# XXX. Switzerland

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Selecting five key landmark decisions from the last 25 years cannot, of course, be done with scientific precision. Any assessment of these decisions will always involve some degree of evaluation. There are other decisions that could have been included in this list of landmark decisions. With my selection, I would like to highlight two characteristics of the Swiss Federal Supreme Court: on the one hand, its willingness to innovate and develop the law, as shown in the first three decisions (on 'normative' household damage, proof of fault in product liability and the development of 'liability based on reliance'); on the other hand, as shown in the third and the last two decisions, the preserving respect for the overall value system of the legal order (in limiting liability based on reliance to avoid contradictions in values), for the legislative powers (in the reluctant recognition of the unlawfulness of 'pure economic losses' and by setting the limitation period for 'long latency damage') and for the reasonable citizen's own maturity and responsibility (in emphasising the contributory negligence of injured parties in traffic).

## 1. BGE 127 (2001) III 403[1]

The Swiss Federal Supreme Court Decision BGE 127 (2001) III 403 is an important judgment on the so-called 'normative concept of damage' issue. This concerns the question of whether pecuniary damage can be determined and compensated even if the injured party has not suffered any specific financial loss.

The decision is essentially based on the following facts. In 1992, the plaintiff was injured in a car accident with no fault of her own and was subsequently unable to work to varying degrees. She was no longer able to run the family household and could no longer help her husband in his

[1] Federal Supreme Court Decision (Bundesgerichtsentscheid, BGE) 127 III 403 of 21 June 2001: at <http://www.bger.ch/jurisdiction-recht>. Cf *H Hausheer*/*M Jaun*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 456, nos 5–22.

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business. Although the injured party did not hire external domestic help and therefore did not incur any costs, she claimed damages based on the costs that she would have incurred if she had hired domestic help.

According to the traditional concept of Swiss liability law, the damage consists of the difference between the financial situation of the injured party as a result of the damaging event and the hypothetical financial situation if the event had not occurred. The bodily injury itself does not constitute damage in the legal sense; rather, it is only the economic disadvantages resulting from the injury for the injured party that are to be compensated. The deprivation of personal opportunities for production (or enjoyment) alone may, under certain circumstances, be considered as immaterial damage; but it is not considered as financial loss.[2]

However, the Federal Supreme Court deviates from these principles in cases where the injured person is no longer able to run the household as before as a result of the bodily injury. The damage resulting from limited or lost ability to work in the household is not merely compensated if specific costs are incurred for domestic helpers who are hired because of the loss of the person running the household: rather, compensation must be paid for the economic loss incurred as a result of the impairment of the ability to work in the household, regardless of whether this loss leads to the employment of a replacement, increased expenditure on the part of the partially disabled person, additional strain on relatives or a reduction in quality of life. The damage must be determined 'normatively', ie the damage must be measured by law without proof of the specific financial loss resulting from the injury, based on what a paid replacement hypothetically would have cost.

In the present case, the Federal Supreme Court has consolidated and deepened its practice on this issue. The reason for the abstract assessment of damages, which is to be carried out independently of the specific additional costs, is that the involvement of an outside person for work in the private sphere of a household does not always appear reasonable and the impairment is usually compensated for by additional unpaid work, either by the injured person themselves or by other members of the family or household. This is because household work is traditionally performed free of charge – by the (married) woman – which is why there is no market for typical household work as such, even though the overall work can be divided into individual tasks that are comparable to activities performed by professionals in return for payment.

[2] For the concept of damage cf *F Werro*, La responsabilité civile (3rd edn 2017) no 46 ff; and *H Rey/I Wildhaber*, Ausservertragliches Haftpflichtrecht (6th edn 2024) no 162 ff.

The present case has also brought about a limitation on abstract calculations, because if the injured spouse was not only active in the household but also worked in the marital business, then a portion must be deducted when determining the abstract household damage. The damage consisting in the lost cooperation in a business, on the other hand, must be calculated and proven according to the traditional concept of damage as a (temporary) loss of income. This is because it is always reasonable to hire an outside third party for commercial activities, and their services are usually remunerated.

The decision is important because it has clearly established and concretised the concept of so-called 'normative damage'. The Federal Supreme Court does not exclude a 'normative' determination of damage in other cases either. For example, an injured person may also be compensated for the (hypothetical) costs of external care, even though the care is provided free of charge by relatives. Such voluntary services should not benefit the injuring party, but the injured person.

Compensation in such cases is largely approved by legal scholars, as the rejection of damages would hardly be compatible with today's social norms. However, as some legal scholars point out, the concept of 'normative damage' proves to be an empty shell, as it encompasses any deviation from the traditional concept of damage without any material criteria. The vague concept of 'normative damage' also makes it difficult to predict the future development of case law on special cases of compensable damage. Decisions would be more predictable and methodologically honest if the courts transparently disclosed the underlying legal assessments for the deviations from the traditional concept of damages.[3]

## 2. BGE 133 (2007) III 81[4]

The Swiss Federal Supreme Court Decision BGE 133 (2007) III 81 is an important judgment in the field of product liability, as it makes it easier for the claimant to prove that a product is defective and makes the manufacturer's position more difficult in several respects.

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[3] Cf *W Fellmann/A Kottmann/A Rothenberger*, Schweizerisches Haftpflichtrecht, vol I (2nd edn 2026) § 2 no 96 ff for an overview of 'normative damage' cases, and § 2 no 111 ff for critics to the concept.

[4] BGE 133 III 81 of 19 December 2006 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2007 (2008) 586, nos 5–19.

The decision is based on the following facts. In March 2000, X purchased a filter coffee machine in a shop in Geneva, which was manufactured in Hong Kong and imported in large numbers by company Y to Switzerland for resale to retailers. The instruction manual contained the following 'safety instructions and important information': 'Avoid dropping the machine or exposing it to impact. Never place the glass container on a cold or wet surface while it is still hot, as the glass could shatter.' The model successfully passed a quality control check prior to export. On 8 June 2001, X wanted to make coffee for her guests. According to her statement in the proceedings, she placed the glass container with the prepared coffee on the kitchen counter and put the lid on it. The jug then exploded and X injured her hand. After returning from the hospital, she discovered that her guests had cleaned the kitchen and thrown the broken glass into the rubbish bin.

Non-contractual liability for product defects in Switzerland is based on two principles. On the one hand, in the mid-1980s, the Federal Supreme Court tightened ordinary tort liability by making it largely impossible for manufacturers, as employers, to absolve themselves of liability for their employees. The traditional proof of sufficient care in the selection, instruction and supervision of auxiliary persons was no longer sufficient to exempt the employer from liability.[5] The Federal Supreme Court thus tightened liability at the same time as the European Product Liability Directive came into force. On the other hand, in 1994, the Swiss legislator voluntarily (ie 'autonomously') implemented the European Directive by means of the Swiss Product Liability Act. This Law was applied in the present case.

However, the injured party was unable to prove a defect in the design or production, as is usually required. The Federal Supreme Court made an important clarification: the individual categories of defects listed in the law are merely indications or causes of product defects; based on the wording of the law, a defect exists if the product does not offer the safety that can reasonably be expected under all circumstances. According to the Federal Supreme Court, the injured party does not therefore have to prove the cause of the defect, but only has to show that the product did not meet the reasonable safety expectations of the average consumer.

The reasonable safety expectations are specified taking into account the presentation and use that can reasonably be expected. This raises the question of whether the injured party used the coffee machine correctly,

[5] BGE 110 (1984) II 456; cf *H Honsell/B Isenring/M Kessler*, Schweizerisches Haftpflichtrecht (5th edn 2013) § 21 no 18 ff; *Fellmann/Kottmann/Rothenberger* (fn 3) no 872 ff.

especially whether they observed the manufacturer's safety precautions. If this is the case and damage still occurred (in this case: the explosion of the glass), then the defect is established.

Put simply, the fact of damage 'proves' a defect and results in liability, provided that the product was used correctly. This alone constitutes an increase in liability. The Federal Supreme Court also made two further clarifications that weaken the position of manufacturers.

On the one hand, the injured party does not have to prove that the product was used correctly, but only that it is highly probable that this was the case.

On the other hand, the manufacturer must not 'complicate' the correct operation by imposing excessive safety requirements. The information and warnings in the instructions for use do not constitute an alternative to the manufacturer's obligation to design and manufacture safe products. In the case of products for everyday use, for which the public expects a certain minimum level of safety, the manufacturer may not effectively exempt itself from liability in advance by means of a safety notice. This is because the manufacturer's liability is compulsory and cannot be excluded according to the Swiss Product Liability Act. Unexpected safety precautions on the part of the manufacturer would therefore be unacceptable and legally inadmissible limitations to the manufacturer's liability.

With this decision, the Federal Supreme Court has significantly developed product liability in favour of the injured party. It is not yet clear whether this tightening of the law will be permanent, in particular whether in future it will be possible to infer a product defect from the damage without further ado. This would effectively remove the requirement of defect and introduce strict liability for product damage.

The decision is also noteworthy from a methodological point of view. In interpreting Swiss law, the Federal Supreme Court closely followed the considerations of the above-mentioned European Product Liability Directive, which the Swiss legislature implemented 'autonomously'. In this way, it facilitates the single market, which is the underlying motive of the Directive.

### 3. BGE 133 (2007) 449[6]

The Swiss Federal Supreme Court Decision BGE 133 (2007) III 499 is an important judgment in the field of 'liability based on reliance', a

[6] BGE 133 III 449 of 12 June 2007 (at <http://www.bger.ch/jurisdiction-recht>). Cf *Loser* (fn 4) nos 20–25.

non-contractual and non-regulated liability concept developed by court practice. In this judgment, the Federal Supreme Court sets limits to the liability and restricts the often-criticised openness of the concept.

The decision is essentially based on the following facts. Renovation work had to be carried out in the Gotthard road tunnel, which connects southern and northern Switzerland in the Alps. Company Y, which was commissioned to carry out the work, engaged Company X as a subcontractor. Later on, a dispute arose over the compensation to be paid to Company X by Company Y. Company X threatened to stop the renovation work if it did not receive higher compensation. In a crisis meeting with the owner of the tunnel and the two companies Y and X, the owner informally promised higher compensation to Company X. But no contractual agreement (in the sense of a contract between the owner and Company Y with a direct claim in favour of Company X) was concluded. Company X claims, however, that the owner had inspired trust and reliance that he would ensure that Company X would receive higher compensation either from Company Y or directly from the owner.

As already mentioned, Company X had no contractual claim to higher compensation. However, it asserts a non-contractual claim against the owner, as the latter acted in bad faith by failing to fulfil the trust he had inspired to provide higher compensation, thereby causing damage to Company X in breach of his duty. As a result, Company X is claiming pure economic loss.

According to the Swiss concept of liability, damage is compensated if it is the result of a violation of absolute legal interests, such as physical integrity, personality rights or property. Other damage, ie pure economic losses, are only compensated if the injuring party has violated a legal duty that serves to protect against such damage.[7] The legal duty must in principle be enacted by the formal legislator, but in exceptional cases it can also be created by the court, which – in its recognised subsidiary legislative function – fills gaps in the law.[8]

In contrast, some legal scholars argue that the court could go beyond this exceptional legislative function and create non-contractual duties in

[7] Cf *Fellmann/Kottmann/Rothenberger* (fn 3) no 362 ff.

[8] Article 1 of the Swiss Civil Code states: (1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. (3) In doing so, the court shall follow established doctrine and case law. At <https://www.fedlex.admin.ch/en/cc/internal-law/21>.

general to compensate pure economic loss.[9] The Federal Supreme Court has not followed this newer approach. In particular, it would undermine the concept of the separation of powers in the creation of (elementary) legal duties between citizens of a society and, especially in Switzerland, would also increasingly conflict with the principle of democracy.

Instead, in the mid-1990s, the Federal Supreme Court, within the scope of its recognised subsidiary legislative function, further developed pre-contractual liability (liability based on *culpa in contrahendo*) and generalised it to 'liability based on reliance'. Landmark decisions were BGE 120 (1994) 331 regarding the liability of a parent company towards creditors of its subsidiary and BGE 130 (2004) III 345[10] regarding the liability of an expert towards third parties – outside of the expertise contract – relying on the written expert opinion (this decision cannot be discussed in detail here due to the limited number of cases for this report). Pre-contractual liability is regulated in Swiss law for isolated special constellations: there is no general liability, but this was recognised by the Federal Supreme Court decades ago. The further developed new concept of liability seemed vague ('based on reliance') and without recognisable limits, which is why it was often criticised at first.

However, the Federal Supreme Court has set limits in several decisions, thereby legitimising liability with regard to its content on the one hand and making it predictable on the other. Liability based on reliance expresses the principle of increased responsibility in special relationships in the field of legal transactions. If a party involved in a legal transaction causes a situation of risk for the other party by inspiring trust and reliance, it has to take legal responsibility for it. The problem of uncertainty in contractual relationships, however, has an importance beyond this individual scope: an efficient and effective legal regulation of contracts requires the parties involved not to eliminate their information gaps exclusively by procuring and securing the missing information themselves, but to compensate the gaps with the alternative strategy of reliance instead. Liability based on reliance may thus contribute to optimising the institution of legal and contractual transactions as a core element of the economy and society.[11] This legitimation explains the limited number of special rela-

[9] For a (critical) overview to this approach, see *M Kessler* in: C Widmer Lüchinger/D Oser (eds), Basler Kommentar, Obligationenrecht I (8th edn 2026) OR 41 no 32a ff; cf also *Fellmann/Kottmann/Rothenberger* (fn 3) § 2 no 344 ff.

[10] See *P Loser*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2004 (2005) 583, nos 26–33.

[11] Cf *P Loser*, Vertrauenshaftung (2006) no 166 ff (with an English summary at no 1340 f).

tionships that merit protection and may thus give rise to liability based on reliance.

In the present BGE 133 (2007) III 499, the Federal Supreme Court in principle excluded liability if one party relies on the other party to perform a task without a contractual obligation. In such cases, the relying party knows that there is no legally enforceable obligation to perform. They rely on 'voluntary' future behaviour. However, reliance may only be protected if the protection does not result in a breach of the value system of private law. The private law system provides the contract (as a legal institution) to protect expectations of performance. In general, it is reasonable for the parties to secure their expectations of performance by concluding a corresponding contract. The recognition of liability based on reliance must not lead to the legal institution of the contract being undermined. Trust in the voluntary performance of a task can therefore only be protected in very exceptional cases, namely when the conclusion of a contract is de facto impossible due to the existing power relations between the parties or the dependence of the relying party and, at the same time, the relying party cannot reasonably be expected to refrain from the transaction or business relationship. In such special circumstances, the requirements of private autonomy are not met and there is therefore no risk of the contract as a private autonomous legal institution being undermined.

In the present case, Company X continued the renovation work because it relied on the information that it would receive the promised higher compensation payments. The conclusion of a corresponding guarantee agreement with the defendant would have been possible due to the existing balance of power, as the defendant had no realistic alternative. Company X was therefore in a strong negotiating position vis-à-vis the defendant. Under these circumstances, its reliance cannot – from a legal perspective – be considered worthy of protection.

This correct conclusion of the Federal Supreme Court essentially excludes liability for situations in which 'guarantees' are relied upon without a guarantee agreement being in place. This applies, for example, to 'letters of comfort', which are common in the commercial sector.

Other constellations of trust respectively other areas of liability based on reliance, on the other hand, are worthy of further protection. This applies, for example, to: (1) reliance on a correct and complete set of information upon which to base a contractual decision, which has been inspired by executive bodies of a company, by persons making statements in a financial market prospectus or by experts;[12] (2) the reliance that a

[12] Cf BGE 130 (2004) III 345, mentioned above at fn 10.

contractual promise is binding when the party inspires such reliance by its behaviour or the reliance that contractual negotiations are conducted in a serious way; and (3) the reliance that the integrity of one's own legal sphere (ensuring physical safety on the sales premises or maintaining confidentiality of information given during negotiations) is maintained when entering contractual negotiations.

With this decision, the Federal Supreme Court has reinforced the importance of interpreting the law in a consistent ('system-compliant') manner.

### 4. BGE 146 (2020) III 25[13]

The Swiss Federal Supreme Court Decision 146 (2020) III 25 is a judgment on the issue of long latency damage. It adheres to the concept newly confirmed by the Swiss legislator that liability claims for physical injury may, in exceptional cases, become time-barred even though the damage has not yet manifested itself. The decision lies between two judgments of the European Court of Human Rights (ECtHR), which have condemned Switzerland for this legal situation. This makes the decision significant, even if it is unclear whether the practice will be changed as a result of the second ECtHR judgment.

The decision is essentially based on the following facts. The injured party, Mr J, born in 1953, lived as a child between the ages of eight and 19 in the immediate vicinity of a factory belonging to Company E, which manufactured materials containing asbestos. He stated that he had been regularly exposed to asbestos emissions. Mr J died in 2006 from pleural cancer, allegedly from exposure to asbestos in his childhood. In 2009, his widow and son, as heirs of Mr J, brought an action against the (successor of) Company E. The first two court instances rejected the claims because they held that the limitation period had expired.

Swiss limitation rules are governed by the system of double time limits. A first short and so-called relative period (of three years) runs from the time the injured party becomes aware of the damage. The second longer and so-called absolute period (of ten years; or 20 years in the case of physical injury) runs from the time of the damaging act or the violation of legal duties. Whether the injured party is already aware of the damage at this time is not relevant.

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[13] BGE 146 III 25 of 6 November 2019 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: E Karner/BC Steininger (eds) European Tort Law (ETL) 2019 (2020) 659, no 61 ff and *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2023 (2024) 689, no 130 ff.

The shortcomings of this system in the case of long latency damage were criticised in 2014 in an initial ruling by the ECtHR (*Howald Moor v Switzerland*).[14] In that case, the ECtHR found that there had been a violation of the right to a fair trial under art 6 of the European Convention on Human Rights (ECHR):[15] it acknowledged that the systematic application of the rule to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprived those persons of the chance to assert their rights before the courts.

In 2018, Switzerland revised its statute of limitations rules. As part of the revision, the time limits for the absolute period in the case of physical injury were extended from ten years to 20 years, as mentioned above. However, the concept of double time limits was retained and a special provision for asbestos damage was waived. The 2014 ECtHR ruling was not the reason for the revision, but was discussed by parliament.

The legal proceedings brought by Mr J's heirs were suspended during the revision of the law. The Federal Supreme Court subsequently dismissed the action on the grounds of limitation, denying that there had been a violation of art 6 of the ECHR.

The case was subsequently referred to the ECtHR, which affirmed a violation of art 6 ECHR (*Jann-Zwicker and Jann v Switzerland*):[16] when it is scientifically proven that it is impossible for a person to know that they suffer from a certain illness, such a circumstance should be taken into account in setting the limitation period. The earlier *Howald Moor* judgment of 2014 was, by some legal scholars, understood to mean that it does not prohibit the setting of absolute limitation periods. Rather, the entire national regulation of damages must be considered. The new *Jann-Zwicker* judgment of 2024 obviously takes a more restrictive view.

Despite this, Federal Court Decision BGE 146 (2022) III 25 remains important.

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[14] ECtHR *Howald Moor and Others v Switzerland,* 11.3.2014, nos 52067/10 and 41072/11 (at <https://hudoc.echr.coe.int/eng>). Cf Swiss Report in the Yearbook 2013: *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 673, nos 21–38.

[15] Article 6 ECHR states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[16] ECtHR *Jann-Zwicker and Jann v Switzerland*, 13.2.2024, no 4976/20 (at <https://hudoc.echr.coe.int/eng>). Cf *C Widmer Lüchinger*, Comparative Remarks, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 779, no 39; and the Swiss Report in the ETL Yearbook: *Loser* (fn 13) no 130 ff and *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2024 (2025) 749, no 132 ff.

On the one hand, the conclusion remains that even the revised law provides for an absolute limitation period for long latency damage. In doctrine, an approach is discussed whereby although the limitation period begins to run from the damaging act, it is suspended during the period of uncertainty about the damage. The Federal Supreme Court explicitly rejected this approach because it would result in the introduction of a concept in which the second period begins from the time of knowledge of the damage – a concept that the legislator had deliberately rejected. It remains to be seen whether this is the final court opinion. This is because the question of whether the missing knowledge of the injury is an *objective* uncertainty – as required by law for suspending the limitation period – or a *subjective* uncertainty is still disputed in doctrine.[17]

On the other hand, the Federal Supreme Court is of the opinion that art 6 ECHR is not applicable to this issue at all. This is because the statute of limitations is not a procedural rule, but a substantive issue of liability law, and the ECtHR is not competent to address substantive regulations on liability law. Article 6 ECHR grants everyone the right to assert their civil rights in court, but does not itself establish these rights and claims. The prerequisite for the applicability of art 6 ECHR is therefore the existence of a substantive claim under national law. The Grand Chamber of the ECtHR has confirmed this view in recent judgments.[18] The case of Mr J – like the earlier *Howald Moor* judgment – was not handed down by the Grand Chamber, but by Section III. Therefore, there is still an open question of exceeding competences.

## 5. BGE 148 (2022) III 343[19]

The Swiss Federal Supreme Court Decision 148 (2022) III 343 is an important judgment in the field of contributory negligence. It concerns the question of whether negligence on the part of the injured party excludes strict liability.

The decision is essentially based on the following facts. On 20 February 2019, B was standing at a tram stop in the city of Zurich with his back to an oncoming tram operated by the municipal transport company.

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[17] Cf *U Babusiaux/A Dedual/R Fein*, Verjährung von Latenzschäden, Zur Umsetzung der EGMR-Rechtsprechung im schweizerischen Verjährungsrecht, Zeitschrift für Schweizerisches Recht (ZSR) I (2025) 433 ff.

[18] See consideration no 8.1.1 of BGE 146 (2020) III 25.

[19] BGE 148 III 343 of 20 May 2022 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 673, nos 55–75.

He was looking at his mobile phone when he suddenly stepped onto the tracks without looking to his left. He was hit by the tram and seriously injured.

In principle, there is strict liability for the operators of a tram or other motorised means of transport. However, according to the statutory provisions, this liability does not apply if a circumstance that cannot be attributed to such operators has contributed to the occurrence of the damage to such an extent that it must be regarded as its main cause. Such circumstances are in particular: (1) force majeure; or (2) gross negligence on the part of the injured party or a third person. In contrast to the two lower courts, the Federal Supreme Court assumed gross negligence on the part of the injured party and denied liability.

In legal doctrine, it is sometimes argued that the complex conditions in urban road traffic should be taken into account:[20] gross contributory negligence is assumed only in cases of completely careless and 'blind' walking on tracks; even when gross contributory negligence is confirmed, the operational risk of the tram is only in exceptional cases completely excluded as the cause of the accident. The Federal Supreme Court is more strict and obviously does not want to limit the required care by the fact that looking at one's mobile phone is increasingly common nowadays: 'the degree of care required is not reduced by negligence and bad habits that have developed in traffic'.

The Federal Supreme Court thus expresses a view that also underpins many other judgments: it upholds the maturity and personal responsibility of the reasonable citizen. This is to be welcomed. Personal responsibility should not be seen merely as a burden, but also as freedom. At first glance, the increasing delegation of concern for personal safety and for personal well-being to the State or large companies may appear to be a relief and a social achievement. Ultimately, however, there is a risk of an increasing disempowerment of the citizens.

[20] See consideration no 4.3.6 of BGE 148 (2022) III 343.