemical form must be accepted" (BVerfGE 82, 272 (282)). See also BVerfGE 54, 129 (139) (*Kunstkritik*) and BVerfGE 93, 266 (*Soldaten sind Mörder II*).

132. Cf. BGHZ 128, 1; BGHZ 131, 332.

field of speech versus privacy, the “fine tuning” by deciding each case on its individual facts promotes just results. The recent *Porn Actor* case may serve as an example.¹³³

In the *Porn Actor* case, the applicant worked as a game-show host for the German broadcasting company SAT 1. The respondent was the publisher of a tabloid in which an article on the applicant was published that revealed truthfully that the latter had appeared in pornographic movies twenty years ago. The applicant sought a provisional injunction with the aim of preventing the respondent from repeating the relevant statement. The district court’s task was to weigh the applicant’s right to privacy against the freedom of the press and the informational interest of the public which falls within the scope of Art. 5(1)2GG. It began by stressing that an activity as a pornographic actor concerned a person’s private sphere and was thus protected by Arts. 1(1) and 2(1)GG.¹³⁴ However, this had to be qualified considering that the applicant himself had made his past public to the media some years ago. In doing so he “waived his right to privacy” with the result that the publisher’s rights under Art. 5(1)2GG were, in principle, not limited by the applicant’s right to privacy.¹³⁵ Yet the court went on to hold that the concrete facts demanded a differentiated way of looking at the case.¹³⁶ First of all, the applicant had engaged in the activity more than twenty years ago. Secondly, even if one thought this irrelevant, the matter could still no longer be regarded as of public interest in view of the fact that it had previously been sufficiently discussed in the media. The statement at issue served only to satisfy the insatiable curiosity of the readers; its informational value was small or nonexistent. But the smaller the informational value of the disclosed information, the greater becomes the need to protect a person’s privacy.¹³⁷ The applicant’s right to privacy was thus allowed to prevail over the competing interests of the press and the public with the result that he was granted the injunction.¹³⁸

133. Landgericht Berlin, NJW (1997) 1155 (*Porn Actor*). Note that the case concerned only the question of a provisional injunction. At this stage, the question of nonpecuniary damages could not be raised.

134. Landgericht Berlin, NJW (1997) 1155.

135. *Id.* at 1155.

136. *Id.* at 1156.

137. *Id.*

138. It is interesting to compare this case to the American case of *Melvin v. Reid*, 112 Cal. App. 285, 297 P 91 (1931). There, the defendant, without her permission or knowledge, produced a film about a prostitute who was tried for murder but acquitted. The California Court of Appeal held that “[t]here can be no privacy in that which is already public.” Nonetheless the judges found in favour of the appellant who “eight years before the production of [the film] had

The judgment is a prime example of the “art of balancing” that has been brought to some perfection by the courts over the last decades. It demonstrates that the criteria set up by the *Bundesverfassungsgericht* are being taken seriously, and thereby acknowledges the important role of both freedom of speech and privacy. The freedom of the press is not eliminated; on the contrary, it is reaffirmed as a cornerstone of democracy. It only has to yield to the right to privacy under the circumstances of the particular case.

The purpose of the fourth section was to demonstrate that the recognition of a right to privacy in German law has not curbed the freedom of the press. Both values are understood as integral parts of the “free democratic basic order” which complement rather than restrict one another. If a conflict arises, the divergent interests have to be weighed and, if possible, balanced. As far as the relationship between speech and personal honour is concerned, the cases show that the courts tend to award greater protection to speech than to personal honour.¹³⁹ With respect to the relationship between speech and privacy it has been shown that speech (and the press) must only yield to privacy if the public interest is smaller than the other person’s interest in the protection of his or her private sphere. Finally, the press itself supports the present developments.¹⁴⁰ Hence there seems to be no reason for English lawyers to be apprehensive of what shall be described in the following section.

V. THE INCORPORATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) INTO ENGLISH LAW

On October 2, 2000, the Human Rights Act came into force in Britain. The Government’s declared aim was “to make more directly accessible the rights which the British people already enjoy under the Convention.”¹⁴¹ For although Britain took the lead in drafting the ECHR and was the first country to ratify it in 1951, it had not, until this year, incorporated it into domestic law. Now that this has happened the guarantees of the Convention have become a source of

abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society.” The old-fashioned language does not conceal that the Court’s decision was based on considerations similar to those made by the German court in *Porn Actor*. The English reader may be reminded of the public discussion about the “child-killer” *Mary Bell* who was granted an order banning publication of her, and her daughter’s, new identity (see *In re X (A Minor)*, 1 W.L.R. 1422 (1984), and, more recently, *TIMES* (London), Apr. 30, 1998, at 1).

139. See *supra* note 131.

140. See *supra* Part III.

141. Home Office, *Rights Brought Home: The Human Rights Bill* para. 1.19 (Cm 3782, 1997).

English law and may be pleaded as a source of rights before the national courts.¹⁴²

The provision at the heart of the Act is sect. 6(1), which makes it unlawful for a “public authority” to act in a way which is incompatible with the rights contained in the ECHR. What counts as a “public authority” for this purpose is deliberately defined widely in sect. 6(3) to include courts, tribunals, and “any person certain of whose functions are functions of a public nature” (sect. 6(3)(c)). At first sight the Act is thus not intended to be binding on private individuals or entities such as newspapers; it is not meant to have a “direct horizontal effect.” However, on closer inspection it turns out that horizontality is not barred completely for two reasons:¹⁴³ First, the obligation contained in sect. 3(1) to interpret *legislation* in a way which is compatible with Convention rights, so far as it is possible to do so, is of general application. That means it applies wherever legislation needs interpretation, including in proceedings between private parties. Secondly, the inclusion of *courts and tribunals* in the definition of “public authorities” in sect. 6(3) means that they too are bound to act compatibly with the Convention in developing the common law in deciding cases between private parties.¹⁴⁴

Moreover, it now seems clear that organisations like the Broadcasting Standards Commission and the Press Complaints Commission (PCC) will be defined as “public authorities” within the meaning of sect. 6(1),¹⁴⁵ the result being that their adjudication on matters of privacy could be subject to subsequent action by the courts. A claim on the basis that the plaintiff’s rights under Article 8 ECHR have been infringed would then be available against these institutions. However, responding to concerns expressed in the press, the Government decided to amend the Bill and to introduce a new clause

142. It is important to point out that, in practice, the ECHR has already been extensively used by the European Court of Human Rights in Strasbourg to buttress and uphold the freedom of the press against efforts by the state to restrict it. See *Sunday Times v. U.K.* (No. 2) (1991) Series A, vol. 217; *Observer and Guardian v. U.K.*, (1991) Series A, vol. 216.

143. See Markesinis, *supra* note 115, at 72-84; Neill, *supra* note 6, at 21.

144. See N. Bamforth, *The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies*, 58 CAMBRIDGE L.J. 159 (1999); F. KLUG, RIGHTS BROUGHT HOME: A BRIEFING ON THE HUMAN RIGHTS BILL WITH AMENDMENTS 9 (1997).

145. “Now, . . . , we can all agree that the PCC is indeed a public authority and will be covered, joining other organisations such as the BBC” (*Hansard*, H.C., col. 545, 2 July 1998 (Sir Norman Fowler)); “I am glad that the Government resisted the Press Complaints Commission’s attempt . . . to immunise itself from liability under Clause 6 of the Bill as a public authority” (*Hansard*, H.C., col. 2114, 29 October 1998 (Lord Lester of Herne Hill)).

“specifically designed to safeguard press freedom.”¹⁴⁶ It is not limited to cases to which a public authority is a party, but applies to anyone whose right to freedom of expression might be affected (sub-sect. 1). It aims at raising the threshold for obtaining interlocutory relief (sub-sect. 2, 3) and names factors which the courts should take into account in considering whether to grant such relief (sub-sect. 4).

VI. CONCLUSIONS: THE SIGNIFICANCE OF GERMAN LAW FOR ENGLISH LAW

The impact that the incorporation of the ECHR will have on the development of an English law of privacy is difficult to predict.¹⁴⁷ However, there is little doubt that in future the courts will be required to balance freedom of expression against the protection of individuals' private lives, taking into account the facts of each case as well as any relevant Strasbourg case law.¹⁴⁸ It is in this respect that German law may be of significance for English law.

The great American lawyer Karl Llewellyn once remarked that legal thinking on the European Continent is “interesting, demanding, and impractical.”¹⁴⁹ Leaving aside the first two attributes, the question remains whether the German way of rather theoretical and

146. *Hansard*, H.C., col. 535, 2 July 1998 (the Home Secretary, Mr. J. Straw). Section 12 of the Human Rights Act reads as follows:

This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied

- (a) that the applicant has taken all practicable steps to notify the respondent;
- or
- (b) that there are compelling reasons why the respondent should not be notified.

No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to the extent to which the material has, or is about to, become available to the public; or it is, or would be, in the public interest for the material to be published; any relevant privacy code.

In this section—“court” includes a tribunal; and “relief” includes any remedy or order (other than in criminal proceedings).

147. *Cf.* HUMAN RIGHTS AND THE EUROPEAN CONVENTION 212 (B. Dickson ed., 1997): “The impact of the Convention within the domestic legal system[s] . . . remains limited, and this may not change much even if the Convention is incorporated.”

148. See Home Office, *supra* note 141, para. 1.19.

149. FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 26, 1997, at 2.

doctrinal legal thinking is transferable to the English Common law. It is submitted that those who believe that it is not underestimate the similarities between the two legal systems as well as the potential that lies in the comparative methodology.¹⁵⁰ Three points shall be made in this respect.

First, as was shown in the last section, the incorporation of the ECHR will involve some form of horizontal effect of the Convention rights as between private parties. It is not that the issue of “privatising human rights” is alien to English law. In fact, some of the early attempts to introduce a Bill of Rights for Britain have at least partly been motivated by the sense that the individual needed protection from private power.¹⁵¹ Moreover, English courts already have regard to the ECHR when interpreting legislation or the common law, or when exercising judicial discretion in private proceedings.¹⁵² Here the German doctrine of “indirect horizontal effect” (*mittelbare Drittwirkung*), which, it is recalled, provides for the *Grundrechte* to “radiate” into the entire legal order and to “influence” its interpretation, may serve as an example how to overcome the traditional private/public divide without excessively curtailing the principle of “private autonomy” (*Privatautonomie*) that governs relationships between private individuals.¹⁵³

Secondly, horizontality involves the balancing of competing values. This is recognized in the Government’s White Paper on the Human Rights Bill: “In particular, our courts will be required to balance the protection of individuals’ fundamental rights against the demands of the general interest of the community, particularly in relation to Articles 8-11 where a State may restrict the protected right to the extent that this is ‘necessary in a democratic society.’”¹⁵⁴ Regarding this, both the European Court of Human Rights¹⁵⁵ and the German courts offer a rich body of case law which may serve as a source of inspiration for English judges who themselves, “with their

150. See R. Zimmermann, *Savigny’s Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science*, 112 L.Q.R. 576, 590 (1996).

151. A. Clapham, *Opinion: The Privatisation of Human Rights*, 1 EHRLR 20, 23 (1995).

152. Cf. M. HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS 147 (1997) (referring to *R. v. Lemon*, [1979] App. Cas. 617; *Gleaves v. Deakin*, [1980] App. Cas. 477).

153. See *supra* Part IV.

154. *Supra* note 141, para. 2.5; KLUG, *supra* note 144, at 4: “[I]t is expected that the courts will import the ‘doctrine of proportionality’ in reviewing whether restrictions on fundamental rights are justifiable or not.”

155. On the relationship between privacy and freedom of the press in the jurisdiction of the European Court of Human Rights, see I. Fahrenhorst, *Paparazzi: Pressefotos und Privatsphäre—eine kritische Betrachtung der neueren Rechtsprechung des BGH im Lichte der EMRK*, 6 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEuP) 85 (1998).

incremental and pragmatic tendencies, are masters of the art.”¹⁵⁶ It is a common prejudice, responsible for the reluctance of English and German lawyers alike to look at the other side of the Channel, that common law and civil law belong to different legal families. Yet, quite apart from the fact that this argument must be used with caution,¹⁵⁷ the German approach of balancing the competing interests on a case-by-case basis should not prove unattractive to English eyes. German courts have developed a flexible set of rational criteria which govern the process of balancing and thereby warrant a significant degree of predictability. In shaping their own criteria, English courts may thus find some inspiration in German law.

Thirdly, returning to the main focus of this paper, German law may have significance for English law as to the remedies available for infringements of privacy. As seen above, an aggrieved person can choose from a number of remedies (provided that the respective conditions are fulfilled) ranging from a counter-statement¹⁵⁸ by the person whose right is affected to the award of damages for nonpecuniary loss. Here again, the BGH has attempted to balance the competing values, the courts’ main concerns being, on the one hand, that the protection awarded to the plaintiff is effective and, on the other hand, that the defendant’s freedom of expression is not unduly restricted. The increasing importance of economic considerations with regard to the award of nonpecuniary damages is the consequence of the great changes in both our social environment and in the contemporary media scene. Due to the “commercialisation” of personality rights the remedies have been commercialised too. This should not deter the English common lawyer. Considering the discontent of some English judges with the means of protection against invasion of privacy which are available under English law,¹⁵⁹ it would seem that German law has found a way of reaching satisfactory results which avoid both leaving a plaintiff unprotected and awarding excessive damages that could muzzle the press.

There is, of course, no single ideal legal method of protecting the complex of values under the privacy label, and comparative legal methodology is not about simply transplanting institutions from one legal tradition to another. It is about using the experiences of other

156. Markesinis, *supra* note 115, at 74.

157. See R. Zimmermann, *Der Europäische Charakter des englischen Rechts*, 1 ZEuP 4 (1993).

158. See *supra* note 5.

159. Cf. *Kaye v. Robertson*, FSR 62, 70 (1991) (quoting L.J. Bingham: “We cannot give the plaintiff the breadth of protection which I would, for my part, wish.”).

legal systems in order to obtain a different perspective on, and highlight deficiencies of, one's own law. It is in this sense that Lord Justice Leggatt in *Kaye v. Robertson* says with respect to the American law: "We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy."¹⁶⁰ It has been stressed that, to be worth anything, a law of privacy ought to have one essential and simple characteristic: it ought to work.¹⁶¹ The German model, on its whole, has worked rather well. It may thus provide some inspiration for English judges in the task which they may face in the near future: the creation of an English law of privacy.¹⁶²

160. *Id.* at 71.

161. P. Prescott, *Kaye v. Robertson—A Reply*, 54 MOD. L. REV. 451, 454 (1991).

162. For a comparative analysis of privacy laws in the United States, England and Germany, see T.U. AMELUNG, *DER SCHUTZ DER PRIVATHEIT IM ZIVILRECHT* (forthcoming 2001).