

Court of Appeal in Warsaw

I Civil Division

Citation: I ACa 300/21

JUDGEMENT ON BEHALF OF THE REPUBLIC OF POLAND

16 August 2021

Warsaw Court of Appeals, 1st Civil Division, represented by

Presiding Judge: **Joanna Wiśniewska-Sadowska**

Court reporter: **Magdalena Turek**

Having examined at a hearing on 27 July 2021 in Warsaw
Action brought by Filomena Leszczyńska against Barbara Engelking and Jan Grabowski
concerning infringement of personal rights following appeals by both parties against the
judgement of the District Court in Warsaw of 9 February 2021, III C 657/19

Has decided to

1. **amend the contested judgement in points one, two, three and five, thus dismissing the claim, and not order the plaintiff to cover the costs of the proceedings;**
2. **dismiss the plaintiff's appeal;**
3. **dismiss the remainder of the defendants' appeal;**
4. **exempt the plaintiff from the costs of the appeal proceedings.**

Joanna Wiśniewska-Sadowska

Ref. I ACa 300/21

GROUND FOR JUDGEMENT

By judgement of 9 February 2021 Warsaw District Court obliged Barbara Engelking and Jan Grabowski to rectify the consequences of the infringement of the personal rights of Filomena Leszczyńska, namely the veneration of a deceased person, by displaying the following statements on the homepage of <https://www.holocaustresearch.pl>: "I, Barbara Engelking, apologise to Filomena Leszczyńska for violating her personal rights by disseminating in the book *Night Without End* inaccurate information about the plaintiff's uncle Edward Malinowski, implying that he robbed Estera Drogicka and that he was complicit in the deaths of Jews (handed them over to the Germans)," signed "Barbara Engelking, author and editor of the book *Night Without End*, and "I, Jan Grabowski, apologize to Filomena Leszczyńska for the infringement of her personal rights in such a way that, as the editor of the book *Night Without End*, I permitted the dissemination of inaccurate information about the plaintiff's uncle Edward Malinowski," signed "Jan Grabowski, editor of the book *Night Without End*."

Moreover, the court obliged the defendants to send the above statements in Polish, signed by hand, by registered mail to the address of Filomena Leszczyńska within 14 days from the date the decision became final (item 2). In the case the book *Night Without End* should be reprinted, the court prohibited the defendants from further infringing upon the plaintiff's personal rights by disseminating information that the plaintiff's uncle Edward Malinowski robbed Estera Drogicka and that he was an accomplice in the death of Jews (he handed them over to the Germans) (point 3). The court dismissed the remaining part of the claim and mutually waived the costs of the court proceedings (points 4 and 5).

The above judgement was entered after the District Court made the following factual findings and legal considerations.

In April 2018, the Center for Holocaust Research of the Polish Academy of Sciences (IfiS PAN) released a publication entitled *Night Without End: The Fate of Jews in Selected Counties of Occupied Poland*, co-edited by Barbara Engelking and Jan Grabowski. The book is part of a research project titled "Jewish survival strategies in the General Government during the occupation, 1942–1945. Case study of selected counties." In the section devoted to the Bielsk Podlaski county, in the chapter titled *Survival strategies*, on pages 149–150, the story of Estera Drogicka is described as follows: "*Whereas Estera Drogicka (nee Siemiatycka), having lost her family, equipped with documents bought from a Belarusian woman, decided to go to Prussia to work, in which she was assisted by the village leader of Malinowo, Edward Malinowski (who robbed her on that occasion) – and in December 1942 she ended up in Rastenburg (Kętrzyn), working as a domestic help for the German Fittkau family. Not only did she meet her husband there (a Pole, who was also a forced labourer), but she also developed a trade, sending Malinowski parcels with things to sell. She visited him when she went "home" on leave. She realized that he was complicit in the deaths of several dozen Jews who had been hiding in the forest and had been handed over to the Germans, but she nevertheless gave false testimony in his defence at his trial*". Footnote no. 397 to the text states as follows: AIPN Bi, 403/18 Edward Malinowski's criminal case records. Testimony by Maria Wiśniewska, p. 43: "*During the German occupation I was hiding as a Jew in the forest near Malinowo. Nobody wanted to take me in. So I went to the village leader, Malinowski, and he took me in. I hid in Malinowski's barn for a few weeks and he fed me [...]. At night his barn was full of Jews, Malinowski gave them food. I owe my life to Malinowski, because he obtained Aryan papers for me, and then, as per my request, reported to the authorities that I was hiding to avoid forced labour. I was then arrested and sent back to Germany. I would go to Malinowo when I was on leave. I was in Germany at the time of the murder of the Jews. I only received a letter from Edward Malinowski, in which he wrote to me that a forester had delivered Jews into German hands and that Jewish partisans had killed him.*" Malinowski was acquitted.

This publication has been the subject of lively discussion in the media, including scholarly reviews. The defendant gave press interviews about the book.

Barbara Engelking is a historian and has been researching the Shoah since 1988. Jan Grabowski has been a historian for thirty two years. He has been researching the history of the extermination of Polish Jews for twenty years. The work on the book took five years. The authors searched numerous archives in Poland and abroad. The authors of the disputed publication met at seminars to establish the methodology of their work. Each author worked with their own sources. A common model was developed, but each author worked independently.

The description of Estera Drogicka's story is based on a 1996 interview given to Shoah Foundation by Estera Drogicka (at the time using the name Maria Wiltgren). In said interview, she stated that: after arriving in the forest near Malinowo, she ran towards the village, maybe seven kilometres or more. When she reached the village, she met a little boy of eight years, whom she asked about the village leader. She told Edward Malinowski that she had an *ausweis* and wanted to go to Germany. He asked her if she had brought anything with her from the ghetto. She replied, "Yes, I did, I left it with the Czapkowicz family": footwear and dresses, and embroidered linen. Then the village leader told her that he would go and retrieve that. She had a very nice sweater that the village leader took. She was given an old sweater in exchange. She had a silk slip, which the leader also took. Of the 100 marks she had, he took 50. He went to the Czapkowicz family, but when he returned he said that they had given him nothing. Edward Malinowski went with Estera Drogicka to the gendarmes and said that she was a Pole who had escaped from Germany. During her forced labour in Germany she traded with Malinowski. She would visit Edward Malinowski's son Adolf when she was on leave. She reported that at the end of 1944, there were Jews hiding in the forest near Malinowo. "A forester saw them, that they were there in the forest. And together with Malinowski, they went to the gendarmerie, and they killed all of them, including the children, they murdered everyone. (...) A few days later, Jewish partisans came and killed the forester. (...) But when the war ended, Malinowski was sentenced to death. (...) I saved him. Even though he did a lot of harm to me".

Barbara Engelking considered this interview as conclusive. In her opinion, when giving the interview in a free country, Estera Drogicka (Maria Wiltgren) was no longer reluctant to speak and did not conceal certain information. Citing her own experience, she explained that there were sometimes discrepancies in the testimonies of survivors. The defendant did not claim that Edward Malinowski was an accomplice in the deaths of Jews, but only quoted the statement made by Estera Drogicka (Maria Wiltgren) in the interview, which referred to a rumour heard from Malinowo residents.

The defendant also consulted records from a post-war criminal court case: Malinowski Edward, father's name – Stanisław, No. IPN Bi 403/18/1, in which the uncle of Filomena Leszczyńska was accused under Article 1 p. 2, Articles 2 and 3 of the Decree of 31 August 1944, facing the following charges: 1) in 1943, in the village of Malinowo, Grodzisk municipality, Bielsk Podlaski county, Białystok voivodeship, assisted the authorities of the German state by indicating to the German gendarmes the hiding place of several persons of Jewish nationality, persecuted for racial reasons, and then took part in their capture, as a result of which all the aforementioned persons were arrested and subsequently shot; 2) at the same time, in the same place and of the same character as in point 1), he appropriated gold items that belonged to the persons murdered in the operation described in point 1), including earrings that belonged to one of the executed women.

On 15 May 1948, several residents of Malinowo village submitted a notice to the Public Prosecutor at the District Court in Białystok. They accused Edward Malinowski of collaborating with the Germans while he held the post of village leader, harming the inhabitants of the village, handing over to the gendarmes 18 Jews hiding in the forest near Malinowo, who were executed, and of collaborating with "Jaskółka's" gang.

In his testimony given during the main hearing on September 6, 1949, Edward Malinowski pleaded not guilty. In his opinion, the Jews hiding in the woods had been reported by a forester from Czarna Wielka, who showed their hiding place to the German gendarmerie.

Estera Drogicka (using the name Maria Wiśniewska at that time) testified as a witness in that trial. Witnesses Leon Koziński and Franciszek Koziński (who reported the crime) testified before the court that they were conflicted with Edward Malinowski. During the trial, witnesses of Jewish nationality also testified that they had been hidden and fed by Edward Malinowski.

By the sentence of the Court of Appeals in Białystok of 6 November 1950, issued in case K. 44/49, Edward Malinowski was acquitted.

On 23 November 1950, residents of Malinowo village submitted an application to the Court of Appeal in Białystok, indicating that the accusation of handing over eighteen people of Jewish nationality to the Germans was unjust and that the forester from Czarna Wielka was responsible for that deed.

The work titled *Night Without End: The Fate of Jews in Selected Counties of Occupied Poland* aroused interest of the Reduta Dobrego Imienia Polaków [Redoubt of the Good Name of Poles] Foundation. Employees of said Foundation accessed the records of the Institute of National Remembrance. They went to Malinowo, where Edward Malinowski lived and ran a farm. Maciej Świrski, the president of the Foundation, met Filomena Leszczyńska, Edward Malinowski's niece. Her father Józef Malinowski was very close to his brother. They ran a farm together and fought together in the war of 1920. According to the family tradition, Edward Malinowski was perceived as a hero who hid Jews during the German occupation. He served as village leader, helping the residents. After the war Edward Malinowski moved out of Malinowo after the trial and communist persecutions, but he would visit his former property in the village. The only surviving close relative of Edward Malinowski is his great-grandson. He lives in Stockholm and is of Swedish nationality.

Estera Drogicka later assumed the name Maria Wiśniewska, and after getting married – Wiltgren. In her resume submitted as a civilian employee of the Security Office in Wrocław, she stated that she lived in Drohiczyn. During the German occupation she lived with her family in the ghetto, which was liquidated on 2 November 1942. Together with her child, her sister and her sister's two children, she escaped to the nearby forest in Drohiczyn. She lived there for two weeks. Miraculously, she managed to escape, while her sister and the children were taken to the gendarmerie, and then transported to Treblinka, where the whole family perished. She then left for Germany, where she survived on Aryan papers.

To her son Zbigniew Wiltgren, she said that Edward Malinowski was a cruel man, that he had betrayed her family. She said that she had obtained an *ausweis* of a Belarusian woman and that after the war she took on her birth date as her own. She reported that she had volunteered for forced labour. To her second son Roman Wiltgren, Maria Wiltgren pointed out that Edward Malinowski had lied to her and robbed her and that she had saved his life by testifying in a criminal trial because she had been saved by him. She said that village leader of Malinowo had taken her belongings for safekeeping and later told her he no longer had them.

Estera Drogicka (Maria Wiltgren) died in 2007. Barbara Engelking had no contact with her. She talked to her sons after this trial started.

Filomena Leszczyńska is 79 years old. She is the niece of Edward Malinowski. She was close to him emotionally (she regarded him as another father). She learnt about the negative portrayal of her uncle in the defendants' work from a Radio Maryja broadcast, in which

excerpts from the defendants' book were quoted. She felt offended by this publication. Her friends phoned her and discussed the issue with her.

With the facts thus established, the District Court found the claim for protection of the plaintiff's non-pecuniary rights partially valid. It dismissed the claim for compensation in its entirety.

The court of first instance held that the plaintiff had standing to seek protection of her personal rights in the form of veneration of the memory of a deceased person because of the familial and emotional ties she had with her uncle Edward Malinowski. In the court's view, the plaintiff was Edward Malinowski's closest relative because his other living relative had no contact with him and did not cultivate his memory, which excluded his competence to pursue claims in this case. The District Court rejected the allegation that the action filed by Filomena Leszczyńska was ostensible and that the plaintiff was being exploited by Maciej Świrski, the chairman of the Redoubt of the Good Name of Poles Foundation.

The District Court ruled that there is a personal right defined as the right to national pride and identity. The court found, however, that the plaintiff's testimony "did not indicate that she associated the infringement of her intangible rights with the right to pride and national identity." The plaintiff did not refer to the Polish tradition or patriotic feelings, nor did she relate her uncle's attitude to the heroic foundations of Poles during World War Two. The District Court therefore held that the plaintiff's right to national identity, as related to ideas about the community with which she identifies, had not been violated. In the District Court's view, the right to an unadulterated history is a personal right, but, as the plaintiff's testimony demonstrated, her claims were related to the good name of her uncle and the tradition of his memory that was cultivated in the family.

In the opinion of the District Court, it followed from the statement of reasons for the claim that the plaintiff linked the protection of the aforementioned right with the right not to infringe the honour, understood as an image of the actions of one's ancestors in one's own eyes and in public opinion, which, in the court's opinion, fell within the scope of veneration of the memory of the deceased.

In the opinion of the District Court, alleging that a deceased person is an accomplice in the death of dozens of other people, as well as that he had robbed a person in a difficult situation, unless it is factually confirmed, is an action that violates personal rights. The court of first instance stressed that the defendants referred to the freedom of scholarly research as a principle precluding them from being held liable, referring to international law and views expressed in doctrine and jurisprudence, but contrary to the prescribed obligation to provide evidence, they failed to demonstrate that their action, which infringed the memory of the late Edward Malinowski, did not bear the hallmarks of unlawfulness.

The District Court pointed out that the very right to academic freedom, including historical research and the publication of its results, is protected under law; however, this protection does not extend to statements that are inaccurate. In its further arguments, the court pointed out that the information in the disputed fragment of the defendants' book was based primarily on an interview given to the Shoah Foundation by Estera Drogicka (already as Maria Wiltgren) and, to a lesser extent, on the records from the criminal case against Edward Malinowski. In the opinion of the District Court, the claims of Estera Drogicka presented by the defendants were unfounded, and thus their publication was not justified by the public

interest understood as the right to establish the historical truth. The District Court concluded that the defendants had breached the rules of due diligence and, for the above reasons, granted protection to the plaintiff with respect to the allegations made against Edward Malinowski of involvement in the extermination of Jews and robbing Estera Drogicka. However, the court dismissed the claim concerning Estera Drogicka's business activity with Edward Malinowski.

The District Court held that the personal rights of the plaintiff in the form of veneration of the memory of the late Edward Malinowski had been infringed and ordered the defendants to publish an apology pursuant to Article 24(1) of the Civil Code, albeit with an amendment to the suggested text. The court pointed out that since Edward Malinowski had taken part in the manhunt organised by the Germans for Jews hiding in the woods, the information included in the defendants' scholarly work was inaccurate, but not untrue. Moreover, the court of first instance forbade the defendants to further infringe the plaintiff's rights by disseminating information that the plaintiff's uncle robbed Estera Drogicka and was complicit in the death of the Jews (he handed them over to the Germans), should the book be reprinted in the future. According to the District Court, supporting the broader scope of the claim would infringe the principle of freedom of scholarly research.

The court of first instance found no grounds to award the plaintiff damages for infringement of her personal rights, holding that in this case full compensation for moral harm is possible by non-material means.

Both parties appealed against the above judgement.

Considering the case within the limits of the appeal, the appellate court held as follows:

The plaintiff's appeal is unfounded. In turn, the charges raised in the defendants' appeal deserved, to a large extent, to be upheld, which resulted in changing the appealed judgement and dismissing the claim. Such a decision was a consequence of a different legal assessment made by the Court of Appeals, as well as a partial change in the factual findings made in this case by the District Court.

The allegations raised in the defendants' appeal concerning the factual findings of the court of first instance were partially justified. As part of the allegations of infringement of Article 233(1) of the Code of Civil Procedure, the appellants claimed that the District Court incorrectly found that persons of Jewish nationality were hidden and fed by Edward Malinowski, and that the findings were based on witness testimony records in Edward Malinowski's criminal case, which concluded with the judgement of 1950, disregarding the principle of directness set forth in Article 235(1) of the Code of Civil Procedure. In the appellate court's opinion, the words used in the justification of the first instance court's decision, "witnesses of Jewish nationality who were hidden and fed by Edward Malinowski also testified during the trial," are unclear and may be misleading. It is unclear whether these are factual findings of the District Court or merely quotations of the witnesses' testimonies. This issue therefore requires clarification. The criminal record, enclosed in its entirety, shows that at the hearing on 6 September 1949, the witnesses called by the defendant were examined. Chuna Kaplan testified that he was hiding in the woods near Malinowo. "Malinowski was hiding me. He gave me bread and pork fat, for which I did not pay him, and warned us, Jews, not to hang around too much" (p. 194). Also the witness Lejba Prybut (p. 195) was hiding in the Malinowo area during the occupation. During the trial he testified: "I went to the defendant twice, I was not afraid of him, even though I knew that he was the

village leader. Each time Malinowski gave me bread and pork fat”. In the appellate court’s opinion, however, there were no grounds to make binding factual findings regarding Edward Malinowski’s behaviour during World War Two based on that testimony. It is not the court’s remit to investigate “historical truth” or critically analyse historical sources. Thus, the appellate court makes no definitive resolution as to Edward Malinowski’s conduct during World War Two. Contrary to the opinion of the plaintiff, those circumstances are not subject to consideration in this case. The case concerns the defendants’ conduct in the context of unlawful infringement of the plaintiff’s personal rights. These issues will be the subject of broader arguments of the appellate court included in the further part of these grounds of judgement.

We also have to agree with the appellants that the findings of the District Court, according to which Filomena Leszczyńska is the person closest to Edward Malinowski, and his living relative had no contact with him and did not cultivate his memory, are arbitrary and are not supported by evidence gathered in the case. The testimony of Mr Maciej Świrski (p. 646), which the District Court found to be entirely credible, indicates that he had been in contact with Edward Malinowski’s great-grandson living in Sweden, who expressed an interest in the case and a desire that “justice be done to his great-grandfather”. It is not clear from the evidence in the case whether he had stayed in contact with Edward Malinowski or whether he cultivates his memory. This circumstance, however, remains irrelevant to the outcome of the case for the reasons stated in further arguments by the appellate court.

The remaining allegations raised under Article 233(1) of the Code of Civil Procedure were incorrectly made. The allegations raised in this respect, concerning: failure to prove the lack of unlawfulness of the defendants’ actions, incorrect assessment of the defendants’ maintenance of due diligence, or assessment of the plaintiff’s legal standing, do not refer to facts, but to the sphere of legal assessments. Thus, they do not justify the allegation of a violation of Article 233(1) of the Code of Civil Procedure.

The findings of the District Court in this case, which constitute the factual basis for the judgement issued, were not disputed by the parties. They were also not effectively challenged in the appeals filed. As for the remaining scope, the Court of Appeals, taking into account the corrections indicated above, accepts these findings as its own and makes them the basis for further considerations.

This case is of a precedent character. It has sparked immense public interest, evoking strong, often very negative emotions. It is a conflict of various values, a unique clash with, on the one hand, the right to freedom of scholarly research and, on the other, the right to protection of personal rights concretised as honouring the deceased.

Locus standi

The existence of a personal right in the form of veneration of the memory of the deceased is determined by the relationship of closeness between the holder of the right (a person close to the deceased) and the deceased. The Supreme Court has consistently held (e.g. judgement of 6 April 2004, I CK 484/03) that the relationship of proximity to the deceased is, on the one hand, the source of the existence of the personal right, and on the other, the factor shaping its content and the scope of the rights arising therefrom. In addition, it is assumed that the relationship of proximity is determined primarily by the family ties linking a given person to the deceased, although it may also be determined by bonds of friendship or partnership. The

common element of these relations is the establishment, applying objective criteria, that the degree of closeness makes it credible that the emotional sphere of that person, related to venerating the memory of the deceased, was infringed (judgement of the Supreme Court of 15 November 1979, I CR 232/79). Determining whether the party seeking protection belongs to the circle of entitled persons should therefore take into account the specific circumstances of the case. On the other hand, the list of relatives in Article 8(4) of the Act on cemeteries and burial of the dead is irrelevant.

In the opinion of the appellate court, in the case of such an understanding of the relationship of proximity, it is irrelevant whether there are other persons more closely related to the deceased, as each of the entitled persons holds their own, individually defined personal right. The appellate court thus assumed that also the plaintiff – in view of her relationship with the deceased Edward Malinowski and close family relations – is a person entitled to bring an action in this case, and the fact raised in the appeal that the deceased Edward Malinowski left descendants does not preclude the plaintiff from the right to seek protection of her personal rights, that is the protection of her image and memory of the deceased.

For the above reasons, the defendants' appeal allegations concerning the lack of standing on the part of the plaintiff should be deemed unfounded, and the determination whether Edward Malinowski's descendants are alive and whether they cultivate his memory was irrelevant to the decision. The plaintiff's testimony also demonstrated that she was related to Edward Malinowski, who was her uncle. She also felt close to him, regarding him as another father. By the same token, there were no grounds to question the plaintiff's right to seek protection of the personal right in the form of veneration of the memory of the deceased due to the familial and emotional ties that linked her to her uncle Edward Malinowski. The allegations of infringement of Article 233(1) of the Code of Civil Procedure in conjunction with Article 6 of the Civil Code and Article 23 of the Civil Code shall thus be deemed unfounded.

Material scope of venerating the deceased

The judicature and doctrine nowadays accept that veneration of the memory of the deceased belongs to the catalogue of personal rights and includes the right of the relatives of the deceased to cultivate the deceased person's memory, show reverence and veneration for the deceased, where the bond is so strong that the entitled person is painfully affected by the violation of the honour and remembrance of the deceased. The right to honour the memory of the deceased is much broader than the defendants indicate in their appeal. It covers not only the funerary sphere emphasised in the defendants' appeal (concerning burial, mourning for the deceased, the right to a grave), but also the symbolic sphere related to showing respect for the memories and remembrance of the deceased in a manner other than through funerary customs and ceremonies. In the symbolic sphere, sometimes referred to as the right to undisturbed cultivation of the memory of the deceased, one should distinguish the right "to good remembrance of the deceased" (linked to the obligation of third parties to respect the dignity of the deceased) and the right to "true remembrance" (from which arises the obligation to provide true information concerning the life and activities of the deceased) (judgement of the Court of Appeal in Warsaw of 21 November 2014, VI ACa 59/14).

It should be stressed at this point that the direct object of protection is not the personal rights of the deceased (their good name, personal dignity) but the protection of the good memory of the deceased, understood as the image of the deceased that exists in the minds of the loved ones and that they expect from other people. Thus, the protection takes place from the

perspective of the feelings and position (personal, family, social) of the surviving relatives. The protected personal right is regarded as an emanation of the personality of the person cultivating the memory of the deceased and is always associated with certain feelings towards the deceased (Supreme Court judgement of 20 September 2007, II CSK 237/07).

Thus defined, the honouring of the memory of the deceased may be violated by making or disseminating accusations that defame the memory of the deceased, thus interfering with the emotional sphere of the loved ones, which is a reflection of the family and emotional ties that the deceased had with their relatives. The legal protection to which they are entitled is not, however, directed at protecting the dignity of the deceased or the loved ones, but aims at protecting the feelings of reverence those persons have for the deceased (judgement of the Court of Appeals in Kraków of 10 June 1992, I ACr 190/92).

The right to venerate the memory of the deceased, as defined above, does not contradict Art. 8 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms or the Constitution of the Republic of Poland. In accordance with the view accepted in the doctrine (Gudowski Jacek (ed.), *Kodeks cywilny. Komentarz*. Vol I. *Część ogólna*, p. 1, commentary on Art. 23 of the Civil Code, LEX), personal rights should not be equated with human rights protected by the provisions of international instruments, including the Convention for the Protection of Human Rights and Fundamental Freedoms. A specific constitutional or convention value does not always correspond to a value which under civil law would specifically meet the criteria for recognition as a personal right. The mere coincidence of the names of the protected values (personal rights and constitutional values) cannot be automatically equated with the coincidence of the object of protection. Even in the situation when human rights or constitutional rights and freedoms refer to values that are also personal rights, the manner and scope of their protection should take into account the character and purpose of application of legal acts, in which these rights and goods have been invoked. In doctrine, it is also stressed that each of these acts provides protection to particular values by applying legal measures appropriate to it. Deciding on the protection of personal rights one should therefore pursue the claims listed in Article 24 of the Civil Code, and the subject of the court's consideration will then be the fulfilment of the prerequisites for granting protection to personal rights. As a matter of principle, in civil cases for the protection of personal rights, references to the Constitution of the Republic of Poland and international instruments are applicable in the accepted line of interpretation of the Civil Code, albeit not decisive, especially in a situation where the convention values are not the same as personal rights. By the same token, the view expressed in the case law on Article 8 of the convention that family life inherently exists between living persons and ceases upon death, and only certain situations occurring after death (for example, the circumstances surrounding the burial or funeral of a loved one) fall within the scope of the right to respect for family or private life under Article 8 of the convention, does not preclude the creation of a personal right in the form of veneration of the memory of the deceased. Contrary to the defendants' appeal allegations, the District Court did not therefore infringe Article 23 of the Civil Code in conjunction with Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 47 of the Constitution.

One has to agree with the conclusion of the District Court that an act infringing the personal right in the form of the right to venerate the memory of a deceased person is a public accusation that a deceased person was complicit in the deaths of several dozen people and that he robbed a person in a difficult situation. It should be emphasized, however, that the legal system provides protection only against unlawful interference with a personal right. Thus only

an unlawful interference with the image of the deceased that exists in the consciousness of the loved ones and that they expect from others constitutes an infringement of the subjective right defined as the right to veneration of the memory of the deceased and thus conditions the granting of protection to the entitled party.

The issue of national identity as a personal right

The District Court indicated in its grounds for the judgement under appeal that there was no basis for finding that the plaintiff's right to national identity had been violated. The District Court's reasoning in this respect is rather unclear. It may raise doubts as to whether the court of first instance decided that the plaintiff did not pursue the protection of this personal right in this case at all, or it decided – referring to her testimony – that the plaintiff had failed to prove that the defined personal right was infringed in that case. Irrespective of the approach ultimately adopted by the District Court, however, it should be indicated – with reference to the defendants' arguments in this respect made in the filed appeal – that under civil law there is no personal right in the form of national identity, attachment to the Polish nation or national pride. The individualised and strictly personal nature of rights protected under Articles 23 and 24 of the Civil Code should be stressed. From the very essence of personal rights it follows that they cannot be collective, universal values, common for some groups. They lack the constitutive feature of every personal right – they are not individualised values, linked to a person, the personality of a concrete individual (see T. Grzeszak, *Dobro osobiste jako dobro zindywidualizowane*, PS 2018, no 4; Gudowski Jacek (ed.), *Kodeks cywilny. Komentarz*. vol I. *Część ogólna*, part 1, commentary to Article 23 of the Civil Code, LEX). The doctrine rightly raises practical problems associated with personal right generated this way, in particular the problem of defining the scope of entitled persons. Every member of the community, i.e. every individual who feels a sense of belonging to the Polish nation and pride in being a Pole should have an active right. An event resulting in an infringement of thusly defined personal right could engender an unlimited number of legal actions filed by individual members of the community – harmed by the infringement and demanding protection of their personal right.

Determination of unlawfulness – conflict of principles and values

In this case, a collision occurred between the subjective right to good remembrance of the deceased and such values as: freedom of scholarly research (including historical research), freedom of public debate about past events (especially controversial) and freedom of expression of other persons (including witnesses to history). The structure of the conflict of principles, which serves the basis for determining the relation of unlawfulness in this case, assumes that subjective rights do not have an absolute character, and the extent to which they are implemented may be subject to limitation due to the necessity of implementation of opposing rights or protection of other legally important values. These issues were exhaustively presented in the resolution of 7 Supreme Court judges of 18 February 2005 (III CZP 53/04). As has been indicated in this ruling, the right to freedom of speech and the right to protection of veneration are protected both under the Constitution of the Republic of Poland, as well as under international legal acts. The importance of these rights and the level of protection afforded to them are the same. Neither of them can be given priority over the other and neither of them is absolute. In such a state of balance between them, a collision between them must always be resolved *in casu*, in the factual and legal circumstances of a particular case. The model presented in this resolution for the application of law in cases for the protection of personal rights violated or threatened to be violated by public statements, including scholarly statements, found expression in the subsequent jurisprudence of the

Supreme Court. “In the case of personal right, it is not possible to establish *in abstracto* fixed, rigid limits to the scope of its protection. In each particular case, the scope of protection of a personal right is determined by the court, giving priority to the protection of a personal right or another value that collides with it.” It means “the need to balance which of the opposing interests, i.e. personal interest of the subject demanding protection of their personal rights, and the social interest, which cannot be fulfilled without invading the sphere of personality of the individual, should be given priority in a given case” (Supreme Court judgement of 23 March 2017, V CSK 262/16). “The conflict of values occurring in cases such as the present one is in fact a conflict of principles, each of which should be realised to the fullest possible extent, taking into account the legal and factual circumstances. Resolution of this conflict (giving priority to one of the principles) is possible only *in casu* and each time requires consideration of the circumstances of the particular case” (Supreme Court judgement of 30 June 2017, I CSK 603/16).

Freedom of research, freedom of public debate, freedom of expression

Freedom of expression is constitutionally guaranteed. In addition, it is legitimised by international law. Article 54(1) of the Polish Constitution guarantees everyone the right to express opinions and to acquire and disseminate information. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms grants everyone the right to freedom of expression, including the right to hold opinions and to receive and impart information. As indicated in the jurisprudence of the European Court of Human Rights, freedom of expression is one of the foundations of a democratic society and a condition for its development and the self-fulfilment of the individual. It cannot be limited to information and opinions which are favourably received or perceived as inoffensive or as a matter of indifference, but is equally applicable to those which offend, shock or disturb the State or a sector of the population. Such are the requirements of pluralism, tolerance and broadmindedness, without which there is no “democratic society” (cf: judgement of the ECtHR of 17 December 1976, *Handyside v. United Kingdom*, no. 5493/72).

The above theses, often cited in many other decisions of the Strasbourg court, constitute the foundation for the protection of freedom of expression and the public’s right to be informed, both under European and Polish law. In the justification of the judgement of the Supreme Court of 18 July 2014, citing the formula from the “*Handyside*” case, it was also pointed out that “the search for historical truth is desirable and the explanation of the reasons why it may not be discovered is valuable for further research of the problem” (Supreme Court judgement of 18 July 2014 IV CSK 716/13). “The publication of statements that are a form of participation in the public debate on historical facts or figures is, as a rule, a manifestation of the permissible and legally protected exercise of freedom of expression and the communication of ideas and opinions, also when they are controversial and incompatible with the dominating version of historical events” (Supreme Court judgement of 24 February 2004, III CK 329/02).

Settlement of conflicts

In the present case, the District Court rightly pointed out, referring to the view well-established in the jurisprudence of the European Court of Human Rights and the Supreme Court, that it is not the role of courts to settle historical disputes or validate the results of scholarly research. However, the District Court did not draw the appropriate conclusions from the above principle and applied it erroneously in the present case, while the standard of

historians' reliability it adopted, depriving them *de facto* of the right of critical evaluation of sources, distorted this principle.

In the jurisprudence of the European Court of Human Rights and the Supreme Court, it is stressed that the court should not settle whether a specific historical fact existed or not, nor should it "determine" by means of judicial authority that a specific historical fact occurred (Supreme Court judgement of 24 February 2004, III CK 329/02). Therefore, it should not be the subject of court proceedings to assess the methodology of historical research, criticise historical sources or verify these sources, and thus to assess the historical method. It is difficult to share the standpoint that as part of a civil trial the court should decide on the credibility of historical accounts and sources, or dictate historians on which sources they should base their findings, and which of those sources are more trustworthy. Such actions would constitute an unacceptable form of censorship and interference in the freedom of research and scholarly work.

It should be stressed that the freedom of scholarly research also includes the freedom to publish research results, and to express opinions based on those results. Therefore, if a historian collects specific source material as part of their research, critically evaluates it (in accordance with the historical method) – and determines specific facts based on the collected sources, such action cannot be regarded as unlawful.

The District Court's assessment that the action of the defendant historians was unreliable and therefore unlawful cannot be supported. The District Court alleged that the defendants based their findings primarily on the interview given by Estera Drogicka (Maria Wiltgren) to the Shoah Foundation. The District Court found this interview unreliable because other sources did not confirm the allegations against Edward Malinowski.

This line of argument cannot be supported. In their appeal, defendants correctly point out that the standard of reliability adopted by the District Court for historians is unduly strict, and the District Court's requirement that only facts supported by all available sources be disclosed is unrealistic and completely forecloses free research. Applying the standard of reliability implied by the District Court's reasoning would lead *de facto* to a situation in which historians could write only and exclusively about facts that are certain, indubitable and uncontroversial. However, this is not the nature of research. Examining hitherto unexplored areas requires a detailed search for sources. It is obvious that a historian encounters contradictory sources containing different descriptions and evaluations of the same events. The essence of historians' work consists of critical analysis of found sources, reconstruction of events on their basis and selection of more reliable sources. Freedom of choice of research material is inscribed in the essence of research work. Moreover, especially in the case of researching recent history, there is no definite catalogue of sources. As previously closed archives are opened and made accessible, new sources may appear that were previously inaccessible to researchers (documents, microfilms, photographs). New, previously unpublished memoirs and letters are released. Each subsequent research may reveal new, previously unanalysed documents, and the resulting facts may change previous findings.

In the opinion of the appellate court there is no doubt that the defendant Barbara Engelking collected extensive source material, assessed it critically, considered some of the available sources as reliable and made certain findings on their basis. It should be emphasised that as a result of an extensive search for sources, the defendant obtained two mutually exclusive testimonies given by Estera Drogicka (later known as Maria Wiśniewska, and after her

marriage as Maria Wiltgren). These were her testimony as a witness during the trial of Edward Malinowski in the Polish court between 1949 and 1950, and the 1996 interview for the Shoah Foundation.

Having such source material at her disposal, the defendant assessed it critically and rejected the testimony of Estera Drogicka given in the 1940s in the criminal case of Edward Malinowski as unreliable. Instead, the defendant based her findings on Maria Wiltgren's (Estera Drogicka's) 1996 interview, which in his opinion was more credible. What is important and needs to be emphasised is while the defendant based her research on the account she chose, she presented the alternative version, quoting the testimony Estera Drogicka gave during Edward Malinowski's criminal trial in a footnote. Therefore, the allegation that important sources were omitted cannot be supported in this case. In the appellate court's view, on the other hand, there was no basis for the plaintiff's demand to include the full text of Estera Drogicka's testimony, which would constitute an impermissible interference with the integrity of scholarly work.

When questioned as a party, the defendant explained the methodology of historians' work. When evaluating Estera Drogicka's testimony given before the court in 1950, she paid attention to both the historical context and the circumstances in which the trial took place. On the basis of the preserved court records she established that some Malinowo inhabitants reported Edward Malinowski to the authorities (p. 293 – 295). However, during the trial the witnesses were intimidated, some of them were beaten and robbed, while Adolf Czajkowski, a feldsher from Drohiczyn who was helping them, was murdered (p. 335 – situation report from 14 August 1949). The questioned witnesses changed their testimony given before the prosecutor, retracting their earlier allegations against Edward Malinowski. This is evident from a comparison of the transcripts of their testimony in the preparatory proceedings and before the court. Other witnesses did not appear in court and did not testify at all, risking fines (they later applied for the fine to be waived, explaining that their failure to appear was due to a threat from "Jaskółka's" gang, p. 256). Moreover, as aptly argued in the defendants' appeal (item 10), also taken into account should be the political context of the time, including the sense of danger that Jewish Holocaust survivors felt in the 1940s. This circumstance, too, was considered by the defendant when evaluating and commenting on the existing sources.

The account given by Estera Drogicka (who at that time appeared before the court as Maria Wiśniewska) under such circumstances raised doubts in the defendant's mind. This account indicated that [Drogicka] had been hidden and fed in Malinowski's barn for many weeks, even though she was penniless. Moreover, Estera Drogicka told the court that at night Edward Malinowski's barn was full of Jews, and that he gave them food. He also arranged for Aryan documents for her and sent her to forced labour, which saved her life. She found out about the murder of the Jews hiding in the forest from a letter from Edward Malinowski (Adolf's son). A forester responsible for that was later killed by Jewish partisans. She also referred to the gold earrings taken by Edward Malinowski from the murdered Jewish woman, explaining that "in 1945 that girl's fiancé told me that Malinowski had given him those earrings and praised him" (p. 193–194).

Having assessed the collected sources, the defendant considered the interview given by Estera Drogicka (Maria Wiltgren) to the Shoah Foundation in 1996 to be more credible. As the defendant argued, this interview was carried out many years after the war, in a safe environment for Estera Drogicka (Maria Wiltgren), far from the places and persons described in the events. Contrary to the claims of the plaintiff's attorney made in the appeal, the content

of this interview does not raise any doubts, and its thorough analysis has ruled out any mistake as to the persons indicated therein. It is beyond dispute that during World War Two and in the post-war era there were two men named Edward Malinowski living in the village of Malinowo: Edward Malinowski, the plaintiff's uncle, who held the post of village leader at that time, and Edward Malinowski, younger than him, the son of Adolf. Both also appeared in the criminal case – village leader Edward Malinowski as defendant, and Edward Malinowski, Adolf's son, as a witness. Contrary to the plaintiff's appeal allegations, Maria Wiltgren (Estera Drogicka) did not confuse those two men. When speaking of Edward Malinowski, the plaintiff's uncle, she usually referred to him as the village leader, whereas when talking about the other Edward, she added the name of his father Adolf. It should further be stressed that in her interview Estera Drogicka also briefly referred to the testimony she gave during Edward Malinowski's trial, trying to explain her motives.

According to her account, she was just on her own, after her son, sister and her children were murdered. "I ran out of the forest from that place. (...) I ran to Malinowo and there was a little boy, maybe eight years old, and he said: 'You're Jewish. You can't live.' (...) I asked where the village leader was and I went in to see the leader, Malinowski Edward". (...) He knew I was Jewish. (...) I said that I had an *ausweis*, (...) so maybe I'll go to Germany. And he said, 'Do you have anything you took from the ghetto with you?'" In the further part of the interview Maria Wiltgren recalls that Edward Malinowski took from her, among other things, a sweater, a silk slip, and half of her money ("he took 50 marks from me, I had 100 marks, and he left me 50.") Then "he went with me to the gendarmes and said that I had escaped from Germany (...) because he is the village leader and he has a requirement, because the village leader constantly had to send people to work in Germany, so he brought me there to go to Germany" (p. 405-406).

In the opinion of the appellate court, there is no doubt that this fragment concerned the plaintiff's uncle, as he was the only village leader at the time, and it is also beyond dispute that he was the one who reported Estera Drogicka for forced labour.

Contrary to the opinion of the District Court, there is also no contradiction in Estera Drogicka's (Maria Wiltgren) statement about being sent to forced labour. According to the appellate court, her account is consistent. It is clear from her statement that she had an *ausweis*, which she had bought from a Belarusian woman. After the loss of her family she went to the village leader, Malinowski, and suggested that he report her for forced labour in Germany. It should be noted that her turn of phrase in the 1996 interview implies how determined she had been. Estera Drogicka had nothing to lose. Her whole family was dead. She had nowhere to hide, and even a young child knew she was Jewish. Under those circumstances, going to forced labour in Germany was her only salvation. It is also obvious that she could not report for forced labour on her own. The Polish population tended to avoid being sent to forced labour, so her reporting to the German authorities or to the police would have been suspicious. On the other hand, her being brought by the local village leader as a fugitive from forced labour lent credibility to her story and was also beneficial to Edward Malinowski, who did not have to send the residents of his own village for forced labour. It is also understandable that she did not mention staying overnight, since the village leader had immediately escorted her to the station.

Contrary to the position of the District Court, the defendant's finding that Edward Malinowski took Estera Drogicka belongings which she had managed to carry out of the ghetto does not

raise doubt. On the other hand, the fact that she recovered some of those items later does not change the main finding that earlier those objects had been taken from her against her will.

Another recollection in the 1996 interview given to the Shoah Foundation concerned the period in 1944 when Estera Drogicka (Maria Wiltgren) came to Poland on leave. She recalled the other Edward Malinowski (describing him as Adolf's son). From her account, we know that he came to Bielsk to pick her up. She stayed in his house, and his sister knitted her a beautiful dress. It is irrelevant that Estera Drogicka (Maria Wiltgren) sometimes got his name wrong, calling him Edmund, since the context of her account demonstrates that she was talking about the same person all the time. There is also no doubt that Edward (Edmund), Adolf's son, mentioned in this fragment of the interview, is not the same person as the plaintiff's uncle, whom Estera Drogicka described as "Malinowski who took my things."

Contrary to the plaintiffs' appeal allegations, there are also no doubts as to the identity of the persons described in the interview, which concerns the murder of Jews hiding in a nearby forest in 1944. "A forester saw them, that they were there in the forest. And together with Malinowski, they went to the gendarmerie, and they killed all of them, including the children, they murdered everyone. (...) A few days later, Jewish partisans came and killed the forester. (...) But when the war ended, Malinowski was sentenced to death. (...) I saved him. Even though he did a lot of harm to me, but never mind. I was in such a... It was something horrible, when I had to testify. Such unpleasantness for me in general. But I saved him."

The above-quoted fragments of Estera Drogicka's (Maria Wiltgren) statement are unambiguous – it was the same Malinowski (the plaintiff's uncle), who was accused in a criminal case after the war and to whose benefit she later testified, that went to the gendarmerie station. However, it is obvious that the only person against whom criminal proceedings were carried out was the plaintiff's uncle. It is also beyond dispute that in his trial Estera Drogicka (Maria Wiltgren) testified as a witness. The fact that she did not mention his name in this part of the interview is therefore irrelevant. What is also important is Estera Drogicka's (Maria Wiltgren's) negative view of that person ("he did a lot of harm to me"), which proves that it was a person known to her, with whom she had had negative experiences. In her interview, Estera Drogicka (Maria Wiltgren) spoke critically only about village leader Edward Malinowski (the fragment about taking away her things: "I had a very nice sweater, he took it away from me (...). I had a silk slip, so he took that, too, and he took 50 marks from me (...) And I was furious when I realised that he would take it."

For the above reasons, it is impossible to support the allegations made in the plaintiff's appeal regarding the incorrect interpretation of the interview by Estera Drogicka (Maria Wiltgren) by the defendant, which allegedly resulted in the incorrect – in the plaintiff's opinion – conclusion that Estera Drogicka (Maria Wiltgren) named village leader Edward Malinowski as co-responsible for handing over the hiding Jews. The claims raised in the plaintiff's appeal that not only the plaintiff's uncle as village leader maintained contacts with the Germans, and therefore the disputed fragment of the interview could have referred to any other person bearing the same surname, are inaccurate. According to the appellate court it is not important who else could have betrayed the hiding place of the hiding Jews, but who – according to Estera Drogicka (Maria Wiltgren) – did it. Estera Drogicka's (Maria Wiltgren) statement in this regard is indisputable – apart from the forester from Czarna Wielka, the person co-responsible for betraying the Jews was the same Malinowski who faced a criminal trial after the war, whom Estera Drogicka (Maria Wiltgren) knew and in whose defence she later

testified. There was only one person who met those criteria – Edward Malinowski, the village leader of Malinowo and the plaintiff's uncle.

It should also be noted that the witnesses in the post-war criminal case also pointed out to Edward Malinowski as the person involved in the denunciation of the Jews in hiding. The enclosed records from that case, which the defendant knew and used, demonstrate that over ten farmers from Malinowo signed a report against Edward Malinowski (p. 293–295). In the report, Edward Malinowski was accused of collaboration with Germans, harming the residents, unlawful requisitioning animals and wood, as well as of handing over Jews in hiding to the Germans. Those accusations were confirmed in the testimony given before the prosecutor. Therefore, information given by Estera Drogicka (Maria Wiltgren) in 1996 is supported by other sources from that period.

As already mentioned at the outset, it is not the subject of this case to determine whether Edward Malinowski, the plaintiff's uncle, was guilty of the death of Jews. However, the above-mentioned historical sources did provide sufficient grounds for such conclusions to be reached by a historian researching this issue. Therefore, the defendants cannot be accused of unreliability in research or even a further-reaching accusation of untruthfulness in a scholarly publication. Therefore, it cannot be claimed that they unlawfully infringed the personal rights of the plaintiff as a relative of Edward Malinowski.

It should also be noted that the story of Estera Drogicka and Edward Malinowski was only a small fragment of the extensive publication *Night Without End: The Fate of Jews in Selected Counties of Occupied Poland*. It was a summary of a research project that lasted several years and was carried out by the Polish Center for Holocaust Research under the title “Jewish survival strategies in the General Government during the occupation, 1942–1945, Case study of selected counties.” The aim of the project was, among other things, to collect accounts of Holocaust survivors, to show how they behaved in the face of the Holocaust and how they strove to survive. They are the heroes of this work. The account of Estera Drogicka, published by the defendant, was one of several stories of survivors from Bielsk county who survived the war on Aryan papers. The profiles of the people described in the book, both Poles and Jews, were briefly presented, and the defendant simply presented their own version of events, focusing on how they managed to survive the occupation.

Bearing the above in mind, it should be stressed that Edward Malinowski was not the main character of this publication. Therefore, the plaintiff's allegations as to the lack of detailed findings concerning his attitude and behaviour as Malinowo village leader during World War Two are unfounded. His profile was presented only through the prism of Estera Drogicka's fate. From the point of view of the volume's subject, it was pointless to include additional information about Edward Malinowski, especially any attempts to determine whether he was a good village leader, whether he hid a Russian soldier who had escaped from a transport, and whether he helped other Jews in hiding. Thus, the testimonies of Lejba Prybut and Chuna Kapłan (leaving aside the question of their credibility, as they were given during the same criminal trial as the testimony of Estera Drogicka) were irrelevant, and even if Edward Malinowski were to be found to have acted appropriately towards them, it cannot be ruled out that allegations against him in the criminal proceedings were well-founded. The applicant's argument that since Lejba Prybut had given testimony incriminating the defendant in another criminal trial, he would not have been afraid to give truthful testimony in Edward Malinowski's case is also misplaced. Speculations on this subject are pointless, especially as little is known about the circumstances surrounding that trial. Other people's opinion about

Edward Malinowski, unrelated to the case of Estera Drogicka, were also irrelevant. Hence, the defendant did not seek information about him from his living relatives. Moreover, the defendant did not describe the criminal trial in detail, did not cite witnesses' testimonies, and did not provide information that a report had been filed against him. Indeed, that was not the subject of her work. However, she did inform about the acquittal of Edward Malinowski and about the testimony of Estera Drogicka given in his defence, considering these facts as important from the point of view of the story she was reporting. For the same reasons the defendant did not present the circumstances that accompanied the trial, either, and in particular did not write that the wife of village leader Malinowski and his son were suspected of telling "Jaskółka's" gang members the names of those who had signed the report (these circumstances are confirmed by Marianna Malinowska's personal questionnaire on page 337, which indicates that she had approached 'Jaskółka' and asked him to punish two farmers from the village of Malinowo who had contributed to the arrest of her husband. 'Jaskółka' fulfilled the request by robbing those farmers; and Tadeusz Malinowski's personal questionnaire (p. 338) which states that he "helped Jaskółka's gang by indicating the place of residence of the farmers, who were robbed"). Whereas the fact that witnesses were intimidated, robbed and beaten, as well as that a murder took place, is confirmed by the situation report of 14 August 1949 (p. 335 – "on 13 August 1949 at 1 p.m. six unknown armed bandits arrived in the village of Malinowo (...), where the bandits severely beat up three residents (...) First aid was given to the beaten residents (...). On the same day, at 9 p.m. one unknown bandit armed with a pistol (...) came to the house of the aforementioned feldsher in the town of Drohiczyn, (...) brought him out into the yard and killed him with three shots."

However, the failure to include the above information does not mean that the defendant failed to consider the circumstances. Neither does it mean that the defendant failed to examine all the sources she gathered and to assess their credibility in accordance with the historical method, to the best of her knowledge. It is obvious that the defendants, due to their education and many years of experience acquired over the course of research of the extermination of Jews, were qualified to evaluate the collected sources. The defendant repeatedly referred to such knowledge resulting from experience, from reading thousands of preserved accounts and memoirs, and from the analysis of documents in archives. On the other hand, considering the nature of the disputed publication, which is devoted to Jews as a certain national group living in occupied Poland, there was no point informing readers each time about the defendant's critical assessment of the sources and the reasons why some of the sources were excluded as unreliable. Every scholar has the right to publish the results of their research, and polemics with such findings should be carried out not in a courtroom but in a scholarly debate, where one's own methodology may be presented and evaluated by persons with appropriate historical knowledge.

In the appellate court's opinion, the allegations in the plaintiff's appeal regarding the defendant's failure to use all the sources available to her are also unfounded, and by referring to "six different sources" the plaintiff seems to be confusing historical sources with evidence gathered in this case. The fact is that the defendant had at her disposal the criminal case file against Edward Malinowski, which included the testimony of Estera Drogicka (Maria Wiltgren) as well as the interview given by Estera Drogicka (Maria Wiltgren) to the Shoah Foundation in 1996. Nevertheless, it is impossible to support the allegations that she "used only one source." It is evident from the defendant's testimony that she had read the entire documentation but concluded that only the 1996 interview was reliable, and therefore rejected the testimony given in Edward Malinowski's trial. This does not mean, however, that she did not use the other sources, since she verified them.

It is irrelevant whether the defendant used documents found in the personnel file of a civilian employee of the UB [Security Office]— Maria Wiśniewska (Estera Drogicka/Maria Wiltgren) (p. 378 – 400). First of all, it should be noted that Estera Drogicka was employed as a summer camp counsellor from 1 July 1947 to 1 September 1947. After that, the contract was terminated. Contrary to the suggestions in the plaintiff's appeal and in pleadings filed during the court proceedings, there are no additional traces confirming Estera Drogicka's connections with the security services. Thus, any allegations made in the appeal that she could not have possibly felt intimidated because she knew where she could potentially seek help, are completely unfounded, and such implications should be considered as unfair to Estera Drogicka. On the other hand, the curriculum vitae in the personal file, handwritten by Estera Drogicka, does not contain any new and significant information, and in its basic outline it is consistent with other sources available to the defendant. According to the curriculum vitae, Estera Drogicka, together with her child, her sister and her two children, escaped during the liquidation of the ghetto. They were hiding in the woods. The sister and the children were handed over to the gendarmes and then transported to Treblinka, where they all died. The fragment recounting the period from their escape from the ghetto until her departure for Germany is emotionally charged, with digressions. "We were struggling for two weeks, finally it started snowing and got really cold, and we had no way out, we had to die, and we wanted to live so much. You're so young, and life seems so beautiful then. To make matters worse, people from the village took us and wanted to hand us over to the gendarmes, there was no way out, by some miracle I managed to get out, my sister and the children were taken to the gendarmes, and they took her to Treblinka, where my whole family died." Later the account becomes cursory and provides scarce details, just one sentence: "I escaped to Germany, where I survived on Aryan papers." In this curriculum vitae, Estera Drogicka (Maria Wiltgren) did not mention the village leader Malinowski, nor did she explain the circumstances under which she had left for forced labour in Germany. She also misidentified the town where she was hiding (she indicated Drohiczyń instead of Malinowo). She did not give any names, either. The above inaccuracies and omissions do not depreciate the interview given in 1996, nor do they undermine the facts resulting from this interview. Additionally, it should be noted that Estera Drogicka prepared this curriculum vitae when she was applying for a job of a counsellor at a summer camp. Therefore, it is obvious that it was much shorter and more concise than the exhaustive testimony she gave at the end of her life, in which – probably for the very first time – she was able to present her own story freely and without any restrictions.

Contrary to the allegations in the plaintiff's appeal, it was not the defendant's error to disregard the information about Edward Malinowski available to the plaintiff, Filomena Leszczyńska, and not to confront Estera Drogicka's 1996 account with what her sons knew about her life. Detailed presentation of Edward Malinowski's biography was, as indicated above, pointless, as he was not a principal figure in the defendants' work. Moreover, the defendant knew his position. The records of the hearings in the criminal files showed that he pleaded not guilty to the charges against him. He maintained that the Germans had been led to the hiding place of the Jews by a forester from Czarna Wielka. Together with other men from the village, he had been taken there to bury the victims. The forester had walked at the head of the procession with the Germans, while they had walked at the end, deliberately delaying the march. When they had reached the hiding place, all the Jews had already been brought out. He had been present at the execution carried out by the Germans. On the following day, on the order of the Germans, he had buried the murdered together with other men from the village. He had taken the earrings of one of the victims, which he had later given to a Jew from

Brańsk, who had described to him the appearance of the murdered woman and said that she had been his fiancée (p. 238 et seq.).

However, Estera Drogicka's sons, Zbigniew Wiltgren and Roman Wiltgren, drew their knowledge about their mother's life solely from her stories. Thus, they were the so-called "hearsay witnesses." Both were born after the war and lived in Wrocław, far away from Malinowo and its residents. Therefore, they could not confront their mother's stories with others. In the appeal the plaintiff's attorney points out the discrepancies between the biography of their mother presented by them and the interview given by Estera Drogicka in 1996. However, a key question arises: was it Estera Drogicka who gave her sons wrong information, or did they misremember their mother's account? Both sons unanimously testified that for a long time their mother lived with a sense of guilt, that she was traumatised by the fact that all her closest family (husband, baby son, sisters and brother with their families, parents) were killed, and she was the only one who survived. She rarely talked about those issues, she did not talk about the war. Therefore, one can get the impression that the witnesses' knowledge about their own mother's life was rather fragmentary, resulting from her recollections, information from interviews, and their own conjectures and speculations. Both witnesses also watched Estera's 1996 interview and only learned about certain events and people from it. Moreover, the witnesses did not fully realise what the lawsuit concerned, misrepresenting the circumstances of the present case. On the other hand, the witnesses agreed that their mother had spoken negatively about Edward Malinowski, although they explained the reasons for her dislike in different ways. It should also be noted that the basic facts in both accounts were consistent with the version presented by Estera Drogicka in the 1996 interview. There were, however, certain discrepancies regarding some details, and at the moment it is impossible to establish what exactly Estera Drogicka told her sons, how much of her account was remembered by her sons, and to what extent they supplemented those memories with their own conjectures and speculations. For example, in his testimony, Zbigniew Wiltgren stated that his mother had blamed Edward Malinowski for giving her family away, although in her 1996 interview Estera Drogicka had not formulated such accusations. In the opinion of the appellate court, if such a fact had indeed occurred, there would have been no obstacle to disclose it in the interview. For these reasons, it is difficult to assume that the knowledge of the above witnesses could be used to verify Estera Drogicka's 1996 interview.

It should also be noted that sources "from the era," contemporary to the events described, are of particular importance in historical research. It is also important whether oral or written accounts come from eyewitnesses. In the case of "hearsay witnesses" it is important to establish where the authors got their knowledge about the events they describe and under what circumstances the accounts were written. In the analysed case, the defendant considered the accounts that come directly from Estera Drogicka to be particularly significant, choosing the interview as the reliable source, because while it was carried out at a later time, it was given in conditions that, in the defendant's opinion, allowed for a free and frank account. On the other hand, the accounts of Estera Drogicka's sons, who only provided an inaccurate account of her recollections, were not significant for the subject matter of this case, i.e. the assessment of the defendants' conduct in the context of the infringement of the plaintiff's personal rights.

The appellate court is of the opinion that in presenting in her scholarly work the reconstructed story of one of the Survivors – Estera Drogicka – the defendant did not infringe the principles of scholarly reliability. She did not disregard any important documents or accounts, and the

selection of sources she used was not arbitrary. The court's control in such a case was limited only to assessing whether the research did not involve any acts of unreliability, in particular manipulation of the collected source material. The court, however, has no competence to replace a historian in their research work, down to which the plaintiff's claims and the District Court's decision in this case *de facto* boiled.

In the appellate court's view, verifying and undermining the defendant's approach, the results of her research and the subsequent conclusions (which is what the plaintiff in this case in fact expects) constitutes an impermissible interference in the freedom of scholarly research and freedom of speech. The appellate court does not conclude definitively whether the research results published by the defendant are free of certain factual or interpretative errors. However, their potential presence could not justify a negative legal assessment of the scholarly publication, in particular deeming it unlawful. As indicated in the previous arguments of the appellate court, a courtroom is not a proper place for conducting a historical debate.

In the light of the above, the plaintiff had no grounds to refer to the decision in the case closed by the judgement of the Warsaw Court of Appeals of 20 November 2009 (VI ACa 609/2009). In the latter case, the appellate court held that judicial interference with a research paper is permissible in the situation where it contains an obvious untruth resulting from bad will and distortion of historical sources. The historical publication assessed by the appellate court in that case included obviously false information about the plaintiff's father. Contrary to available sources, it was historically stated that the plaintiff's deceased father was convicted of spying for the USSR, whereas the court verdict against him found him guilty of belonging to the Communist Party of Western Ukraine. However, such a situation of intentional misrepresentation did not occur in the present case.

No violation of personal rights in connection with the information about trading with Estera Drogicka

The defendant's admitted inaccuracies in Estera Drogicka's story were due to a minor mistake. In her work, the defendant mentioned that while on forced labour in Germany, Estera Drogicka "developed a trade, sending Malinowski parcels of things to sell. She visited him when she went 'home' on leave" (p. 149–150). In fact, this passage referred to Edward Malinowski, Adolf's son, and not the plaintiff's uncle. In the appellate court's view, the above mistake is irrelevant for the assessment of the legitimacy of the claim filed in this case. The information in the publication that it was the plaintiff's uncle Edward Malinowski who corresponded with the Jewish woman and received from her various goods for sale does not infringe the plaintiff's personal rights in the form of veneration of the deceased. The plaintiff's position that it offends her and thus violates the memory of her uncle by "stating that the uncle traded with Estera" (p. 920 *verte*), was not in any way explained by the applicant. The statement that Edward Malinowski was a trader does not have a negative overtone and is not offensive from the point of view of objective criteria. It does not therefore constitute an infringement of the "good memory of him." The hard living conditions that Polish population faced under the German occupation, the lack of sufficient food (ration cards) and of everyday necessities, as well as attempts to cope with these shortages by trading in goods on the black market are commonly known facts. It was a widespread phenomenon, and people involved in trading were not disparaged in any way. Therefore, the information about trading with Estera Drogicka did not put the plaintiff's uncle in a bad light, nor did it imply – as emphasised in the plaintiff's appeal – that he was a heartless or unscrupulous person. While residing within the territory of the German Reich, Estera Drogicka had access

to many goods that were hardly available in the General Government, and therefore the trade was beneficial for both parties. Likewise, the defendant's words do not imply that Edward Malinowski used Estera Drogicka's vulnerable position when trading with her. Nor does it seem that in the light of objective criteria it might be offensive to make references to trading with a person of Jewish nationality.

It should be stressed that in examining whether a given conduct constitutes a violation of an individual's personal rights, reference should be made to objective criteria, based on socially accepted assessments and values, as well as established contexts and semantic references (judgement of the Warsaw Court of Appeals of 16 December 2016, VI ACa 1431/15). The need to ensure the protection of certain values must exist in a broader (universal) perception and, in this sense, must be objective in nature, not limited to individual preferences based on a subjective opinion not reflected in the beliefs of a larger group of people (judgement of the Wrocław Court of Appeals of 6 February 2015, I ACa 1596/14). From the objective concept of personal rights as an object of protection follows the directive ordering to interpret statements that constitute a potential source of violation of personal rights, in the light of generally applicable semantic rules of language, assuming the average linguistic competence of the recipient of a given communication and taking into account the entire intra-textual and situational (external) context accompanying a given utterance (judgement of the Warsaw Court of Appeals of 21 November 2014, VI ACa 59/14). The application of the above criteria proves that the statement about Edward Malinowski's trade with Estera Drogicka in no way violated the personal rights of the plaintiff, was not objectively offensive, nor did it imply anything negative about her uncle. Also in this respect, the plaintiff's request could not be upheld as the passage about the trade did not infringe the plaintiff's personal rights.

Chilling effect

An important factor to consider in resolving the conflict of principles present in this case is the potential effect of a judgement granting the plaintiff's claims.

Freedom of scholarly research, including freedom to express opinions based on the results of research, conditions the possibilities of scholarly development. Restrictions on scholars' freedom to publish the results of their research require the most stringent scrutiny (ECtHR judgement of 13 February 2001 No. 38318/97, *Lunde v. Norway*). In particular, the so-called "chilling effect", which could halt further research, is unacceptable. This is particularly important in cases that constitute an important element of public debate, raise vital social issues and concern the history of a given state and nation. Historical debate should be kept wide open, especially in areas where the truth is still being investigated by historians. This means that the state is obliged to refrain from too hasty and harsh interventions, especially when a given statement serves to clarify and understand past events and contributes to the exchange of crucial ideas and opinions in society (ECtHR judgement of 21 September 2009, No. 73604/01, *Monnat v. Switzerland*).

Limits of free speech and "difficult" subjects

In the jurisprudence of the European Court of Human Rights, the prevailing view is that the search for historical truth requires broadening the limits of freedom of expression and refraining from overly harsh interventions by the state, especially when the expression serves to clarify and understand past events and contributes to the exchange of crucial ideas and opinions in society (cf. ECtHR, judgment of 23 September 1998, No. 24662/94, *Lehideux and*

Isorni v. France; ECtHR, judgment of 29 June 2004, No. 64915/01, Chauvy and others v. France; ECtHR judgment of 21 September 2009. No. 73604/01, Monnat v. Switzerland).

In the reasoning of the Lehideux judgement, the Strasbourg Court stated that, even if certain statements may lead to “the reopening of a dispute and the memory of past sufferings,” the passage of time and distance from events should lead to a less severe assessment of such statements. This is part of the effort that each country should make to allow an open discussion of its own history. In such cases, the extent of sanctions and interference, restricting the exercise of freedom of expression and the communication of ideas and opinions, should be only that which is “necessary in a democratic society” (Article 10(2) of the Convention). Every nation, every state must account for – or rather face its own history, even if the effects of this are painful and difficult to accept. This view was explicitly referred to by the Supreme Court in the judgement of 24 February 2004 (III CK 329/02), raising the importance of a free historical debate in a democratic society, including difficult and painful issues. As the Supreme Court pointed out, “the object of the court’s findings is not the existence of a specific historical fact, nor the ‘confirmation’ by the power of judicial authority that a specific historical fact occurred. The court may refer to the state of historical knowledge about specific facts, accepting this state as an important point of reference when evaluating statements made by various persons about specific events or ‘historical figures.’ (...) Moreover, it would not serve the general good to limit the possibility of historical debate, to accept the dominant versions of events as binding and “the only right ones.” The appellate court fully shares and endorses this standpoint.

In the appellate court’s view, there is no doubt that the issues of Polish-Jewish relations during World War Two, which are the subject of the defendants’ research, are of major social significance and constitute an important public interest. It is also in the public interest to hold a debate about those relations and accompanying events, to address difficult issues arising from them, even if – again referring to the judgement of the European Court of Human Rights in the Lehideux case – it were to be painful and difficult to accept for the participants of those events and their descendants.

For the above reasons, considering the plaintiff’s allegation of a violation of Article 24 of the Code Civil unfounded, the appellate court dismissed the plaintiff’s appeal in its entirety pursuant to Article 385 of the Code of Civil Procedure.

Whereas, having concluded that the complaints listed in the defendants’ appeal are largely justified, pursuant to Article 386(1) of the Code of Civil Procedure, the Court of Appeals changed the contested judgement in the first, second, third and fifth paragraphs, thereby dismissing the claim. Moreover, pursuant to Article 385 of the Code of Civil Procedure, the court dismissed the remaining part of the defendants’ appeal.

The appellate court decided to depart from the principle of Article 98(1) of the Code of Civil Procedure and apply in this case Article 102 of the Code of Civil Procedure, not charging the plaintiff with the costs of judicial proceedings for both instances. The court took into account the nature of the case, in particular the fact that the subject matter of the court’s decision was a collision between the plaintiff’s subjective right to good remembrance of the deceased and such values invoked by the defendants as: freedom of scholarly research, freedom of public debate about past events, or freedom of expression of other persons.