I. Austria

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The Austrian Civil Code, the ABGB (*Allgemeines Bürgerliches Gesetzbuch*), dates back to the year 1812 and while there were substantial amendments concerning tort law in the early 20th century as well as some less significant more recent amendments, court practice has been of great importance in the area of tort law. In the first quarter of the 21st century, there were two prominent subject areas in which notable decisions of the Austrian Supreme Court, the OGH (*Oberster Gerichtshof*), reshaped the Austrian tort law landscape. The first being the expansion of compensation for non-pecuniary loss of secondary victims and the second, the much-debated issue of wrongful birth. When choosing landmark decisions, there were three obvious candidates from these two subject areas, two dealing with non-pecuniary loss and one with wrongful birth. Selecting the other two decisions was more difficult, as several cases would equally have merited being chosen. Ultimately, we decided to include a decision on the criteria for compensation of frustrated expenses and another one heralding a restrictive stance on attributing the behaviour of an auxiliary to a person harmed.

1. OGH 22 February 2001, 2 Ob 79/00g[1]

This decision of the OGH was the first to award a close relative compensation for the mental shock suffered as a consequence of the primary victim's death even though the close relative had not been present at the scene of the fatal accident. In this case, the father of the direct victim,

[1] ECLI:AT:OGH0002:2001:0020OB00079.00G.0222.000; Zeitschrift für Verkehrsrecht (ZVR) 2001/52 (comment *E Karner*). The case is also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 58, nos 51–54. On the topic of compensation for non-pecuniary loss in mental shock cases, see, in particular, *E Karner*, Zur Ersatzfähigkeit von Schock- und Trauerschäden, in: FS Danzl (2017) 87; *idem*, Der Ersatz ideeller Schäden bei Körperverletzung (1999) 94 ff; *H Koziol*, Österreichisches Haftpflichtrecht II (3rd edn 2018) A/5/182 ff; *K-H Danzl*, Handbuch Schmerzengeld (2019) nos 3.51 ff, 3.67 ff.

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who had been killed in a car accident, suffered mental shock reaching the level of an injury to health when informed about his son's fatal accident.

While earlier court practice had rejected compensation claims of close relatives of fatally injured primary victims outright with the argument that these relatives were only indirect victims,[2] the OGH accepted compensation for mental shock in two cases from the 1990s,[3] in which the secondary victims had been involved in the accident causing the primary victim's death. With the present decision, the OGH made it clear that compensation for mental shock of close relatives does not depend on the close relative having witnessed the accident: if the close relative suffered mental shock reaching the level of an injury to health, this constitutes bodily injury in the sense of § 1325 ABGB, a provision that expressly foresees monetary compensation of non-pecuniary loss (*Schmerzengeld*). This is important as, ever since a decision from the early 20th century,[4] the OGH, in principle, limited compensation of non-pecuniary loss to cases where such compensation is expressly provided for by the law.[5] As mental shock cases fall under bodily injury in the sense of § 1325 ABGB, compensation for the non-pecuniary loss suffered is therefore possible. Based on legal literature,[6] the OGH came to the conclusion that such injury is unlawful due to the violation of the secondary victim's absolutely protected right to bodily integrity, provided that the tortfeasor's conduct was also particularly dangerous in relation to the secondary victim due to it being highly likely to cause their mental shock. Thus, the secondary victim is protected not as an 'indirect' victim of the tort against the primary victim, but in their own capacity, effectively becoming a 'primary victim' themself. The OGH therefore awarded the claimant compensation for what it calls shock damage (*Schockschaden*).

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[2] OGH 2 Ob 501/57, ZVR 1958/144; 2 Ob 34/63, ZVR 1963/147; 2 Ob 6/71, Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (SZ) 44/39.

[3] 2 Ob 45/93, ZVR 1997/75; 2 Ob 99/95, ZVR 1997/75.

[4] GlUNF (Sammlung von zivilrechtlichen Entscheidungen des kk Obersten Gerichtshofes, Neue Folge) 4185 from 1908.

[5] On the alternative position taken by parts of legal doctrine according to which monetary compensation of non-pecuniary loss is generally possible in cases of gross negligence or intent according to §§ 1323 and 1324 ABGB, see *F Bydlinski*, Der Ersatz ideellen Schadens als sachliches und methodisches Problem, Juristische Blätter (JBl) 1965, 181; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) D/3/2 ff; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 5/26.

[6] *E Karner*, Rechtsprechungswende bei Schock- und Fernwirkungsschäden Dritter? ZVR 1998, 182, 186 ff.

This case was followed by a whole range of decisions which defined more closely under which conditions compensation is possible in mental shock cases and carved out different groups of cases. Accordingly, the benchmark always has to be the ground for attributing liability identified by the OGH in the first case, namely whether the conduct of the tortfeasor was highly likely to cause the secondary victim mental shock reaching the level of an injury to health. In this sense, compensation is possible either if close relatives of a primary victim suffered mental shock or if the secondary victim suffering the shock, though not being a close relative, was involved in the accident in a qualified manner,[7] eg by having been endangered in the accident. As far as the family relationship is decisive, it was discussed which family members are entitled to compensation. The OGH convincingly uses the close emotional relationship between the primary and secondary victim as its starting point[8] and has, for instance, considered parents (as in the case at hand)[9] and children,[10] spouses,[11] non-marital partners,[12] siblings[13] but also a stepparent[14] as close relatives, not, however, best friends. The latter may be entitled to

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[7] See OGH 2 Ob 208/23m, ZVR 2024/167 (comment *E Karner*); also discussed by *D Messner-Kreuzbauer/BC Steininger* in: E Karner/BC Steininger (eds), ETL 2023 (2024) 1, nos 68–74. See also *C Huber*, Schockschaden bei qualifizierter Beteiligung am Unfallgeschehen – Anmerkung zu OGH 14.12.2023, 2 Ob 208/23m, Österreichische Jurist:innenzeitung (ÖJZ) 2024, 550.

[8] See on this *Karner*, FS Danzl (fn 1) 99.

[9] But also the parents of an unborn child: OGH 1 Ob 114/16w, Evidenzblatt der Rechtsmittelentscheidungen (EvBl) in ÖJZ 2017/53 (comment *C Brenn*) = Juristische Ausbildung und Praxisvorbereitung (JAP) 2016/2017, 168 (comment *S Konrad/S Nitsch*) = Recht der Medizin (RdM) 2017, 68 (comment *E Karner*). See also *K-H Danzl*, Aktuelle (Fort-)Entwicklung beim Schmerzengeld, ZVR 2016, 456; *C Huber*, Zuspruch von Trauerschmerzengeld an beide Elternteile im Fall der Totgeburt – Bestandsaufnahme und weitergehende Überlegungen – Anmerkung zu OGH 30.8.2026, 1 Ob 114/16w, ÖJZ 2017, 383; *G Gerstner/R Rienmüller*, Trauer-Schmerzengeld nach vermeidbarer Totgeburt (intrauterinem Fruchttod) in der 37. Schwangerschaftswoche, Österreichische Zeitschrift für das ärztliche Gutachten (DAG) 2017, 105.

[10] Eg OGH 2 Ob 135/07b, ZVR 2008/59 (comment *C Huber*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2007 (2008) 134, nos 40–46.

[11] OGH 2 Ob 136/11f, SZ 2012/64 = EvBl 2013/3 (comment *R Rohrer/M Spitzer*) = ZVR 2012/204 (comment *E Karner*).

[12] OGH 8 Ob 127/02p, ZVR 2002/96 (comment *E Karner*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 66, nos 52–60.

[13] Eg OGH 2 Ob 39/09p, ZVR 2010/119 (comment *C Huber*).

[14] OGH 2 Ob 126/23b, ZVR 2024/6 (comment *BC Steininger*); also discussed in ETL 2023 by *Messner-Kreuzbauer/BC Steininger* (fn 7) nos 39–44. See also *T Schoditsch*, Die schadenersatzrechtliche "Kernfamilie" im Licht des Art 8 EMRK, ÖJZ 2024, 283.

compensation if they were involved in a qualified manner and, to assess this qualified involvement, the pre-existing (non-family) relationship with the best friend does play a role.[15] The OGH also stresses that, due to the objective indicator of the mental shock suffered, the circle of persons eligible for compensation can be drawn more widely than in mere bereavement cases, where no mental shock reaching the level of an injury to health was suffered.[16]

Compensation is not only possible if the primary victim was killed but also in cases of primary victims suffering most severe permanent injury.[17] Damage to property or death of an animal, on the other hand, cannot justify compensation.[18] As the cases of mental shock are considered to fall under § 1325 ABGB on personal injury, compensation is possible both under fault-based and strict liability. Moreover, close relatives covered by the protective purpose of a contract between the primary victim and the person responsible for their death/most serious injury will also be able to claim compensation for their non-pecuniary loss.[19] Finally, we would like to briefly address the question of contributory negligence on the part of the primary victim.[20] Here, court practice reduces compensation awarded to secondary victims if their personal relationship with the primary victim was decisive for awarding compensation.[21] If, however, secondary victims would have had a claim for compensation even without a close rela-

[15] OGH 2 Ob 208/23m (see above fn 7).

[16] OGH 2 Ob 126/23b (see above fn 14).

[17] OGH 2 Ob 163/06v, SZ 2007/96; 2 Ob 77/09a, ZVR 2010/120, 264 (comment *G Kathrein*). See on this *Karner*, FS Danzl (fn 1) 103 ff.

[18] See OGH 2 Ob 100/05b (property damage), JUS Z/3960; 10 Ob 3/20v (death of an animal), Zeitschrift für Wirtschaftsrecht (ecolex) 2020/251 (comment *T Schoditsch*) = ZVR 2021/197 (comment *BC Steininger*); also discussed by *S Nitsch* in: E Karner/BC Steininger (eds), ETL 2020 (2021) 1, nos 24–31; 2 Ob 12/25s EvBl 2025/215 (comment *F Artner*) = ZVR 2025/176 (comment *BC Steininger*) = AnwBl 2025/174 (comment *M Zoppel*) (airplane crash into claimants‘ home).

[19] 9 Ob 83/09k, interdisziplinäre Zeitschrift für Familienrecht (iFamZ) 2010, 329 (comment *M Ganner*) = Österreichische Zeitschrift für Pflegerecht (ÖZPR) 2010, 127 (comment *K Mayr*) = Zivilrecht aktuell (Zak) 2010/613 (comment *D Schmaranzer*); 9 Ob 12/24s, EvBl 2025/113 (comment *K Mayer*) = DAG 2025, 17 (comment *J Zahrl*) = ZVR 2025/77 (comment *BC Steininger*).

[20] See on this *Karner*, FS Danzl (fn 1) 107 ff; *idem*, ZVR 2001, 288 f.

[21] 2 Ob 178/04x, ZVR 2004/105 (comment *K-H Danzl*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2004 (2005) 142, nos 51–54; 4 Ob 36/10p, iFamZ 2010, 281 = Zak 2010/480 (comment *A Kletečka*) = RdM 2010, 149 (comment *E Bernat*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 1, nos 30–42.

tionship with the primary victim (eg because they were directly involved in the accident), no such reduction is justified.[22]

While court practice has therefore quite clearly defined groups of cases and answered many of the questions relevant for awarding compensation to shock damage victims since the OGH issued this landmark decision, new aspects are nevertheless likely to arise in the future, particularly as awards for non-pecuniary loss – though generally comparatively low in Austria – seem to be highly important for secondary victims as acknowledgement of their suffering.

2. OGH 16 May 2001, 2 Ob 84/01v[23]

Less than three months after the decision just outlined, which set out the conditions for awarding compensation in cases of mental shock of secondary victims, the OGH was confronted with a case in which parents of a child killed in a car accident suffered mental harm not reaching the level of an injury to health. § 1325 ABGB on bodily injury, which expressly provides for compensation of non-pecuniary loss, was therefore not applicable. Consequently, the OGH had to decide whether compensation for 'mere bereavement' – ie mental harm suffered without a mental shock on the part of the secondary victim – is possible.

Notwithstanding the standard practice of the OGH mentioned earlier,[24] according to which compensation of non-pecuniary loss is only permissible if expressly provided for by the law, the 2nd panel of the OGH came to the conclusion that compensation for bereavement is, in principle, possible. The OGH argued that differentiating between mourning reaching the level of an injury to health and mourning which does not is often difficult. Moreover, it held that denying mourning parents compensation for their bereavement while compensation for non-pecuniary harm is available in cases of minor injuries and, under certain circumstances,

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[22] *E Karner*, FS Danzl (fn 1) 109.

[23] ECLI:AT:OGH0002:2001:0020OB00084.01V.0516.000; ecolex 2001/235 (comment *E Helmich*) = ZVR 2001/73 (comment *E Karner*); also discussed by *BC Steininger* (fn 1) nos 69–74. See also *A Fötschl*, Neue Entwicklungen in der Rechtsprechung des OGH zum Schmerzensgeld, Versicherungsrecht Beilage Ausland (VersRAI) 2001, 60; *L Stärker*, Seelische Schmerzen als ersatzfähiger Schaden – OGH erweitert Umfang der Ersatzpflicht bei qualifiziertem Verschulden, Arbeits- und Sozialrechtskartei (ASoK) 2001, 323; *G Christandl/D Hinghofer-Szalkay*, Ersatzansprüche für immaterielle Schäden aus Tötung naher Angehöriger – eine rechtsvergleichende Untersuchung, Zeitschrift für Rechtsvergleichung (ZfRV) 2007, 44.

[24] See above at fn 5.

even in cases of property damage (according to § 1331 ABGB), is disconcerting. After stressing the importance of defining the group of persons eligible for compensation narrowly, the OGH therefore considered the law to have a gap which has to be filled by analogy and referred to several provisions: apart from the already mentioned § 1331 ABGB on property damage, it named § 1328 ABGB on sexual abuse, § 1329 ABGB on deprivation of liberty and § 213a *Allgemeines Sozialversicherungsgesetz* (General Social Insurance Act, ASVG) on occupational diseases and work accidents as well as § 8 (3) *Mietrechtsgesetz* (Tenancy Law Act, MRG). On the basis of these provisions and with reference to the general rule of §§ 1323 and 1324 ABGB, the Supreme Court deduced that compensation of non-pecuniary loss comparable to that suffered in the case at hand, without a bodily injury, requires a higher degree of fault which means that compensation of non-pecuniary loss for bereavement (*Trauerschmerzengeld*) is only possible in cases of gross negligence or intent. As the defendants were only liable on the basis of strict liability, the OGH denied the claim in the case at hand.

Taking into account the otherwise restrictive court practice for awarding compensation for non-pecuniary loss, this decision marks a major step and, therefore, clearly qualifies as a landmark decision. Just like in the shock damage cases, the question of who is entitled to compensation was at the heart of several cases following this decision. As there is no objective indication as to the mental shock suffered by the secondary victim in 'mere' bereavement cases, the formal family relationship plays a more important role here.[25] What is decisive is again the existence of an intense emotional relationship between the primary and the secondary victim. The OGH has, for example, considered parents – as in the case at hand[26] – and children (even if the children are grown-up and were no longer living in the same household as the parent in question),[27] spouses[28] and non-marital partners[29] as eligible for bereavement damages. For siblings, the OGH looks at the existence of a common household: if the siblings lived together in the same household, a close emotional relation-

[25] *Karner*, FS Danzl (fn 1) 100 f.

[26] Also, in the case of the death of their unborn children, 1 Ob 114/16w (see above fn 9).

[27] 2 Ob 141/04f, JBl 2004, 792, discussed in ETL 2004 by *BC Steininger* (fn 21) nos 25–32.

[28] 2 Ob 148/15a, EvBl 2017/11, 87 (comment *R Rohrer*) = ZVR 2017/92 (comment *C Huber*); also discussed by *J Pehm* in: E Karner/BC Steininger (eds), ETL 2016 (2017) 1, nos 25–31.

[29] OGH 2 Ob 212/04x, Österreichisches Anwaltsblatt (AnwBl) 2006, 254; 2 Ob 15/07f, Zak 2007/523.

ship is presumed, whereas without such common household, the family relationship will typically not suffice for awarding compensation for bereavement to siblings.[30] Yet the existence of a close emotional relationship remains decisive, which means that even in atypical scenarios, compensation can be awarded if the claimant succeeds in proving that such an intense emotional relationship existed.[31] The courts combine awards for shock damage and bereavement damages.[32]

Parts of doctrine have criticised the limitation to cases of gross negligence or intent,[33] instead advocating compensation also if the tortfeasor acted with slight negligence or is liable on the basis of a strict liability regime. This is also provided for by all three drafts for reforming Austrian tort law[34] and by art 10:301(1) Principles of European Tort Law (PETL),[35] but has, so far, not been accepted by court practice. While it can be argued that compensation should – just like in cases of shock damage – equally be available if the close relative was severely injured, this has so far not

[30] OGH 2 Ob 90/05g, ZVR 2005/73 (comment *E Karner*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2005 (2006) 118, nos 40–43.

[31] OGH 2 Ob 90/05g (see fn 30 above).

[32] OGH 2 Ob 143/15s, EvBl 2016/39 (*C Huber*) = ZVR 2015/214 (comment *G Kathrein*); 1 Ob 114/16w (see fn 9); 2 Ob 109/19x, ZVR 2021/6 (comment *C Huber*). See also *K-H Danzl/E Karner* in: P Bydlinski/S Perner/M Spitzer, Kommentar zum ABGB (7th edn 2023) (KBB[7]) § 1325 no 29.

[33] *R Reischauer/M Neumayr* in: P Rummel/M Lukas/A Geroldinger, ABGB (4th edn 2025) § 1325 no 28; *M Hinteregger*, Trauerschmerzengeld und der Anspruch auf immateriellen Schadenersatz im österreichischen Recht, in: FS Danzl (2017) 71, 75 ff, 85; *Karner*, FS Danzl (fn 1) 98; in this sense already *E Karner/H Koziol*, Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform, 15. ÖJT 2003 Band II/1 (2003) 81 Fn 375. See also *L Beisteiner*, Angehörigenschmerzengeld – Der Ersatz von Schock- und Trauerschäden bei Tötung oder Schwerstverletzung naher Angehöriger (2009) 99 ff; *K-H Danzl,* 60 Jahre EKHG, ZVR 2019, 184, 190 f; *D Hinghofer-Szalkay/M Prisching*, Schwerste Verletzung eines Angehörigen: Fortentwicklung des „Trauerschmerzengeldes"? ZVR 2008, 444, 446; *S Nitsch,* Schock- und Trauerschadenersatzansprüche nach österreichischem und deutschem Recht, ZfRV 2019, 20, 26, 34.

[34] See *E Karner*, Geldersatz für ideelle Schäden, Minderung der Ersatzpflicht, Beweislast, Verjährung, in: I Griss/G Kathrein/H Koziol (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 83, 86; *R Reischauer/K Spielbüchler/R Welser*, Reform des Schadenersatzrechts Band III – Vorschläge eines Arbeitskreises (2008) 73, 76 f; *G Kathrein* in: BMJ (ed), 200 Jahre ABGB – RichterInnenwoche 2011 in Lochau 16.-20. Mai 2011 (2012) 237, 251. For a comparison of the three drafts, see *BA Koch*, Zukunftsfähiges österreichisches Haftungsrecht, 22. ÖJT 2025 Band II/1 (2025) 72 ff.

[35] See also art 2:202 [1] PEL Liab Dam (= art VI-2:202 DCFR).

been decided by court practice either.[36] Both questions concern areas where a broadening of the group of cases eligible for awards of mere emotional harm without a mental shock or the like in the future is, at least in our view, not unlikely.

3. OGH 20 January 2009, 4 Ob 204/08s[37]

Contributory negligence and liability for auxiliaries (vicarious liability) are both familiar and well-established cornerstones of European tort laws (compare arts 6:102 and 8:101 PETL). It is also commonly accepted that they can be combined, meaning that a compensation claim may be reduced where a *victim's* auxiliary contributed negligently to the occurrence of harm (art 8:101(3) PETL). However, under Germanic legal systems, it was, and remains, a very controversial issue whether a victim is responsible for auxiliaries only under the same conditions as a tortfeasor (in the context of a larger 'mirror image' or 'equality thesis', *Spiegelbildthese* or *Gleichbehandlungsthese*, which calls for the same conditions for contributory and actual negligence), or whether their responsibility for others must be broadened to cover a wider range of tasks (in the context of a 'differentiating thesis', *Differenzierungsthese*).[38] This is so important under Germanic legal systems because their rules on liability for auxiliaries are infamously narrow:[39] on the tortfeasor's side, general attribution only occurs within the boundaries of special relations, such as contractual relations in particular (in Austria: § 1313a ABGB). In contrast, attribution rules within tort law proper (in Austria: § 1315 ABGB) are so narrow as to be essentially inoperative in practice.[40] Thus, the question is whether

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[36] See *Karner/Koziol* (fn 33) 88 ff; *Hinghofer-Szalkay/Prisching*, ZVR 2008, 446; *Karner*, FS Danzl (fn 1) 98.

[37] ECLI:AT:OGH0002:2009:0040OB00204.08S.0120.000 ecolex 2009, 315 (comment *A Kletečka*) = ZVR 2010/8 2 (comment *C Huber*). The case is also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 1, nos 15–23.

[38] For an in-depth discussion in English, see *Koziol*, Basic Questions (fn 5) no 6/204 ff.

[39] Compare *B Markesinis/J Bell/A Janssen*, Markesinis' German Law of Torts (5th edn 2019) 115 ff.

[40] § 1313a states: 'Whosoever is under an obligation of performance to another is liable to that person for the fault of his legal representative, and of persons he engages to perform the obligation, as if it were his own fault.'
§ 1315 states: 'Whosoever, for the conduct of his affairs, avails himself either of an unfit person, or knowingly of a dangerous person, is liable for the harm such a person causes to another in that capacity.' Translations are by *BC Steininger* in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law: Basic Texts (2nd edn 2018) 1 ff.

these narrow rules also apply where the victim made use of auxiliaries, or whether broader attribution is possible.

Before the decision we are about to introduce, about half of Austrian academia and the OGH itself[41] supported a broader attribution of auxiliary conduct on the victim's side.[42] In this view, Austrian attribution and contributory negligence rules[43] did not properly address 'vicarious contributory negligence' and had to be interpreted liberally when addressing this issue, with a view to the differences in context. Supporters of this view argued that losses remain where they fall in general, and therefore, the injured party should be responsible for a wider scope of delegated tasks than the tortfeasor. Not only the employment of a negligent auxiliary for contractual tasks, but also their assignment to *protect* the victim's person or assets should weigh against compensation in the apportionment of liability. The other half of Austrian authors[44] argued for equality between tortfeasor and injured party in a more narrow sense, ie a more direct transposition of the rules on the tortfeasor's auxiliaries to the victim: even if one agrees that attribution rules are too narrow, they argued, the arguments for a broader attribution on the claimant's side are inconsistent with the system's value judgements for the tortfeasor's side. Therefore, this part of academia assumed that a special relation between claimant and defendant is usually necessary for 'vicarious' contributory negligence.

The facts of the present case, which is where the Supreme Court took its present stance on this basic question, provided a seemingly perfect, vivid example on which the issues at stake could be exemplified. The claimant was injured by the defendant in a skiing accident. When skiing, the claimant relied on a trained guide using voice commands, since he continued skiing despite being almost completely blind. The defendant failed to monitor the area and collided with the claimant although he

[41] OGH 7 Ob 27/91, SZ 64/140.

[42] Among others *S Dullinger*, Zum Mitverschulden von Gehilfen ex delicto, JBl 1990, 20 and 91, 31 ff; *Koziol*, Basic Questions (fn 5) no 6/221 ff; *R Reischauer* in: Rummel, ABGB (3rd edn 2007) § 1304 no 7d.

[43] The central rule is § 1304: 'Where damage has been suffered and there is also fault on the part of the person harmed, he has to bear the loss proportionately with the harm-doer, and if the proportion cannot be determined, in equal shares.'

[44] *A Kletečka*, Mitverschulden durch Gehilfenverhalten (1991) 28 ff; further, among others, *F Bydlinski*, Gehilfenmitverschulden beim Arbeitgeber und betriebliche Hierarchie, in: H Krejci et al (eds), Festschrift für Theodor Tomandl (1998) 45; *M Karollus*, Gleichbehandlung von Schädiger und Geschädigtem bei der Zurechnung von Gehilfenverhalten, ÖJZ 1994, 257 (with a nuanced view).

could have seen the guide and the claimant in time to avoid them. The impact injured the claimant. The defendant claimed, among other things, that the trained guide was (also) skiing too fast, and could have slowed down to prevent the accident.

The OGH engaged with the relevant literature at length, and followed the 'mirror' or 'equality thesis' which has dominated court practice ever since.[45] Thus – in contrast to the lower courts – the Supreme Court did not reduce the claimant's award by reference to his guide's potential negligence. The significance of this case is considerable: it is common that a claimant entrusted their property or – as in the case itself – even their person to someone who then takes negligent care of them. One need only remember that a large amount of assets is held by companies, and therefore generally maintained by its employees. Where such employees fail in their task to protect the company's property, a tortfeasor now generally has to pay in full rather than having a defence of contributory negligence. While the tortfeasors have a recourse claim against the negligent auxiliary, they still assume the risk of its enforcement against the auxiliary.

Critics of the case (including one of the authors)[46] have reiterated that 'equality' in contributory negligence need not be understood mechanically, that contributory negligence under Austrian law does not require wrongfulness or a similarly rigid standard, and that activities such as skiing in spite of blindness pose a specific risk that should be attributed to the claimant rather than the defendant. Critics also underline that the victim who relied on a negligent auxiliary to protect their assets would not be deprived of full compensation altogether, since they can pursue another, unlimited claim against the auxiliary itself. It should be their risk whether this claim is effective or not.[47] It also turned out that the new case law on this standard case has some complex implications, relating to whether the tortfeasor may pursue recourse claims against the negligent auxiliary although the auxiliary is protected by employment law.[48]

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[45] For a recent confirmation, see OGH 4 Ob 38/23a ZVR 2024/57 (comment *G Kathrein*).

[46] *E Karner*, Gehilfenzurechnung auf Seiten des Geschädigten, ZVR 2010, 9, 12 f; *BC Steininger* (fn 37) no 19 ff; similarly *Koziol*, Basic Questions (fn 5) no 6/223 ff.

[47] *Karner*, ZVR 2010, 12; *BC Steininger* (fn 37) no 21.

[48] If the employee has to (partly) reimburse the primary tortfeasor, there is a risk that this functionally undercuts liability privileges under employment law. For an overview on the complex interpretative responses to this issue, see *D Messner*, Gesamtschuld und Regress bei Schädigung durch DN und Dritte, ÖJZ 2014, 584; *M Trenker/BA Oberhofer* in: M Schwimann/G Kodek, ABGB-Praxiskommentar (5th edn 2022) § 2 DHG no 80 ff.

Ascribing this decision landmark status is also a good occasion to ask whether the facts may have been a bit *too* vivid for a decision of the general issue concerned. In a personal injury case involving a disabled person who was highly dependent on their auxiliary, it may have seemed more humane to award full compensation than it would have seemed, for example, to the benefit of a company that uses negligent employees to maintain their buildings or machines. Similarly, it may have seemed severe to demand that the claimant should primarily pursue their claim against the auxiliary in the case discussed here, as this would have threatened to deteriorate a longstanding personal relationship between guide and claimant. Would Austrian practice be the same if the OGH had dealt with a mundane case of property damage enabled by a negligent office worker?[49]

While we cannot say for sure, the now-predominant Austrian view exemplified in this landmark case is strongly shaped by its national statutory law and its methodological commitments. It is not necessarily the best overall system, and does not suggest that the general European tendency to accept a broader liability for others on the victim's side (compare again art 8:101[3] PETL) is in any way problematic. The present case also serves as a reminder that landmark decisions do not always close the debate, since defenders of the difference thesis remain faithful to their views.[50]

4. OGH of 17 February 2010, 2 Ob 113/09w[51]

As a consequence of personal injury, the injured person's prior arrangements may become pointless. For example, they cannot proceed with their already booked holiday, they must drop out of a sports class, or cannot use their rental car – although they still have to pay for such arrangements. This is known as the problem of 'frustrated expenses' (*frustrierte Aufwen-*

[49] Reconsidering this issue, even from the perspective of the 'difference thesis', it may have been denied that the guide was an 'auxiliary' rather than an independent contractor in the first place. This is generally the case where the person in question is 'too' independent, such as for independent contractors or guardians – see *Koziol*, Haftpflichtrecht (fn 5) C/9/142 FN 392, C/9/145 – or even closer to the case, with the driver of a car (OGH 2 Ob 187/01s ZVR 2003/27; Rummel/*Reischauer* [fn 42] § 1304 no 7d).

[50] KBB[7]/*Karner* (fn 32) § 1304 no 7; *Koziol*, Haftpflichtrecht (fn 5) C/9/138 ff.

[51] ECLI:AT:OGH0002:2010:E93578, ZVR 2010/157 (comment *C Huber*). The case is also discussed in ETL 2010 by *BC Steininger* (fn 21) nos 17–22.

dungen) in the Germanic juridical jargon.[52] Although a tortfeasor's duty to compensate for these costs may seem intuitive at first glance, there are doctrinal problems with the justification of such claims and with assessing how far they may go. The injured has already incurred the relevant monetary costs *before* the injury, and so the tortfeasor cannot have caused *them* – rather the tortfeasor can only have reduced or eliminated the effective utility of these expenses at the time of the tort. Prior to the present decision, case law did not award compensation for frustrated expenses.[53] Notably, in one decision from 1987 concerning the costs of a booked camping van, the OGH stated that the losses actually caused by the injury were non-pecuniary in nature.[54] Since the compensation of non-pecuniary interests is limited to narrow (if controversial) conditions,[55] the claimant would usually not receive reimbursement. An exception was only made for the 'general costs' of maintaining a harmed thing for the time during which it was not usable (eg, tax and insurance costs for a damaged car).[56]

The facts of the present leading decision featured the common and clear-cut example of a holiday that had to be cancelled after personal injury. The claimant collided with a snowmobile negligently driven by the defendant. As a result of the accident, she had to cancel a pre-booked holiday to India, incurring financial loss via the cancellation fee.

In the decision, the OGH cites a number of relevant decisions and academic opinions, which had overwhelmingly denied compensability. In a surprising turn from the majority view at the time,[57] the OGH nonetheless

[52] See generally *Koziol*, Basic Questions (fn 5) no 5/29 ff.

[53] OGH 2 Ob 279/77, ZVR 1978/264; 8 Ob 27/87, SZ 60/102; 22 September 1988, 8 Ob 650/88; 7 December 1995, 2 Ob 72/94.

[54] OGH 8 Ob 27/87, SZ 60/102.

[55] See above at fn 5.

[56] OGH 2 Ob 20/64 ZVR 1965/114; most recently 11 April 2025, 4 Ob 50/25v.

[57] Interestingly, the court of appeals had already taken a claimant-friendly stance in a judgment for the claimant, by following the approach of an in-depth monograph by *T Schobel*. Der Ersatz frustrierter Aufwendungen: Vermögens- und Nichtvermögensschäden im österreichischen und deutschen Recht (2003). Schobel argues for a 'flexible system' (bewegliches System) under which a test with several factors would have decided on the compensability of frustrated expenses. He first singles out cases where the claimant has a transferable, valuable *claim-right* – even if to an *immaterial* benefit! – as cases of *pecuniary* harm, but only if the tort impairs the transferability. Otherwise, Schobel points to the measurability of the non-pecuniary deprivation in pecuniary terms, its perceptibility, moral hazard, the notions of society, the risk produced by the tortfeasor, foreseeability of harm for the tortfeasor, and finally the connection to the type of wrong committed by the tortfeasor. For cases like ours, however, he demands gross negligence (ibid 293), which is why the OGH concluded that even if one were to follow Schobel's approach, it would not result in compensation.

decided for the claimant and set forth a test under which frustrated expenses are *compensable*. The claimant must have a *legal position* which is 1) valuable in monetary terms, transferable and exploitable, and 2) susceptible to being used only *one time*, rather than continuously (as, eg, an annual railway ticket would be).[58] The use of this position must have been frustrated by the tort.

The importance of this shift is universally acknowledged.[59] The OGH characterised the case discussed here as a leading one in a significant later decision,[60] where the Court explicitly extended the reasoning to consequences of property damage. In this later decision, the defendant had driven into the claimant's rally car[61] between two parts of a rally tournament, making the claimant's prior arrangements (a general lease fee, fuel, tyres) pointless. Here, the OGH declined to compensate the claimant, by arguing that the expenses were not transferable and exploitable *after the rally began*. Nonetheless, the OGH reiterated that the invalidation of prior expenses is compensable even where they are a consequence of damage other than personal injury if the criteria set out by the test in the leading decision of 2010 are met.

The later decision on the rally driver's losses also highlights some difficulties with the test proposed by the OGH in the case primarily discussed here. Why exactly the driver's expenses do not fulfil the test is not entirely clear for all items. While the lease was not transferable, the Court specifically notes that fuel and tyres could, in theory, have been sold to hobby/ordinary drivers at a lower price – thus they were transferable and retained *some* economic value. At the same time, fuel and – at least for a professional – racing tyres are made for one-time use. Would the claimant at least have succeeded if his vehicle had been damaged *before* the rally? Is compensation really categorically excluded for positions that are valuable in the abstract but non-transferable in the specific instance?[62] Does it matter whether the entitlement represents something with a clear

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[58] This is stressed by *C Huber* in his case note, ZVR 2010/157 and by a later decision, 2 Ob 93/21x EvBl 2022/104 (comment *S Jahn*).

[59] *E Bernat/P Schwarzenegger*, (Kein) Anspruch auf Ersatz von „frustrierten" Aufwendungen? ZVR 2022, 253, 255 f; *E Karner*, Rechtsprechungswende beim Ersatz frustrierter Aufwendungen – Bemerkungen zu OGH 2 Ob 113/09w, ÖJZ 2010/86, 830; *S Jahn*, Case note to 2 Ob 93/21x, EvBl 2022/104.

[60] OGH 2 Ob 93/21x EvBl 2022/104 (comment *S Jahn*).

[61] Technically a leased car, but still protected as quasi-property under Austrian case law, see *Jahn*, EvBl 2022/104.

[62] *Bernat/Schwarzenegger*, ZVR 2022, 256 f raise sound arguments against this distinction.

objective (person-independent) value at the time of injury (compare the 'objective' and 'subjective' assessments under Austrian law)?[63] Despite the landmark decision in the 2010 case, some rather basic questions concerning frustrated expenses still remain to be resolved. Nonetheless, the case represents a very impactful decision regarding a common category of losses.

5. OGH 21 November 2023, 3 Ob 9/23d[64]

In this case, an amplified panel of the OGH had to decide whether the parents of a child whose physical disability had negligently not been detected by the mother's obstetrician, which meant that the parents were deprived of the possibility to opt for an abortion, were entitled to compensation for the girl's maintenance costs. The OGH's decision in this last of our five landmark cases drew a line under a long debate on the question of compensation in wrongful birth cases, a topic that had been discussed controversially and quite emotionally both in legal doctrine and in the public in Austria since a first OGH decision on this topic was issued in 1999.[65] While the OGH's denial of compensation for wrongful life, ie of claims by the child itself, in this first decision was generally accepted, the situation was different in respect of claims for compensation of maintenance costs brought by parents arguing that, but for the negligence of the

[63] In this sense, *Jahn*, EvBl 2022/104.

[64] ECLI:AT:OGH0002:2023:0030OB00009.23D.0707.000; AnwBl 2024, 212 = DAG 2024, 19 (comment *J Zahrl*) = EF-Z 2024/25 (comment *M Schickmair*) = EvBl 2024/49 (comment *E Karner*) = iFamZ 2024, 16 (comment *M Neumayr*) = JBl 2024, 178 (comment *A Kletečka*) = Journal für Medizin- und Gesundheitsrecht (JMG) 2024, 104 (comment *M Salcher*) = Medizinrecht (MedR) 2024, 344 (comment *E Bernat*) = ÖZPR 2024/15 (comment *M Rief*) = RdM 2024/24 (comment *BC Steininger*) = VbR 2024/11 (comment *P Leupold*/*M Leitner*). Reported in ETL 2023 by *Messner-Kreuzbauer/Steininger* (fn 7) nos 56–67. See on this also *S Oechsner/S Lagger-Zach*, "Wrongful birth", "wrongful conception" und Art 5 UN-BRK, Zak 2024, 68; *C Huber*, Wronful conception infolge einer fehlerhaften Spirale – Die Karten werden (womöglich) neu gemischt, ÖJZ 2024, 460; *D Prisching/B Sommer*, Schadenersatzrechtliche Gleichstellung von "wrongful birth" und "wrongful conception", Zak 2024, 104; *P Schwarzenegger*, Wrongful birth und wrongful conception – weiterführende Überlegungen zu OGH (verstärkter Senat) 3 Ob 9/23d, JBl 2024, 366; *H Koziol*, Die Bedeutung des Selbstbestimmungsrechts der Eltern für die Schadenersatzansprüche wegen unerwünschter Elternschaft, JBl 2024, 553.

[65] OGH 1 Ob 91/99k, RdM 1999, 177 (comment *C Kopetzki*). For a summary of this decision in English see *BC Steininger*, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 68, no 13 f. See also *C Hirsch*, Arzthaftung infolge unerwünschter Geburt eines Kindes – Anmerkung zu OGH 25.5.1999, 1 Ob 91/99k, RdM 1999, 163.

defendant in treating or informing the mother/parents,[66] their child would not have been born or even conceived. Based on differing theories put forward in legal doctrine,[67] different panels of the OGH developed two inconsistent lines of reasoning. According to the first group of decisions, compensation of maintenance costs is only possible exceptionally in cases in which these maintenance costs place an extraordinary burden on parents, be it because of the extraordinarily high costs (typically due to a disability of the child) or because of the particularly limited funds of the parents.[68] The second group of decisions considered the entire maintenance costs for a child born with a disability to be compensable –

[66] Typically, a hospital or medical practitioner, but there was also a case on product liability, see 8 Ob 69/21m, DAG 2022, 97 (comment *J Zahrl*) = iFamZ 2022, 178 = JBl 2022, 665 (comment *S Dullinger*) = ÖZPR 2023, 29 (comment *M Rief*) = VbR 2023, 13 (comment *P Leupold/B Gelbmann*), reported by *S Loibl/S Nitsch* in: E Karner/BC Steininger (eds), ETL 2022 (2023) 1, no 33 ff.

[67] For an overview of the positions in doctrine, see *Koziol*, Haftpflichtrecht (fn 5) B/1/29: One line of argument stressed the complexity of the family relationship, arguing that looking exclusively at financial aspects is not permissible and that, therefore, compensation is only possible exceptionally in cases of an extraordinary burden (see eg *C Hirsch*, Arzthaftung bei fehlgeschlagener Familienplanung [2002] 50 ff). The other line of argument looks at the financial side and stresses that maintenance costs which would otherwise not have occurred are compensable loss according to the general rules (see eg *S Engel*, Haftung Dritter für unerwünschte Geburt eines Kindes, ÖJZ 1999, 621).

[68] OGH 6 Ob 101/06f, ecolex 2006 (comment *G Wilhelm*) = EF-Z 2006, 131 (comment *M Leitner*) = EvBl 2006/171 (comment *BC Steininger*) = FamZ 2006, 198 (*M Neumayr*) = RdM 2007, 20 (comment *C Huber*); reported in ETL 2006 by *BC Steininger* (fn 65) no 18 ff; see on this *BC Steininger*, Wrongful birth revisited: Judikatur zum Ersatz des Unterhaltsaufwands nach wie vor uneinheitlich, ÖJZ 2008, 436; *D Hinghofer-Szalkay/C Hirsch*, Wrongful Conception die Zweite – (k)ein Ende in Sicht, EF-Z 2007, 89; *A Hollaender*, RdM 2007, 7; *A Kletečka*, JBl 2011, 749; 2 Ob 172/06t ecolex 2007/69 (comment *G Wilhelm*); see on this *D Hinghofer-Szalkay/C Hirsch*, Wrongful birth/Wrongful conception quo vadis? Mögliche und unmögliche Entwicklungsvarianten der Haftungsproblematik von "ungewollter" Geburt und "ungewollter" Empfängnis, ÖJZ 2007, 519; *R Pletzer*, "Recht auf kein Kind?" – Überlegungen anlässlich der jüngsten Entscheidung des OGH zu "wrongful birth", JBl 2008, 490; 6 Ob 148/08w, ecolex 2008/397 (comment *H Friedl*); reported by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 108, no 55 ff; see on this *E Karner*, Unerwünschte Zeugung und ungeplante Geburt – (k)eine Rechtsprechungsdivergenz, EF-Z 2009, 91; *R Fucik*, Wieder Neues zu "wrongful birth", ÖJZ 2008, 3; 9 Ob 37/14b, RdM 2015, 149 (comment *E Bernat*); reported by *BC Steininger/J Pehm* in: E Karner/BC Steininger (eds), ETL 2015 (2016) 1, no 6 ff; see on this *P Schwarzenegger*, Der OGH, ein unerwünschtes Kind und die Einheitstheorie, EF-Z 2015, 166; 8 Ob 69/21m (see fn 66); also 1 Ob 91/99k (fn 65).

irrespective of the question of an extraordinary burden being placed on the parents.[69]

If the OGH has to decide a legal issue of fundamental importance which has not been answered uniformly in the past, § 8 of the *Bundesgesetz über den Obersten Gerichtshof* (OGH Act, OGHG) requires a decision by an amplified panel. The OGH had, however, rejected the need for such an amplified panel with the argument that there was no contradiction between the two lines of decisions as the first related to cases of children with no disability who would not have been conceived but for the negligence on the part of the defendant (the OGH uses the term *wrongful conception*[70]), while the second group of decisions – according to the OGH's reasoning – concerned situations in which the parents were negligently not informed of the child's disability and were therefore unable to opt for an abortion (referred to as *wrongful birth* cases by the OGH).[71] The first important aspect of the current decision therefore is that the OGH accepted the contradiction between its two lines of reasoning: either maintenance costs are generally compensable, then no extraordinary burden is required and the entire maintenance costs for all children in question can be compensated irrespective of the question of their disability, or such costs can only be compensated exceptionally, in which cases it remains unclear why the basic maintenance costs for disabled children should automatically be considered to be an extraordinary burden and therefore compensable.[72]

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[69] OGH 5 Ob 165/05h, EF-Z 2006, 53 (comment *E Bernat*) = FamZ (comment *M Neumayr*) = JAP 2006/2007, 115 (comment *F Parapatits*), reported in ETL 2006 by *BC Steininger* (fn 65) no 5 ff; see also *G Luf*, Kind als Schadensquelle? AnwBl 2007, 547; *S Merckens*, Kein Schaden ohne Kind – Rechtliche Erwägungen zur jüngsten "wrongful birth"-Judikatur des OGH, 5 Ob 165/05h; *BC Steininger*, ÖJZ 2008, 436; *eadem*, Verpflichtung zu paternalistischer ärztlicher Aufklärung statt eigenverantwortlicher Patientenentscheidung? Einige Bemerkungen zur E 5 Ob 165/05h, JBl 2007, 198; *R Rebhahn*, Ersatz des vollen Unterhalts bei "wrongful birth"! Zak 2006, 206; 5 Ob 148/07m, ecolex 2008/109 (comment *G Wilhelm*) = RdM 2008, 47 (*C Kopetzki*); reported in ETL 2007 by *BC Steininger* (fn 10) no 61 ff; see on this *BC Steininger* ÖJZ 2008, 436; *D Hinghofer-Szalkay/ C Hirsch*, Die Ersatzfähigkeit immaterieller Schäden bei Geburt eines unvorhergesehen behinderten Kindes, RdM 2008, 136; *A Kletečka,* JBl 2011, 749; *R Pletzer,* JBl 2008, 490.

[70] The use of this term is misleading, as, outside of this Austrian debate, it only refers to the moment at which the negligence occurred, namely before or after conception, while the question of whether the child suffers from a disability is irrelevant.

[71] See OGH 6 Ob 101/06f (fn 68); 2 Ob 172/06t (fn 68); 5 Ob 148/07m (fn 69); 6 Ob 148/08w (fn 68).

[72] In this sense *BC Steininger*, ÖJZ 2008, 438 f.

As soon as the contradiction was acknowledged, the OGH had to decide under which circumstances compensation is possible and it convincingly did so by opting for the practically much easier option of considering maintenance costs generally compensable, which not only avoids differentiating between ordinary and extraordinary burdens, but also the problematic focus on the question of the child's disability to be observed in the OGH's past practice and the ensuing debate.[73] A detailed doctrinal justification of this result was later provided by *Helmut Koziol*, formerly one of the main proponents of a limitation of compensation to cases of an extraordinary burden.[74] He stressed the defendant's encroachment upon the parents' right to self-determination, the violation of which allows for compensation of consequential damage. Because the latter is, as now argued by *Koziol*, assessed on the basis of a subjective concept, the decisive point is whether parents consider the coming-into-existence of the family relation with their child as advantageous.

When stating that the OGH has drawn a line under the topic, this is clearly not a final one, as other aspects are already being dealt with. In this sense, the OGH has just requested a preliminary ruling from the CJEU on the question as to whether the loss of income suffered by a woman who became pregnant with an IUD can be considered as bodily injury in the sense of the Product Liability Directive.[75] Moreover, when looking at developments in other jurisdictions, the non-pecuniary harm aspects of such cases might also come up more prominently in the future.

[73] See *BC Steininger*, RdM 2024, 116 f.
[74] *Koziol*, JBl 2024, 559 ff.
[75] OGH 18 November 2025, 2 Ob 77/25z.