

# European Tort Law 2017

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## XI. Germany

### A. Legislation

#### 1. Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld (Law on Compensation of Secondary Victims for Pain and Suffering)<sup>1</sup>

In 2017, one important shift in German tort law concerned the award of pecuniary compensation to surviving relatives and other persons in a close personal relation to the victim of a wrongful death caused by the tortfeasor ('bereavement damages'). In recent years, accidents such as the intentional downing of the Germanwings flight 4U 9525 over the French Alps by the co-pilot in March 2015<sup>2</sup> and the collision of two passenger trains near Bad Aibling in Bavaria in February 2016<sup>3</sup> caused high numbers of casualties. Under the law as it stood, secondary victims such as family members of the (primary) victims killed in these accidents could only claim damages for pain and suffering from the tortfeasor if they could prove that they were harmed in their own rights protected by § 823(1) German Civil Code (*Bürgerliches Gesetzbuch*. BGB). Incited by academic commentators,<sup>4</sup> the German legislature in the aftermath of these accidents took up earlier proposals<sup>5</sup> and entitled secondary victims to claim an appropriate indemnification for mental distress in the case of wrongful death of their close ones. The general rule on such compensation was laid down in

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1 Federal Law Gazette (Bundesgesetzblatt, BGBl) I 2421, 21 July 2017.

2 See already *J Fedtke/F Schad*, XI. Germany, European Tort Law Yearbook (ETLY) 2016, 226.

3 <<http://www.zeit.de/gesellschaft/zeitgeschehen/2016-02/bad-aibling-zug-entgleist-rosenheim-tote>> (all online sources were last accessed on 14 February 2018).

4 See *T Kadner Graziano*, Angehörigen- oder Trauerschmerzensgeld – die Würfel fallen, *Recht der internationalen Wirtschaft (RIW)* 2015, 549, 564. The German debate on compensation for secondary victims is, however, much older, see *L Jaeger*, Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld, *Versicherungsrecht (VersR)* 2017, 1041; *C Katzenmeier*, Hinterbliebenenschmerzensgeld: Anspruch auf Entschädigung in Geld? *Juristenzeitung (JZ)* 2017, 869; *G Wagner*, Ersatz immaterieller Schäden: Bestandsaufnahme und europäische Perspektiven, *JZ* 2004, 319, 325 ff; *id*, Angehörigenschmerzensgeld, in: A Bruns et al (eds), *Festschrift für Rolf Stürmer* (2013) 231 ff (all with further refs).

5 For the background to the legislative procedure see *J Fedtke*, XI. Germany, ETLY 2017, 214 f.

§ 844(3) BGB.<sup>6</sup> In addition, the legislature amended the rules on special torts accordingly (for example, the respective Acts on Product Liability, Road and Air Traffic, Medicinal Products, Nuclear Energy), so that secondary victims can henceforth also claim damages for such pain and suffering in cases of strict liability. For an overview of the literature on the new compensation regime see the sources cited in no 60.

- 2 The new law is remarkable, since the legislature explicitly rejected the granting of unconditional compensation to secondary victims in the course of the last major reform of the law of damages in 2002.<sup>7</sup> Instead, it maintained the general system according to which compensation for non-pecuniary loss was only awarded if a secondary victim could prove it had suffered a medically recognisable injury because of the death of the primary victim (so-called ‘damages caused by shock’ or *Schockschäden*). Thus, in order for the secondary victim to be entitled to compensation, grief and sorrow had to have caused psychological distress reaching a pathological level, thereby surpassing the effects commonly endured when a close person passes away. Accordingly, there were relatively few cases in which even close relatives were entitled to damages.<sup>8</sup> Apart from claiming ‘damages caused by shock’, surviving relatives could obviously claim their own material losses, such as funeral costs and lost services or maintenance payments by the primary victim. As the primary victim’s heirs, they could also inherit the damages claim for pain and suffering that the primary victim acquired against the tortfeasor. However, whether such a claim exists depends on the remaining lifespan of the primary victim and is subject to the intensity of his/her suffering. Hence, in the case of the primary victim’s immediate death, no claim for damages against the tortfeasor could be acquired by the victim and, therefore, his/her heirs could not inherit any claim against the tortfeasor. As a consequence, surviving relatives did, under the old law, frequently not receive any compensation for non-pecuniary losses. While the possibility of inheriting the primary victim’s claims remains unaffected, the new Law addresses this perceived injustice by granting closely related survivors an own additional

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<sup>6</sup> § 844(3) BGB states: ‘Der Ersatzpflichtige hat dem Hinterbliebenen, der zur Zeit der Verletzung zu dem Getöteten in einem besonderen persönlichen Näheverhältnis stand, für das dem Hinterbliebenen zugefügte seelische Leid eine angemessene Entschädigung in Geld zu leisten. Ein besonderes persönliches Näheverhältnis wird vermutet, wenn der Hinterbliebene der Ehegatte, der Lebenspartner, ein Elternteil oder ein Kind des Getöteten war’.

<sup>7</sup> Cf Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften, BGBl I 2674, 25 July 2002.

<sup>8</sup> For a recent example see Federal Court of Justice (Bundesgerichtshof, BGH) 27 January 2015, VI ZR 548/12, *Neue Juristische Wochenschrift* (NJW) 2015, 1451.

claim in cases where a tortfeasor unlawfully causes the death of a person. Nonetheless, even grave injuries of the primary victim remain insufficient to trigger compensation under the new provision. For such injuries compensation of secondary victims can only be claimed under the general rules, ie if a *Schockschaden* can be proven.

A closer look at the new rules reveals that the German legislature did not limit the group of persons entitled to compensation, eg to certain close family relationships. Instead, the law stipulates that everybody having a close personal relationship (*besonderes persönliches Näheverhältnis*) and, therefore, suffers from grief and sorrow is entitled to compensation from the tortfeasor. Yet, it does presume that a sufficiently close relationship exists between parents and children, spouses or registered partners.<sup>9</sup> This legal presumption is, however, rebuttable. A spouse that has filed a petition for divorce will thus not be entitled to monetary compensation if the other spouse dies wrongfully. Furthermore, no close relationship can be assumed if a parent had no contact with his/her deceased child for an extended period of time, for example because of a dispute between them. Beyond these persons (parents, children and spouses), other secondary victims (siblings, grandparents and grandchildren and, notably, even non-relatives such as companions, cohabitants, intimate friends and foster children) may also claim damages if they prove that their bond to the victim displays similar closeness as is generally exhibited by the relationships for which the presumption operates.<sup>10</sup> Although this openness seems justified in view of diverse models of personal relationships in modern life, it certainly complicates the application of the law for the courts. By consequence, the open wording of the new provisions on compensation of secondary victims requires a nuanced approach, since courts will need to determine under which circumstances individuals other than those explicitly named in the provision can be found close enough to the victim to be entitled to damages for their own pain and suffering.

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<sup>9</sup> After the Law on Homosexual Marriage (Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts; BGBl I 2787, 28 July 2017) was adopted on 20 July 2017, no new registered partnership can be formed between partners of the same sex. However, previously existing partnerships remain valid if they are not converted into marriages.

<sup>10</sup> Printed documents of the German Parliament (Bundetsagsdrucksache, BT-Drucks) 18/11397, 13. For the previous discussion on the amounts to be granted see *Katzenmeier*, JZ 2017, 869, 876.

- 4 The amount of compensation to be awarded has not been capped or specified by the legislature. Victims can claim adequate compensation (*angemessene Entschädigung*). It is thus up to the judges to decide what amount is adequate. In the parliamentary debates, an average of € 10,000 was used when calculating the costs of the new law, as this is the (rough) average compensation awarded for *Schockschäden*.<sup>11</sup> Although this amount can serve as a (soft) yardstick, a judge will always have to assess the individual sorrow and pain of the secondary victim in the circumstances of a given case to determine what amount of compensation is adequate. Criteria to be taken into account are the intensity of the relationship with the deceased and the circumstances of his/her death.<sup>12</sup>
- 5 In compensating the pain and suffering of a secondary victim, the newly introduced claim pursues the same aim as the damages awarded for *Schockschäden*. Hence, the former shall in practice be absorbed by the latter if the suffering of the secondary victim amounts to a medically recognised injury, given that *Schockschäden* are regularly a more severe injury than a lesser amount of grief and sorrow.<sup>13</sup>
- 6 In sum, the new rules are likely to increase the number of damages actions under German law. But given that many other European countries and also the US are far more generous in compensating damage for bereavement, the new German Law only marginally curtails the incentives to forum shop abroad. Such forum shopping took place after the downing of the Germanwings plane in the French Alps as illustrated by the fact that some plaintiffs lodged an action before a US court *inter alia* to bypass the restrictive German approach to compensation of secondary victims.<sup>14</sup> Regarding the ongoing Germanwings litigation before the German courts,<sup>15</sup> the new German law is, however, inapplicable *ratione temporae*.<sup>16</sup>

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11 BT-Drucks 18/11397, 11.

12 *H Sprau* in: Palandt, BGB (77th edn 2018) § 844 no 25.

13 BT-Drucks 18/11397, 12.

14 See *Fedtke*, ETLY 2017, 214f; on case *Manuel Bandres Oto, et al v Airline Training Center Arizona, Incorporated*, Arizona District Court, Case 2:16-cv-01027 (preliminarily dismissed on the basis of forum non conveniens).

15 <<http://www.zeit.de/news/2017-09/23/unfaelle-germanwings-absturz-angehoerige-klagen-in-essen-23125807>>.

16 § 72(6) Air Traffic Act (Luftverkehrsgesetz) stipulates that the new compensation regime does not apply to fatal injuries that occurred before 22 July 2017.

## 2. Achtes Gesetz zur Änderung des Straßenverkehrsgesetzes (Eighth Amendment to the Road Traffic Act)<sup>17</sup>

A second major legislative reform with implications for German tort law concerns ‘automated driving’ of vehicles. Amending the German Road Traffic Act (*Straßenverkehrsgesetz*, StVG) in 2017, the legislature laid down rules for automated steering systems that partly or even fully take over certain driving functions from the operator of the vehicle.<sup>18</sup> Having in part already become available on the regular car market, the use and importance of such tools will soon significantly increase – requiring forward-looking legislative action in a country (despite various emission scandals, see below nos 13–15) still considering itself one of the main hubs for innovation in the automotive industry. Nonetheless, the new Law neither legalises nor regulates the use of fully autonomous driving systems, ie systems that permanently transfer the steering control from the driver to the computer system, thus making the classical driver superfluous.

Regarding the strict liability of the *Halter*<sup>19</sup> of a vehicle (§ 7(1) StVG) involved in an accident caused by an automated driving function, no amendments of the core rules were deemed necessary. Failures of automated systems are already covered by the strict liability of the *Halter* employing them. To ensure that the use of automated steering functions does under no circumstance come at the (financial) expense of other road users – namely victims of possible traffic accidents – the legislature, however, increased the limits of this strict liability for a single accident from € 5 million to € 10 million for personal injury and from € 1 million to € 2 million for material damage. This regime is ultimately supposed to lead to a situation in which the liability insurance of the *Halter* and the insurance of the car’s producer clarify their respective responsibilities in the case of a systemic failure of automated driving functions causing damage to third parties.<sup>20</sup>

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<sup>17</sup> BGBl I 1648, 20 June 2017.

<sup>18</sup> For the background to the legislative procedure see *Fedtke*, ETLY 2017, 214, 215f.

<sup>19</sup> The *Halter* is the person who pays for the expenses of a vehicle and who has the right to use it. Usually the car’s owner is the *Halter*, but this does not need to be the case. For example, a bank which financed the purchase of the car can be the owner of the vehicle. However, the debtor would often be registered as its *Halter*, since it is he/she who drives the car and pays for its expenses.

<sup>20</sup> BT-Drucks 18/11300, 14.

- 9 The fault-based liability of the car's driver (§ 18(1) StVG) – or, as was clarified by the new Law, the user of the automated steering system<sup>21</sup> – was subject to further amendments, as a new benchmark for determining the user's fault (*Verschulden*) when employing an automated steering system was introduced. The new StVG explicitly allows the user of an automated driving function to 'turn away' (*'sich ... abwenden'*) from traffic and from steering of his/her vehicle as long as he/she stays 'ready enough to perceive' (*'derart wahrnehmungsbereit'*) a necessity to retake control of the steering at any given time.<sup>22</sup> Such a timely retake of the car's control is mandatory both in the case of an explicit request by the automated system and when the user perceives or ought to perceive that the conditions for the 'designated use' (*'bestimmungsgemäße Nutzung'*) of the system are no longer present.<sup>23</sup>
- 10 The creation of this rather indeterminate legal concept in order to come to grips with automated driving has received much criticism from practitioners and academics alike.<sup>24</sup> While it might still be conceivable to define the 'designated use' of an automated system with regard to the producer's intentions and advertising – eg in a sense that lane assistants and traffic jam aids shall only be employed on highways – things become much more complicated when it comes to the degree of the driver's 'turn away' and to his appropriate 'readiness to perceive'. Certainly, these concepts are intended to mean that the driver should not

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21 § 1a(4) StVG: 'Fahrzeugführer ist auch derjenige, der eine hoch- oder vollautomatisierte Fahrfunktion im Sinne des Absatzes 2 aktiviert und zur Fahrzeugsteuerung verwendet, auch wenn er im Rahmen der bestimmungsgemäßen Verwendung dieser Funktion das Fahrzeug nicht eigenhändig steuert'.

22 § 1b(1) StVG: 'Der Fahrzeugführer darf sich während der Fahrzeugführung mittels hoch- oder vollautomatisierter Fahrfunktionen gemäß § 1a vom Verkehrsgeschehen und der Fahrzeugsteuerung abwenden; dabei muss er derart wahrnehmungsbereit bleiben, dass er seiner Pflicht nach Absatz 2 jederzeit nachkommen kann'.

23 § 1b(2) StVG: 'Der Fahrzeugführer ist verpflichtet, die Fahrzeugsteuerung unverzüglich wieder zu übernehmen,

1. wenn das hoch- oder vollautomatisierte System ihn dazu auffordert oder
2. wenn er erkennt oder auf Grund offensichtlicher Umstände erkennen muss, dass die Voraussetzungen für eine bestimmungsgemäße Verwendung der hoch- oder vollautomatisierten Fahrfunktionen nicht mehr vorliegen'.

24 For a comprehensive overview see the opinions of experts consulted in the legislative procedure available at <<https://www.bundestag.de/dokumente/textarchiv/2017/kw13-de-automatisiertes-fahren/499928>> and *J-E Schirmer*, Augen auf beim automatisierten Fahren! Die StVG-Novelle ist ein Montagsstück, *Neue Zeitschrift für Verkehrsrecht (NZV)* 2017, 253; *B Wagner/T Goeble*, Freie Fahrt für das Auto der Zukunft? – Kritische Analyse des Gesetzentwurfs zum hoch- und vollautomatisierten Fahren, *Zeitschrift für Datenschutz (ZD)* 2017, 263.

be held responsible for a failure to *constantly* observe the traffic or monitor the automated system. In the parliamentary debates it was, therefore, argued that it should be permissible to write or read emails on the car's entertainment system, as long as the driver remains 'ready to perceive' situations making it necessary to take over manual control.<sup>25</sup> At the other end of the scale, a sleeping driver will most likely not be deemed sufficiently 'ready to perceive' the need for his/her intervention. Yet, between these extremes, there is a vast grey area: will it be permissible to read a newspaper, thereby limiting one's visual perception of the traffic situation? Or will the driver be allowed to turn his/her back to the traffic and play with children on the rear seats?<sup>26</sup> Before these questions have been answered conclusively by the courts, it will not be possible to make a proper assessment of the amendment's effect on traffic tort law. At this point, however, it can already be predicted that instances of drivers' liability for the use of automated steering systems will be rather exceptional, since their responsibility benchmark is lowered significantly compared to a situation of non-automated driving.

### 3. Implementing Damages Directive 2014/104/EU<sup>27</sup>

In June 2017, Germany transposed the Damages Directive 2014/104/EU.<sup>28</sup> This 11 Directive is intended to facilitate actions for damages against infringers of competition law prohibitions and focuses on actions brought against unlawful cartels. The Directive does not only contain rules on issues of substantive law, such as the aim of damages claims, but also procedural rules and provisions on the interplay between public and private law enforcement. Germany has used the European impetus to substantially overhaul its Restriction of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) by the 9th reform of the GWB (9. GWB-Novelle).<sup>29</sup> In addition to the implementation of the Damages Directive,

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<sup>25</sup> BT-Drucks 18/11776, 10.

<sup>26</sup> *Schirmer*, NZV 2017, 253, 255 f.

<sup>27</sup> Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 1 June 2017, BGBl I 1416, 8 June 2017.

<sup>28</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] Official Journal (OJ) L 349/1.

<sup>29</sup> On the new rules for damages claims see *C Kersting*, *Kartellschadensersatzrecht nach der 9. GWB-Novelle*, VersR 2017, 581; *G Klumpe/T Thiede*, *Keeping the Floodgates Shut – Kartell-*

the legislature, for example, amended the rules on merger control to grapple with the digital economy.

- 12 With regard to tort claims for violations of competition law, it is worth underscoring that both the Directive and the German implementation follow the principle that tort law shall only balance losses incurred but should not enrich the victim. Hence, punitive damages for violations of competition law rules can still not be awarded under German law.

#### 4. ‘Dieselgate’ – Still No Functioning Collective Actions in Germany

- 13 The Volkswagen emissions scandal added some momentum to manifold calls to introduce new forms of collective action in Germany. The need to strengthen the collective law enforcement has for a long time been discussed at both national<sup>30</sup> and European level<sup>31</sup>. The previous government’s Federal Minister of Justice (*Heiko Maas*) intended to enable associations such as consumer protection organisations to file lawsuits in favour of a group of consumers that had registered online and paid a modest registration fee. The associations would have been entitled to lodge a certain type of model lawsuit (so-called ‘*Musterfeststellungsklage*’), ie a suit in which a court could rule on certain predefined issues, for example on the question as to whether a car of a certain type with a certain engine model not conforming to emission standards has a defect entitling the buyer to sue the seller for breach of contract. The declaratory judgment handed down in such a model lawsuit would then serve as a template for follow-up litigation and settlement negotiations. After courts had clarified the matter, each registered consumer could then lodge his/her personal claims against the defendant. Thus, a second lawsuit might nonetheless be necessary, since

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schadensersatz nach der 9. GWB-Novelle, (Neue Zeitschrift für Kartellrecht) NZKart 2017, 332ff; *A Weitbrecht*, Eine neue Ära im Kartellschadensersatzrecht – Die 9. GWB-Novelle, NJW 2017, 1574 ff. For further sources see below at no 61. For a detailed analysis of all changes introduced by this amendment to the GWB see the contributions to *C Kersting/R Podszun* (eds), Die 9. GWB-Novelle (2017).

30 See already *Fedtke/Schad*, ETLY 2016, 226, 227 f.

31 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60. For a comparative overview see *A Stadler*, Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz, Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW) 2015, 61, 66 ff.

the declaratory judgment would only deal with specific issues, so that in the example mentioned above, a consumer would still have to prove that he/she had purchased such a car and suffered (individual) damage.

Although far from a US-style class action or other effective models of collective law enforcement implemented in other EU Member States, the idea of establishing a *Musterfeststellungsklage* did not make it into a proper government proposal in 2017 as it was blocked by other Ministries concerned about a possible adverse effect on businesses in Germany.<sup>32</sup> Eventually, the Ministry of Justice published the draft in summer 2017 merely as a ‘discussion paper’.

Nevertheless, the new government that was formed in spring 2018 after the general elections of September 2017 announced that the idea of a *Musterfeststellungsklage* will be tabled again. For the time being, consumers and their lawyers have found their own creative ways of dealing with ‘Dieselgate’. While nearly 8,000 claimants have headed down the long road of instituting individual lawsuits before German courts, around 15,000 individuals have assigned their rights to professional litigators who now sue the car producer in what is called Germany’s biggest mass litigation to date.<sup>33</sup>

## B. Cases

### 1. Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) 2 April 2017, 1 BvR 2194/15:<sup>34</sup> Denial of Monetary Compensation for Severe Infringements of Personality Rights

#### a) Brief Summary of the Facts

This complaint before the *Bundesverfassungsgericht* was instituted by a television presenter. In the context of reporting on an on-going debate on anti-semitism, she mentioned a publicist taking part in this discussion and called him a ‘poor man’ (*armer Mann*) for being readily available as a ‘millstone in

<sup>32</sup> <<http://www.sueddeutsche.de/wirtschaft/konsumentenrechte-union-blockiert-sammelklagen-fuer-verbraucher-1.3364565>>.

<sup>33</sup> <<http://www.tagesspiegel.de/wirtschaft/sammelklage-im-dieselskandal-15-000-vw-kunden-reichen-klage-ein/20548282.html>>.

<sup>34</sup> Neue Juristische Wochenschrift, Rechtsprechungsreport: Zivilrecht (NJW-RR) 2017, 879.

the process of coming to terms with the [German] past' (*Mühlstein der Vergangenheitsbewältigung*). The publicist reacted on his blog by referring to the presenter, amongst other things, as a 'little minx' (*kleines Luder*) being the 'silliest and most incapable' of all presenters on that show and for whom a prior meeting with him must have been an 'absolute climax' of a 'life otherwise poor of highlights' (*absolute Climax ihres ansonsten an Höhepunkten armen Lebens*). While a preliminary injunction against the dissemination of these statements was granted on request of the presenter, her claim for monetary compensation for the infringement of her personality rights (*allgemeines Persönlichkeitsrecht*) was ultimately dismissed by the Higher Court of Appeal (*Oberlandesgericht, OLG*) *Düsseldorf*.<sup>35</sup> Although the judgment acknowledged severe violations of the claimant's personality rights, compensation in money was deemed unnecessary to remedy the infringement. The court based this assessment on the heated context of the debate, the limited reach of the blog – 6,000 hits – compared to the television broadcast and the satisfaction already achieved by the presenter through the injunction. This reasoning became the subject of the constitutional complaint.

## b) Judgment of the Court

- 17 The *Bundesverfassungsgericht* rejected the complaint as the ruling of the *Oberlandesgericht* was found to be in line with the limits set forth by the Constitution. From a constitutional perspective, monetary compensation for infringements of personality rights derives from the State's duty to protect those rights of individuals enshrined in arts 2(1) and 1(1) of the German Constitution (*Grundgesetz, GG*) against violations. By consequence, the ordinary courts have resorted to these constitutional provisions to develop principles for awarding compensation. Such compensation is, however, awarded only in cases in which a severe infringement of personality rights cannot be sufficiently remedied in other ways, taking into account the gravity of the violation as well as its context. This limitation is necessary to avoid chilling effects on freedom of speech, which also enjoys the status of a fundamental right under the German Constitution (art 5(1) GG).
- 18 Even though the statements of the blogger were not protected by his freedom of speech, the *Bundesverfassungsgericht* found that the decision of the *OLG*

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<sup>35</sup> OLG Düsseldorf, 13 August 2015, Case I-16 U 121/14, Beck online Rechtsprechung (BeckRS) 2016, 2919.

*Düsseldorf* to not award monetary compensation stayed within the constitutional limits. Approving the trial court's reasoning, the Federal Constitutional Court underscored the heated character of the debate on anti-semitism in which the unlawful statements were voiced as well as the limited reach and non-commercial nature of the publicist's blog. More importantly, the successful and enforceable preliminary injunction against the blogger had, in the eyes of the *Bundesverfassungsgericht*, already granted a certain satisfactory relief to the television presenter.

### c) Commentary

The decision of the Federal Constitutional Court confirms the high hurdles German tort law sets for victims of personality rights' infringements to obtain monetary compensation. Even a severe violation of these rights might not entitle the victim to claim compensation in money where other ways of granting satisfaction are available, such as the order of retractions or corrections. 19

What is more, the *Bundesverfassungsgericht* confirms that injunctive relief 20 may also be sufficient to remedy the violation of personality rights. By emphasising the long-standing principle that compensation in money is to be considered as *ultima ratio*, the Federal Constitutional Court strengthened the protection of freedom of expression when balancing the conflicting fundamental rights. Nonetheless, where the victim is, for instance, subject to repeated or more intense personality rights' violations by the infringer, the need to award monetary compensation is inevitably more pressing.

## 2. Federal Court of Justice (*Bundesgerichtshof*, BGH) 4 April 2017, VI ZR 123/16:<sup>36</sup> Liability of an Online Rating Platform

### a) Brief Summary of the Facts

After having suffered from a life-threatening sepsis because of his particular 21 constitution, a patient of a private surgery clinic gave the hospital a negative review on an online platform operated by the defendant. In reaction to the clinic's complaint, the platform operator independently – ie without consulting

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<sup>36</sup> NJW 2017, 2029.

the patient – slightly amended the entry’s content. Yet, the amended entry still included the allegation that neither the hospital nor its staff were prepared for life-threatening emergencies and hence were ‘overstrained’. In addition, the final entry still stated that the septic complication arose ‘during a standard surgery’. In reaction to the operator’s final refusal to remove the review, the clinic sued him, seeking an order barring him from the continued publication of the allegations contained in the entry.

## b) Judgment of the Court

- 22 The Federal Court of Justice upheld the lower courts’ decision to grant the order against the online platform. First and in line with the previous case law, the Court extended the *allgemeines Persönlichkeitsrecht* to legal entities as far as required to protect their reputation in their field of activity. Based on an analogous application of § 1004(1)(2) and § 823(1) BGB in conjunction with arts 2(1), 19(3) GG, the Court then held that the allegations unlawfully interfered with the protection of the clinic’s reputation. Although it acknowledged that the personality rights needed to be weighed against the right to free speech as enshrined in art 5(1) GG and art 10(1) European Convention on Human Rights (ECHR) – protecting both the expression of opinion and the operation of the communication platform by the defendant – the *Bundesgerichtshof* ultimately found that, in the case at hand, the protection of the clinic’s personality rights prevailed due to the specific nature of the assertions.
- 23 To reach this conclusion, the Federal Court of Justice classified the statement that the sepsis arose ‘during a standard surgery’ as a factual claim (*Tatsachenbehauptung*), requiring that it must have already been proved previously or at least show a certain initial degree of likelihood for its dissemination to be lawful. However, since the septic complications only set in 36 hours after and without a direct link to the surgery, the claim that the complication arose ‘during’ the surgery could not meet these requirements. Such an untrue factual claim does not benefit from the protection of art 5(1) GG and thus infringed the plaintiff’s personality rights. With regard to the allegations that the clinic and its personnel were not prepared to handle life-threatening emergencies, the BGH, by contrast, found the expression of a personal opinion (*Meinungsäußerung*) to outweigh the inherent factual claim. Nonetheless, since the opinion was closely linked to, and based on, several untrue factual claims – neither was the surgery directly linked to the sepsis nor were the clinic’s personnel unprepared for emergency situations – the defendant’s interest of publication was outweighed by the plaintiff’s legitimate interest in protecting its reputation.

While these findings largely apply the settled case law on *Meinungsäußerungen* and *Tatsachenbehauptungen* conflicting with personality rights, the fact that it was not the original author of the opinion but rather the online platform which was sued for damages received particular attention. The Court held the platform operator liable because it appropriated the allegations originally made by the patient when it independently amended the review while rejecting other requests, including the one to fully take down the entry. By reviewing the content and deciding which parts to keep and which parts to amend, the platform, in the eyes of the Court, abandoned the role of a passive intermediary and assumed an active role in disseminating the comments. Since the original author of the entry was not consulted during this procedure, the operator had independently assumed the accuracy of the allegations. This justified the attribution of the statements to the defendant from this point in time on. Lastly, the Court voiced no doubts regarding the required visibility of this active editing to the plaintiff, given that the platform's operator had explicitly informed the hospital of the amendments. 24

### c) Commentary

The decision sets standards for the liability of (online) platform operators for allegations originally made by third parties on their website. The central question revolves around the conditions under which a portal can be deemed to have appropriated the statements made by one of its users, so that they are to be regarded as own statements of the platform operator. Applying the case law of the Court of Justice of the European Union (CJEU) on the e-commerce Directive,<sup>37</sup> the BGH found that the tipping point is reached with the adoption of an active role by the platform instead of that of a neutral intermediary. The finding that this was the case in the present scenario, where the platform's operator had independently altered the original statement but left it online, employs a rather broad interpretation of appropriation, since it does not focus on how much the operator actually identified with the various allegations.<sup>38</sup> However, this ap-

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<sup>37</sup> CJEU 12.7.2011, C-324/09, *L'Oréal/eBay*, ECLI:EU:C:2011:474, no 112ff; CJEU 15.9.2016, C-484/14, *Mc Fadden/Sony Music*, ECLI:EU:C:2016:689, nos 61, 73.

<sup>38</sup> Cf *S Schonhofen*, Bewertungsportalbetreiber macht sich Äußerungen durch inhaltliche Überprüfung und Abänderung zu Eigen, Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht (GRUR-Prax) 2017, 307.

proach appears to be justified as it would otherwise be difficult to establish the liability of platforms for content which they have amended.

26 This being said, the Court's position on the visibility of the platform's active role raises questions: could the defendant have avoided liability if it had merely not disclosed its responsibility for the amendments to the plaintiff via the notice? As the Court noted, the appropriation of the allegations would in such a scenario have to be deduced from the statement itself or its presentation. This analysis however poses a much greater challenge in comparison to cases in which the platform voluntarily discloses its amendments. Well-advised operators could thus deliberately try to hide their involvement. Although injunctive relief could possibly still be granted on the basis of disregarded duties to review,<sup>39</sup> it would ultimately be difficult to hold the platform liable. Consequently, incentives for platform operators to not even adopt or at least hide any active role in disputes centring around users' entries remain high.<sup>40</sup> Taking into account the fact that the original author of a statement might not always be known or solvent, whereas the effect of his/her statement is amplified through the potentially unlimited reach of online rating platforms, the dependence of an operator's liability on the visibility of the appropriation of a certain content risks proving to be counterproductive in the long run.

27 As for the Court's analysis of the permissibility of the actual allegations, the decision can be regarded as most instructive. Having laid out the fine differentiations developed in German case law between *Tatsachenbehauptungen*, *Meinungsäußerungen* and hybrid forms combining the two, the BGH deviates from the lower courts in finding that only the statement on the direct link between the sepsis and the surgery represents a (wrongful) factual claim. However, since the opinion that the clinic and its personnel were 'overstrained' by the handling of emergencies directly relied on that false claim, it was equally deemed unlawful. Although the expression of an opinion is generally subject to more lenient standards of review than factual claims, the same standards apply if the opinion at its core relies on a false claim and the falseness is either known to the publisher or already demonstrated. In the light of the increasing dissemination of false information over social networks and other online platforms and the severe harm potentially caused by such 'fact based opinions', the Court's reasoning seems to strike a fair balance between the conflicting fundamental rights wherever an untrue factual claim lies at the core of the opinion being expressed.

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<sup>39</sup> BGH 1 March 2016, VI ZR 34/15, NJW 2016, 2106, 2109f no 37 ff.

<sup>40</sup> *A Lampmann*, Anmerkung zu BGH, Urteil vom 4.4.2017 – VI ZR 123/16, NJW 2017, 2033, 2034.

### 3. BGH 23 May 2017, VI ZR 261/16:<sup>41</sup> Non-Inheritability of Pending Damages Claims for Personality Rights' Infringements

#### a) Brief Summary of the Facts

The plaintiff in this case was the widow and sole heiress of a former concentration camp warden who in 2011, at a very old age, was sentenced to imprisonment by a German criminal court.<sup>42</sup> This criminal sentence never became final, since the accused died before the *Bundesgerichtshof* could decide on the appeal. In parallel to the criminal proceedings, the former warden had lodged a damages action against a large German newspaper for infringements of his personality rights. He argued that the online version of the newspaper had, inter alia, unlawfully published an article on the proceedings containing his full name and alleging he had wrongfully invoked frailty in court to influence the criminal proceedings. After his death, the damages claim against the newspaper instituted by the deceased was pursued by his widow. 28

#### b) Judgment of the Court

Without even assessing the merits of the original plaintiff's claim, the *Bundesgerichtshof* straightforwardly rejected the damages action on the grounds that claims for infringement of personality rights are not inheritable. The Court had already decided in 2014 (and in earlier cases) that such claims do not pass to the victim's heirs.<sup>43</sup> In its 2017 judgment, the *Bundesgerichtshof* further clarified that no exception to this general principle of non-inheritability is required where such claims are already pending before a court at the moment of the claimant's death. 29

Under German law, the heirs inherit the entire property of the deceased (§ 1922 BGB), which generally includes claims against third persons. With regard to general claims for damages for pain and suffering, § 847(1) BGB, prior to its reform, stated that such claims could not be inherited except in cases in which the claim had been settled by agreement or the victim had instituted a law suit 30

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<sup>41</sup> NJW 2017, 3004.

<sup>42</sup> Court of Appeal (Landgericht, LG) München II, 12 May 2011, 1 Ks 115 Js 12496/08, BeckRS 2011, 139286.

<sup>43</sup> BGH 29 April 2014, VI ZR 246/12, NJW 2014, 2871.

(‘*Anspruch ... durch Vertrag anerkannt oder ... rechtshängig*’).<sup>44</sup> This rule, however, was repealed in its entirety by the legislature in 1990. Against this background, the *Bundesgerichtshof* argued that neither this reform nor any other reform of the law of damages was to mean that the German legislature wanted to depart from the general principle of non-inheritability of damages claims for violation of personality rights. *A fortiori*, the legislature, in the eyes of the *Bundesgerichtshof*, had no intention of creating an exception for claims pending before a court at the time of the victim’s death by applying the old version of § 847(1) BGB by analogy.

31 Quite the contrary, the principle of non-inheritability of claims for the infringement of personality rights is still deemed to be embedded in the object and purpose of this type of compensation by the Court. Contrary to personal injury claims, including those for damages for pain and suffering, the compensation awarded for an infringement of the *allgemeines Persönlichkeitsrecht* is primarily intended to provide satisfaction to the victim. In circumstances where the victim passes away before a legally binding judgment against the violator is handed down, this aim cannot be achieved and, therefore, the claim is extinguished upon the victim’s death.

32 Moreover, the *Bundesgerichtshof* was not willing to carve out an exception to this rule based on the general principles of pendency. The Court noted that in some situations pendency does preserve the rights of the plaintiff, as for instance it suspends the prescription period (§ 204(1) no 1 BGB). This rule, as other rules of the BGB, ensures that the parties know in due time whether or not a certain claim will be pursued. However, such reasoning cannot apply to claims based on infringements of personality rights, where the non-inheritability – as the Court pointed out – flows from the specific nature of the claim, ie results from the death of the person whose personality rights were infringed. Although the *Bundesgerichtshof* therefore rejected a possible exception to the non-inheritability principle based on pendency, it – strictly speaking by way of *obiter dictum* – accepted the heritability of claims that became legally binding prior to the plaintiff’s death.

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44 In its previous wording (before the amendment of 30 June 1990), § 847(1) BGB read: ‘Im Falle der Verletzung des Körpers oder der Gesundheit sowie im Falle der Freiheitsentziehung kann der Verletzte auch wegen des Schadens, der nicht Vermögensschaden ist, eine billige Entschädigung in Geld verlangen. Der Anspruch ist nicht übertragbar und geht nicht auf die Erben über, es sei denn, daß er durch Vertrag anerkannt oder daß er rechtshängig geworden ist.’

### c) Commentary

The decision complements the existing case law on the non-inheritability of 33 damages claims based on the infringement of personality rights. The *Bundesgerichtshof* reiterated the general principle that damages claims are generally not inheritable. This reasoning predominantly rests on the understanding of personality rights as rights vested exclusively in the person of the bearer (*höchstpersönliches Recht*). As a consequence, only the bearer himself/herself may claim damages for their infringement. By its decision in 2017, the Court extended its restrictive approach to cases in which the victim initiated court proceedings but died before the judgment became final. Only if a final judgment has been rendered before the victim's death may the heirs claim the damages from the tortfeasor. As the Court itself noted, this latter finding stands somewhat in contrast to the wording of its 2014 decision, in which it held that, in circumstances where the victim dies before 'the compensation claim was fulfilled', the aim of satisfying the victim cannot be achieved and, therefore, the claim cannot be inherited.

Although the departure from this very strict wording of the 2014 judgment is 34 to be welcomed, the Court's narrow understanding of satisfaction remains questionable and is highly disputed. In this regard, critics have pointed out that a satisfactory effect can already lie in the mere determination of wrongdoing by the courts, be it in the form of a final or of an appealable judgment. There is a certain irony in the fact that, of all things, the victim's death could free the wrongdoer from his/her obligation to pay damages. What is more, although the underlying personality right might be a *höchstpersönliches Recht*, the claim resulting from its infringement is a financial asset like every other ordinary claim.<sup>45</sup>

Practically speaking, the decision of the German Federal Court therefore 35 tends to favour potential infringers of personality rights such as (online) publishers and the tabloid press. Confronted with damages claims by alleged victims, playing for time and hoping for the death of the plaintiff during the proceedings could turn out to be a valid litigation strategy in some instances. As a prominent example, the civil proceedings brought by the former German chancellor *Helmut Kohl* against his biographers (see below, nos 41–52) might, under the *Bundesgerichtshof's* reading, come to a sudden end after *Kohl's* death during the course of the appeal proceedings.

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<sup>45</sup> See, amongst others, *V Beuthien*, Vereitelt der Tod die Genugtuung? Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2014, 957, 958.

#### 4. BGH 7 September 2017, III ZR 71/17:<sup>46</sup> Compensation for Non-Pecuniary Losses Caused by Lawful Executive Acts

##### a) Brief Summary of the Facts

36 In the aftermath of a drive-by shooting, the police identified a car on the premises of a petrol station, which they assumed had been used for the crime. Suspecting the two persons present in the station's salesroom to have been involved in the shooting, the police officers arrested them and dislocated the shoulder of one of the suspects in the process. As it turned out, neither the injured individual nor his colleague were involved in the crime. Following medical treatment including physiotherapy, the plaintiff sued the State (*Bundesland*) employing the officers for both non-pecuniary and pecuniary losses, but only succeeded in respect of the latter. With his appeal to the *Bundesgerichtshof*, the plaintiff pursued his claim for damages for pain and suffering.

##### b) Judgment of the Court

37 Departing from its older case law, the *Bundesgerichtshof* did grant the victim a claim for damages for non-pecuniary losses. The lower courts' reluctance to grant damages for those losses was based on the *Bundesgerichtshof's* former settled case law dating as far back as 1956.<sup>47</sup> Under this case law, the BGH had confined damages claims resulting from the so-called general claim for compensation out of (particular) sacrifice (*allgemeiner Aufopferungsanspruch*) to pecuniary loss. This reasoning rested mainly on the argument that the legislature had deliberately limited the instances in which damages for pain and suffering were due, namely to some fault-based damages claims against a tortfeasor.<sup>48</sup> Thus, as the *allgemeiner Aufopferungsanspruch* requires neither fault nor even the illegality of the executive act for which compensation is sought, the victim could not claim any compensation for non-pecuniary losses according to the prior case law.

38 The departure from this case law was essentially grounded on changes in the general law of damages that took place over a number of years. First, the Court pointed out that the German legislature significantly enlarged the possi-

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<sup>46</sup> NJW 2017, 3384.

<sup>47</sup> BGH 13 February 1956, III ZR 175/54, NJW 1956, 629.

<sup>48</sup> BGH 13 February 1956, III ZR 175/54, NJW 1956, 629, 630.

bilities for victims to claim compensation for non-pecuniary losses with the reform of the law of damages in 2002.<sup>49</sup> As a result of these amendments, victims can also claim compensation for non-pecuniary losses in instances of strict liability. Further, several more specific legislative acts regulating the compensation of injuries caused by State officials were extended to cover non-pecuniary loss. Thus, the previous assumption that the legislature categorically opposes general compensation for pain and suffering could no longer be maintained. In addition, the *Bundesgerichtshof* argued that the specific characteristics of the *Aufopferungsanspruch* do not exclude compensation for non-pecuniary losses either. Although the public law roots of this claim impose a balancing exercise to achieve appropriateness and fairness of the final compensation, these roots do not require an exclusion of damages for non-pecuniary loss, since the balancing may take place regardless of the nature of the damage considered.

### c) Commentary

The outcome of the BGH's decision is to be welcomed, as no persuasive arguments seem to exist for denying victims of erroneous actions by State officials adequate compensation for non-pecuniary losses. In granting compensation in money for pain and suffering, the Court comes the closest it can get to the full restoration of the individual's *status quo ante*. What is more, it aligns its case law with the tendency of both the Federal and the States' legislature to extend claims for compensation for pain and suffering to matters of executive interference. 39

However, the proximity of the Court's judgment to legislative action could backfire in view of the separation of powers. In this regard, critics have pointed out that the granting of compensation for pain and suffering is still an exception under German law and, as such, should not be expanded to a general principle by the judiciary.<sup>50</sup> Instead of deriving it from specific legislation, such a general principle applicable, inter alia, to the *allgemeiner Aufopferungsanspruch*, should be adopted by the legislature. In anticipating such legislation, the BGH not only blurs the lines between the powers but also risks undermining calls on the legislature to adopt an urgently needed comprehensive codification of State 40

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<sup>49</sup> Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften, BGBl I 2674, 25 July 2002.

<sup>50</sup> *J Singbartl/J Zintl*, Anmerkung zu BGH, Urteil vom 7.9.2017 – III ZR 71/17, NJW 2017, 3386 f.

liability.<sup>51</sup> Indeed, the exceptional character of provisions regulating compensation for pain and suffering under German law cannot be denied. Hence, legislative action inverting the rule and the exception would certainly be preferable. Yet, it appears that injured individuals remaining uncompensated for their pain and suffering while waiting for such a law is a consequence hard to reconcile with a modern sense of equity and justice.

## 5. Higher Regional Court (*Landgericht*, LG) Köln 27 April 2017, 14 O 323/15:<sup>52</sup> Record Compensation for the Infringement of Former German Chancellor Helmut Kohl's Personality Rights

### a) Brief Summary of the Facts

- <sup>41</sup> *Helmut Kohl*, chancellor of the Federal Republic of Germany from 1982 to 1998, sued the two 'ghost-writers' and the publisher of his biography for several infringements of his personality rights. After a first phase of cooperation, in which one of the authors had recorded *Kohl's* statements on tape for subsequent editing, the parties fell out as a result of what the former chancellor had perceived as a breach of confidence. At the time of termination of the collaboration, only three out of the four initially conceived volumes of *Kohl's* memoirs had been jointly published. Subsequently, the defendants released a book covering the most recent period of the plaintiff's life against his explicit will, expressed inter alia through rejected preliminary injunctions against its publication.<sup>53</sup> Partly due to several controversial quotes relating to former and current high-level politicians attributed to the former chancellor, the book became a bestseller in 2014. On the grounds that some citations were distorted, others quoted out of context and some others allegedly untrue, *Helmut Kohl* sued the defendants for compensation of severe personality rights' infringements.

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<sup>51</sup> Ibid.

<sup>52</sup> BeckRS 2017, 125934.

<sup>53</sup> LG Köln, 7 October 2014, 28 O 433/14, NJW 2015, 801; and 28 O 434/14, BeckRS 2014, 19382.

## b) Judgment of the Court

The *Landgericht Köln* as the court of first instance awarded the former chancellor compensation for serious violations of his *allgemeines Persönlichkeitsrecht* in the amount of € 1 million based on § 823(1) BGB and arts 1(1), 2(1) GG. The violations resulted from the fact that only the former chancellor had the right to decide which of his statements were to be published, while the ‘ghost-writer’ who recorded the interview had the contractual obligation to keep other recorded statements confidential. The breach of this obligation made the unauthorised publications illegal from the outset, insofar as the recording ‘ghost-writer’ was concerned. However, in respect of the publisher and the second ‘ghost-writer’, who were both absent at the time of recording the interviews, the freedom of press and opinion (art 5(1) GG) provided a countervailing consideration. 42

In balancing these conflicting interests, the court held that the freedom of the press and opinion could not justify the publication of the quotes without *Kohl*’s consent. First, as the recordings were partly damaged, the defendants could not present a clear transcript to substantiate some quotes attributed to the plaintiff. With regard to the remaining controversial citations, the court found that the transcripts of the recordings presented by the defendants were – at least in part – highly inaccurate and contradictory. Hence, the plaintiff’s credible denial of some of the statements could not be refuted. Given that the defendants had not properly (re-)checked the veracity of (all) the published quotes, the interest of the plaintiff in not disclosing highly sensitive information prevailed over the purpose of disseminating information in the public interest. 43

With regard to the former chancellor’s harsh comments about third persons, 44 to a large extent prominent figures in the public sphere, the court found that *Kohl* had clearly prohibited the use of certain citations and explicitly reserved the right to control the final wording of the publication. Where the political position of the plaintiff had already been largely apparent to the general public, his personal, partly offensive opinion about his political opponents did not carry additional informational value, so that freedoms of press and opinion could not prevail here either.

## c) Commentary

Although falling short of the requested € 5 million, the sum of € 1 million 45 granted by the *Landgericht Köln* sets a new record in compensation for severe infringements of personality rights in Germany. Previously, compensation had reached up to € 635,000 in a 2015 case of mass media prejudgment with severe

consequences for the private and professional life of the affected<sup>54</sup> and € 400,000 for several purely fictional reports on intimate details of the life of a royal in the tabloid press in 2010.<sup>55</sup> With its judgment, the *Landgericht* thus continues the judicial trend towards higher amounts of compensation for purposes of deterrence.

46 Nevertheless, since the defendants have lodged an appeal against the judgment, it remains to be seen if the record compensation will be confirmed by the *Oberlandesgericht Köln*. Not only could it strike a different balance between the conflicting interests at hand, it could also assign different values to the criteria serving as the basis for the assessment of the amount of compensation. But first and foremost, the *Oberlandesgericht* will have to take into account the fact that the former chancellor died after the appeal was lodged in June 2017, triggering the disputed question on the heritability of pending claims for compensation arising out of an infringement of personality rights. If the *Oberlandesgericht* follows the *Bundesgerichtshof's* case law on this issue (see above nos 28–35),<sup>56</sup> it seems likely that it will dismiss the claim, since the original plaintiff died before a final judgment was issued. However, this would leave his heirs behind with nothing in hand, as opposed to a record-breaking entitlement during the lifetime of the claimant. The infringers, on the other hand, would get away with the profits made, at least partly at the expense of the victim.

47 This dilemma perfectly illustrates the consequences of the most recent case law of the *Bundesgerichtshof*, which does not carve out an exception to the principle of non-inheritability of claims for violations of personality rights. A way out of this dilemma would be to interpret the existing case law in a way that the claim may pass on to the heir once a court has ruled on the matter, even if the judgment rendered at the moment of the claimant's death is not final.<sup>57</sup> In contrast to the plaintiff of the case decided by the *Bundesgerichtshof* in 2017, the former German chancellor was still alive at the time of the decision of the court of first instance. Therefore, the granted compensation did indeed provide some satisfaction to the plaintiff within his lifetime. It is however doubtful whether the *Oberlandesgericht Köln* will follow this path. The court indicated at the oral

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54 LG Köln, 30 September 2015, 28 O 2/14 and 28 O 7/14, BeckRS 2015, 16608 and 16609. For a comprehensive analysis of this case see *Fedtke/Schad*, ETLY 2016, 226, 237 ff.

55 OLG Hamburg, 30 July 2009, 7 U 4/08, NJW-RR 2010, 624.

56 BGH 23 May 2017, VI ZR 261/16, NJW 2017, 3004.

57 *P Fölsing*, Anmerkung, Entscheidungen zum Wirtschaftsrecht (EWiR) 2017, 595, 596.

hearing that it tends to the outcome that the claim was not passed to *Kohl's* heirs and suggested that the parties settle the dispute out of court.<sup>58</sup>

## 6. Personal Injury

In addition to these cases justifying coverage in greater detail due to their overall significance, numerous other lawsuits regarding the compensation of personal injury were decided in 2017. For reasons of focus and space, only a selection of cases of practical interest shall however be briefly presented. 48

The first of these cases on personal injury concerns the treatment of a patient by a dentist.<sup>59</sup> Adhering to a 'holistic' concept of dentistry, the practitioner recommended and – with consent of the patient – executed a naturopathic treatment to alleviate physical ailments suffered by the patient in various parts of her body. Instead of reducing those ailments, however, the surgical removal of all the molars on the right side of the patient's jaw caused additional dental problems. Whereas the courts of lower instance had largely granted the plaintiff's claims for pecuniary and non-pecuniary loss on the grounds that the dentist had wrongfully refrained from comprehensively examining conventional reasons for the patient's suffering, the *Bundesgerichtshof* set aside the judgment of the lower court and remanded the case. Most importantly, the Court pointed out that alternative and naturopathic medical treatments are not unlawful per se if executed on the basis of sufficiently informed consent of the patient and located within the limits of public policy (*gute Sitten*), § 138(1) BGB. However, with regard to the alleged infringement of the dentist's duties to carefully and on a case-by-case basis weigh the pros and cons of alternative treatment with those of conventional treatment, the *Oberlandesgericht's* judgment does, in the eyes of the *Bundesgerichtshof*, rely on an insufficient factual basis, since the only expert heard in the proceedings was knowledgeable in conventional medicine only. Surprising as it may be, the Court thus explicitly demanded the (additional) opinion of an expert 'familiar with theory and practice of holistic dentistry' to assess a potential breach of medical duties – and for the time being referred the case back to the lower court to remedy this deficiency. 49

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<sup>58</sup> Gericht: Ansprüche Kohls wohl nicht vererbbar, Frankfurter Allgemeine Zeitung, 16.2.2018, 1.

<sup>59</sup> BGH 30 May 2017, VI ZR 203/16, NJW 2017, 2685.

50 Second in line is a tragic accident in a public swimming lake, which led to the severe lifelong disability of a 12-year-old girl.<sup>60</sup> Under inexplicable circumstances, the child entangled herself in the buoys installed for the safety of the guests in the swimming lake run by the municipality. Although she was held under water the lifeguards in charge for several minutes did not perceive the gravity of the situation. Further, when they finally realised something was wrong with the buoys, they did not react immediately but rather asked other teenagers to check and unhurriedly fetched their swimming goggles. This delayed the rescue of the child by at least three more minutes. This being said, the lower court nevertheless dismissed the girl's action for damages for lack of causation. Deciding on the appeal against that decision, the *Bundesgerichtshof* affirmed that a claim for damages could indeed only be granted if the injury could have been avoided or reduced by non-wrongful behaviour of the lifeguards, but pointed out that this possibility had been erroneously excluded by the lower court. On the contrary, based on the facts introduced in the proceedings, a scenario was indeed conceivable in which proper conduct of the lifeguards would have led to a rescue after a maximum of three minutes. This would have (at least partly) eliminated the severe damage suffered by the plaintiff. Further, in case the plaintiff failed to prove causation with regard to such a scenario, the lower court would nonetheless have had to evaluate a possible reversal of the burden of proof. In line with the *Bundesgerichtshof's* settled case law on medical liability, such a reversal could occur where a professional responsible for the life and health of others grossly neglects his/her duties of protection. As a result, the burden of proof would lie on the defendant, who would then have to prove that their failure to act had *not* been the cause of the damage. But even if not gross but only simple negligence was assumed, the plaintiff should still have benefited from an easing of the burden of proof in line with the settled case law on breaches of duties to protect and control.

51 Another 2017 case dealing with causation and the burden of proof was decided by the *Oberlandesgericht München* and revolves around strict liability for domestic animals.<sup>61</sup> Two unleashed dogs had engaged in play and were chasing each other when a cyclist approached the scene on a cycle track. One of the dogs suddenly ran in the direction of the cycle path, causing the cyclist to fall off the bike and suffer a skull fracture. The question as to the liability of the owner of the second dog, which had only been playing with the dog which directly caused the accident, was answered by the *Oberlandesgericht* in the nega-

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60 BGH 23 November 2017, III ZR 60/16, BeckRS 2017, 135004 = NJW 2018, 301.

61 OLG München, 23 June 2017, 10 U 4540/16, NJW 2017, 3664.

tive. Although in theory joint liability would follow from an intense ‘chasing game’ involving both dogs to an equal extent and increasing the specific risk posed by each of the animals, the court was not convinced that the second dog’s behaviour caused the first dog to run onto the cycle path. It therefore dismissed the lawsuit, leaving behind the owner of the dog directly responsible for the accident – or rather the indemnity insurance – as the sole debtor.

Finally, the *Oberlandesgericht Dresden* had to deal with an accident in 52 which a pedestrian was hit by a car as he was crossing a road at dawn, suddenly trying to wind his way through speedy traffic.<sup>62</sup> In an attempt to hold the driver, the *Halter* and the insurer of the car partially liable, the pedestrian argued that the driver should have greatly reduced his speed when he realised a pedestrian was trying to cross the road. Successful at the court of first instance, this argument was dismissed before the *Oberlandesgericht* because the consulted expert was not able to say whether the driver could have seen the pedestrian at all. Instead, the expert assumed it was most likely that the collision could not have been avoided by the driver. Although German traffic law generally holds the car’s *Halter* strictly liable (see above, no 8), he/she is not liable where the victim’s gross negligence caused the accident. Applying these principles to the case at hand, the court held that the sudden crossing by the pedestrian who had seen the oncoming car’s headlights was grossly negligent and caused the accident, freeing the defendants from any sort of partial liability.

## C. Literature

### 1. *J-U Franck, Marktordnung durch Haftung (Mohr Siebeck, Tübingen 2016)*

In his habilitation treatise (*Habilitationsschrift*), *Jens-Uwe Franck* focuses on the 53 role of liability law for the prevention of violations of European and German market regulation rules. Starting from a solid theoretical and empirical groundwork on the general implications of liability for behaviour control, the author first looks at the European legal framework for the enforcement of EU market regulation rules. With regard to violations of fundamental freedoms by private actors, he concludes that liability for their infringements is required by EU law and thus needs to be put in place by the courts even if national tort law denies

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<sup>62</sup> OLG Dresden, 9 May 2017, 4 U 1596/16, NJW-RR 2017, 1303.

such a claim. As regards market rules laid down in Directives, by contrast, no general obligation to create a liability regime for violations can be deduced from the European principle of effectiveness. Turning to German law, the analysis looks at several general heads of damage under the BGB to show that potential gateways for claiming financial losses caused by the violation of market regulation law do exist – namely §§ 823(2), 826 BGB and the liability resulting from *culpa in contrahendo*. From there, *Jens-Uwe Franck* examines more specific liability provisions created with the explicit purpose of strengthening the enforcement of market regulation provisions by private parties. Focusing primarily on capital market and competition law as well as on network regulation, the analysis shows how the market-shaping function of the specific liability rules stands in contrast to the rather restrictive approach to market regulation adopted by general BGB tort law. The author complements his work with an economic analysis of the law and scrutinises the (non-)preventative effects of over- and under-enforcing market regulation rules.

## 2. *C Heinze, Schadensersatz im Unionsprivatrecht (Mohr Siebeck, Tübingen 2017)*

- 54 The *Habilitationsschrift* of Christian Heinze analyses the issue of effective enforcement of European liability rules under the law of Member States. In national legal orders, the ‘*ubi ius, ibi remedium*’ maxim usually applies. This is not the case under European private law, which often stipulates rights without establishing mechanisms ensuring their effective enforcement. Thus, the consequences of an infringement of liability provisions of European origin are usually left to the law of the Member States. Nonetheless, the law of the EU does stipulate overarching principles for the enforcement of European rights through national law. The intensity of these standards varies depending on the legislative instruments deployed in the respective area of law. These can be very general requirements flowing from the principle of effectiveness, specific rules enshrined in Directives approximating the laws of the Member States or harmonising Regulations establishing strict requirements. Against the background of this tripartite structure embedded in EU law, *Christian Heinze* analyses the influence of European liability rules on national tort law for ten selected issues in the areas of competition, consumer, product liability and travel and transportation law. With regard to the principle of effectiveness, he discusses, inter alia, the question of private enforcement of competition law and finds that the aim of prevention inherent in cartel damages claims has largely been transferred from European to national tort law. Similar conclusions are drawn in the field of

travel and transportation law – nowadays to a large extent determined by European Directives – which has witnessed an increase of concepts such as damages attributed for the lack of enjoyment of a holiday. Regarding rules laid down in Regulations, the author shows how the national notion of ‘damage’ itself has undergone several changes, using the example of the law of air transport. The meticulous analysis of the various areas of law reveals that the task of effectively enforcing EU liability law has significantly changed the face of German tort law with regard to, for instance, its growing function of preventing wrongdoing, the notions and interpretation of damages and causation and the concept of fault as a requirement for liability.

### **3. A Janssen, Präventive Gewinnabschöpfung (Mohr Siebeck, Tübingen 2017)**

To provide a complete picture of the function and legitimation of contemporary 55 tort law, *André Janssen’s* concisely written *Habilitationsschrift* must not be forgotten. It comprehensively analyses the stripping of profits in German tort law as a means of preventing wrongdoing. *Janssen* argues that the maxim ‘tort shall not pay’ does not fully apply in German law and convincingly demonstrates that, on the contrary, the German *lex lata* provides incentives for private parties to commit wrongs in order to make economic profit. After laying the theoretical groundwork on the issue of prevention through tort law, the author scrutinises specific areas of law in which profit stripping considerations have already had an influence, namely intellectual property law, competition law and violations of personality rights. With regard to the latter, *André Janssen* dedicates an entire chapter to the analysis of the effect of profit stripping on the press as a potential infringer and draws parallels to the stripping of profits in intellectual property cases. In conclusion, the author takes the view that an efficient protection of personality rights requires the full stripping of profits in cases of, and limited to, the deliberate infringement of personality rights. With regard to competition law, the author argues that, although the German private enforcement mechanisms already take into account unlawful profits in order to simplify claims for damages, the existing tools do not live up to their purpose of contributing to the prevention of violations of competition law prohibitions. Drawing on the specifics of each of the areas of law considered, the analysis derives general features of profit stripping for preventative purposes and provides an outlook on the practical scope of application of this mechanism.

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