XII. Germany

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Selecting five cases among the rich German case law is a difficult, if not impossible task, and readers may easily wonder why we have left out a particular case. We believe, however, that the five landmark cases presented below are not only important for their contribution to the law of delict but reflect changes in legal or social norms, in the procedural landscape or in legal policy and therefore offer a perspective that extends beyond doctrinal developments. We have kept references in footnotes to a minimum. Readers are kindly referred to the respective reports in the Yearbooks on European Tort Law for details.

1. ECtHR 24 June 2004, no 59320/00 (*Caroline von Hannover v Germany*)[1]

The first landmark case is actually a set of cases initiated by Princess Caroline of Monaco (who later became Caroline von Hannover by marriage). Since the 1990s, she sued publishers of the yellow press to protect the privacy of herself and of her family. The yellow press had published private information and unauthorised photographic material. In the course of the various lawsuits, the balance between the freedom of the press and the protection of privacy shifted significantly towards the latter.

A first important decision was already handed down in 1994. The *Bundesgerichtshof* (BGH) ruled that if the yellow press intentionally violates the 'general right to personality' (*allgemeines Persönlichkeitsrecht*) of a person to generate more profit through increased sales, the principle of prevention requires that the calculation of the amount of monetary compensation takes into account that the infringer intended to maximise profits by infringing the law. Even though in cases of such a 'ruthless commercialisation' the *Bundesgerichtshof* did not call for proper

[1] European Court of Human Rights (ECtHR) Neue Juristische Wochenschrift (NJW) 2004, 2647 = European Tort Law (ETL) 2004 (2005) 300, no 11 ff (*J Fedtke*); Federal Court of Justice (Bundesgerichtshof, BGH) 28 September 2004 – VI ZR 305/03, NJW 2005, 56 – Charlotte Casiraghi II = ETL 2004 (2005) 300, no 18 ff (*J Fedtke*).

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'disgorgement of profits', it made clear that the amount of monetary compensation must 'have a genuine deterrent effect',[2] which blurs the line between compensatory damages and punitive damages (which are alien to German tort law) and also the line between tort law and the law of unjust enrichment. As a consequence, in 1996, the Higher Regional Court (*Oberlandesgericht*, OLG) Hamburg awarded Caroline the sum of DM 180,000 (€ 92,000) for unlawful publication of false information and unauthorised photographic material.[3] At that time, this was a very high amount for an infringement of personality rights by the press.

In addition to the increased sums awarded by courts to remedy blatant violations of personality rights, the lawsuits initiated by Caroline led to a much broader protection of privacy. Under German law, infringements of personality rights have to be balanced, inter alia, with the rights of the press to inform the general public. Courts had ruled that so-called 'absolute persons of contemporary interest' (*absolute Personen der Zeitgeschichte*) enjoy less protection against the taking of photos or videos when they act in public areas that cannot be qualified as secluded zones (*örtlich abgeschiedene Bereiche*). Put simply, German courts were of the opinion that absolute persons of contemporary interest, which may include celebrities that do not hold a public office, must accept that they are photographed when they appear in public even while pursuing everyday activities. An exception applied for secluded zones, ie public areas that are well shielded against outside views, as even exposed persons may expect privacy in such areas. The publication of certain photos of Caroline was therefore considered as lawful by the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG).[4]

To overcome the German approach, Caroline lodged an application with the European Court of Human Rights in Strasbourg. She invoked a violation of art 8 of the European Convention on Human Rights (ECHR), according to which everyone has the right to respect for his private and family life, his home and his correspondence. The European Court held that the decision of the *Bundesverfassungsgericht* to deny monetary compensation for photos of Caroline that were taken when she was in the public sphere – for example, while she was shopping, doing sports, cycling or visiting a beach club – infringed art 8 ECHR.[5]

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[2] BGH 15 November 1994 – VI ZR 56/94, NJW 1995, 861, 865 – Caroline von Monaco.

[3] OLG Hamburg 25 July 1996 – 3 U 60/93, NJW 1996, 2870 – Caroline von Monaco.

[4] BVerfG 15 December 1999 – 1 BvR 653/96, NJW 2000, 1021 – Caroline von Monaco.

[5] ECtHR *Caroline von Hannover v Germany*, 24 June 2004, no 59320/00, NJW 2004, 2647 = ETL 2004 (2005) 300, no 11 ff (*J Fedtke*).

The European Court emphasised that Caroline of Monaco did not exercise a public function in either Monaco or Germany and that the photos displayed activities of her everyday life which – even though they were exercised in public – were of a purely private nature. As the photographs were published merely to please the interest of a certain audience, and were not intended to foster a discussion of public interest, the European Court of Human Rights ruled that the right to privacy (art 8 ECHR) must prevail in such scenarios over the freedom of expression (art 10 ECHR). The European Court also made clear that the framework developed by German courts, which granted absolute persons of contemporary interest less privacy protection when acting in the public sphere, does not protect the European right to privacy sufficiently.

As a consequence, German courts had to adapt their assessment, which they did swiftly. Since then, celebrities and other persons of public interest do not have to accept the publication of photographs displaying everyday activities unless the photographic material serves a discussion of public interest. A perfect example is a decision handed down by the *Bundesgerichtshof* only a few months after the judgment of the European Court of Human Rights.[6] In this case, Charlotte Casiraghi, a minor daughter of Princess Caroline, had sued a magazine for publishing photographs of a riding tournament in which she had participated to illustrate a story which was not related to this event at all but to Charlotte's general life and to speculations about a not yet existing interest in the opposite sex. Referring to the decision of the European Court, the *Bundesgerichtshof* held that Charlotte was not exercising any public function and therefore the interest of the public and the press in photographic reporting on her everyday life without consent violates the daughter's right to privacy – even though she might soon become a member of the international 'jet set'.

Although some publishers have complained that the judgment of the European Court of Human Rights is a form of censorship as it allows persons of public interest to control information and images when acting in public, the judgment of the European Court of Human Rights is to be applauded. Everyday activities are of a private nature even if pursued in public, unless such material is necessary to foster a public debate.

[6] BGH 28 September 2004 – VI ZR 305/03, NJW 2005, 56 – Charlotte Casiraghi II = ETL 2004 (2005) 300, no 18 ff (*J Fedtke*).

2. BGH 17 June 2014, VI ZR 281/13 (Bicycle Helmet)[7]

The second landmark case is the bicycle helmet case of 2014, which addresses the delicate issue of under which circumstances courts can, as a factual matter, introduce increased safety measures for riding bicycles even though the legislature did not make such measures mandatory.

The facts of the case are simple: a motorist parks her car at the side of a street and opens the door without paying attention to a cyclist attempting to ride past the car. The cyclist cannot avoid the collision with the open door, falls off the bike, and suffers severe brain damage. It was out of dispute that the motorist, as keeper of the vehicle, was strictly liable. The motorist and her insurer relied, however, on the defence of contributory negligence. The cyclist did not wear a protective helmet so the defendants argued that a helmet would have prevented at least some of the damage, as it usually absorbs parts of the impact's force. They argued that the cyclist's claim should be reduced by 50% in accordance with § 9 Road Traffic Act (*Straßenverkehrsgesetz*, StVG) and § 254 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Whereas the Regional Court (*Landgericht*, LG) Flensburg[8] rejected the contributory negligence defence in line with the prevailing view, the *Oberlandesgericht* Schleswig[9] reduced the victim's claim by 20%. The *Oberlandesgericht* took the position that a reasonable cyclist would have worn a helmet to protect herself against head injuries. This judgment stirred a heated debate in Germany, as the legislature had not made the use of such helmets for cyclists mandatory in Germany – and this remains the case even today. With regard to other activities such as horse riding or downhill skiing, however, it was widely accepted by the lower courts that – even though wearing a protective helmet is not prescribed by statute – the claim of a rider or skier not wearing a protective helmet must be reduced for contributory negligence insofar as compensation is claimed for injuries that could have been avoided or mitigated by wearing such a helmet.[10] The *Bundesgerichtshof* had also ruled that motorcyclists were partly responsible for their head injuries resulting from an accident if they did not wear a protective helmet, even before the legislature made

[7] NJW 2014, 2493 = ETL 2014 (2015) 216, no 2 ff (*J Fedtke*).

[8] LG Flensburg 12 January 2012 – 4 O 265/11, Beck online Rechtsprechung (BeckRS) 2014, 8138.

[9] OLG Schleswig 5 June 2013 – 7 U 11/12, Straßenverkehrsrecht (SVR) 2014, 263.

[10] OLG München 25 November 2011 – 8 U 3652/11, Zeitschrift für Sport und Recht (SpuRt) 2014, 26, 27 (ski accident); LG Bonn 21 October 2011 – 3 O 272/06, BeckRS 2013, 6187 (horse riding accident).

it mandatory to wear one.[11] The bicycle helmet case therefore presented the perfect opportunity for the *Bundesgerichtshof* to clarify the law of contributory negligence with regard to dangerous conduct that is not prohibited by law.

The *Bundesgerichtshof* rejected any contributory negligence on the part of the cyclist. Contributory negligence presupposes that the claimant fails to exercise the care that a reasonable and prudent person would apply in order to avoid harm. This standard is determined not only by the rules of the Road Traffic Regulation (*Straßenverkehrsordnung*, StVO) but also by general rules of good conduct for participating in road traffic. These general rules can also flow from a general belief that certain conduct is regarded as dangerous and that persons engaging in such conduct would therefore usually take measures of precaution to mitigate possible harm. These beliefs can also change over time. To assess whether a general belief has been established, courts can rely on statistics and official or unofficial surveys. The court therefore examined publicly available data and emphasised that, according to a survey, around 11% of cyclists in inner cities actually wore protective helmets in 2011, ie the year when the accident took place. This figure, the court reasoned, cannot support the finding that, at the time of the accident, cyclists generally regarded helmets as a reasonable precautionary mechanism. So it cannot be expected of a reasonable cyclist to wear such a helmet. 'At least' for accidents that took place in 2011, the court refused to reduce compensation claims for head injuries if the injured cyclist was not wearing a helmet.

Even though reliance on empirical data can be questioned, as sufficient data is not available for all scenarios, it at least provides an indication of when contributory negligence can be assumed because it is generally accepted that one should take a certain precaution. Although the court did not specify what percentage must be met in order to find that a helmet is generally regarded as a reasonable precautionary measure that cyclists can be expected to take, one can assume that it must lie above 50%.

Against this background, even today, the average adult inner-city cyclist not wearing a helmet does not face a reduction of their claim for damages, even though more and more bike riders actually wear helmets. In 2024, 34% of cyclists across all age groups already did so on a regular basis according to an official survey.[12] This survey also reveals that with regard to some groups, the figures are much higher. 80% of children up

[11] BGH 9 February 1965 – VI ZR 253/63, NJW 1965, 1075.

[12] See the survey of the Bundesanstalt für Straßen- und Verkehrswesen, availabe at <https://www.bast.de/DE/Publikationen/DaFa/2025/2025-01.html>.

to the age of ten and 60% of adult cyclists with e-bikes regularly wear helmets. Thus, with regard to these groups, a general conviction that a helmet should be worn can be assumed. In practice, this matters mainly for e-bike riders, given that children up to the age of seven are not liable at all (and consequently their contributory negligence cannot be invoked, either), and children from seven to ten years of age are largely shielded by § 828 (2) BGB.

In addition, cyclists who use their bikes for sporting activities outside regulated events, such as mountain biking or slipstreaming, will also face the contributory negligence defence in case they sustain head injuries. Although to our knowledge no data is available, one can observe that, in these contexts, helmets are worn regularly.

3. BGH 25 May 2020, VI ZR 252/19 (Diesel Emissions Scandal)[13]

The third selected judgment is the first in a series of five decisions handed down in 2020 by the *Bundesgerichtshof* on a manufacturer's delictual liability in the wake of the diesel emissions scandal. After US authorities had, back in 2015, discovered the use of software in a particular type of diesel engine manufactured by Volkswagen that was found to be an improper defeat device, large numbers of affected buyers brought actions for compensation.[14] While claims directed against car retailers revolve around contractual remedies, there is no contractual link to the manufacturer and claims must therefore be delictual in nature. In 2014, the claimant had bought a used car equipped with an affected diesel engine for € 31,490 gross from a car dealer. In 2017, the claimant requested that Volkswagen refund the purchase price and concurrently tendered transfer of the car.

The very careful and detailed reasoning of the *Bundesgerichtshof* can be sketched here in very broad strokes only (at the risk of oversimplification). The court held that the defendant was liable under §§ 826, 31 BGB for intentionally inflicting damage *contra bonos mores*. The *Bundesgerichtshof* found that the defendant had acted *contra bonos mores* in marketing the affected cars: the deception of the competent Federal Motor Transport Authority showed indifference towards a potential

[13] ECLI:DE:BGH:2020:250520UVIZR252.19.0, NJW 2020, 1962 = ETL 2020 (2021) 206, no 34 ff (*J Kleinschmidt*).

[14] See the reports on the state of play in diesel litigation in ETL 2018 (2019) 221, no 7 ff (*J Kleinschmidt*); ETL 2019 (2020) 205, no 14 ff (*W Wurmnest/M Gömann*).

detriment to the individual buyer as well as towards the protection of health and of the environment and equalled a direct deception of the individual buyer. In order to hold the defendant corporation liable, such individual conduct must be attributed to the defendant via § 31 BGB. In a key aspect of the decision, the BGH surmounted the lasting uncertainty as to what exactly the defendant's board members had been aware of by taking the claimant's assertions to this effect as conceded for procedural reasons: as the claimant had supplied sufficient facts to make the defendant's board members' knowledge appear likely, it would have been the defendant's task, under a so-called 'secondary burden of producing evidence' (*sekundäre Darlegungslast*), to elucidate the relevant facts, which it failed to do. This procedural device prevents corporations from being able to hide behind a non-transparent structure. The court went on to hold that the claimant had suffered harm due to the defendant's conduct. The harm consisted in the conclusion of a contract for purchase of the affected car. Here, the BGH clarified that economic loss may also follow from normative considerations even if damage is not measurable. The undesired obligation in itself constitutes legally relevant damage: § 826 BGB protects the general freedom of action and individual economic self-determination. It was therefore regarded as sufficient that the claimant had received a performance that had not been fully fit for purpose. Finally, the BGH found that the relevant persons within the defendant corporation who were aware of the strategic decision acted with the required intention of inflicting harm.

As a consequence, the claimant can request that the undesired sales contract be unwound. If he surrenders his car to the manufacturer (from whom it had not been bought), he will receive a refund of the purchase price paid as damages; however, significant compensation for the benefit of using the car (in the present case about € 5,874) will be deducted. According to the general principle referred to as *Vorteilsausgleichung*, a claimant must not be placed, because of the damaging event, in a better position than he would have been in without the event. Without this deduction, liability would contain a punitive element which in this form is alien to German tort law. Before the judgment, the issue as to whether compensation for use would be deducted had been very controversial, and it is this aspect that received criticism from a number of authors who feared that the longer aggrieved buyers had used their cars, the less attractive it would become to seek redress in money – against giving up their cars (which may be economically and ecologically unsound in itself).

The decision is therefore an example of a vigorous and logical application and evolution of tort law principles to a factual situation of

enormous societal importance. Its real value, however, lies in the fact of providing, almost five years after the discovery of the software, legal certainty to potential claimants who may henceforth evaluate the potential outcome of initiating legal proceedings and to lower courts for whom the judgment lays the ground stone for ruling on various issues on which they (and legal scholarship) had previously been split. It must not be overlooked, however, that the judgment was just the beginning. Many related aspects in other cases called (and continue to call) for clarification. In 2021, the *Bundesgerichtshof* even created a temporary 'auxiliary Senate', whose only task it still is to deal with appeals in tort cases based on the allegation of improper defeat devices in cars with diesel engines. To give just some examples,[15] the court could clarify in later judgments that compensation for use may reduce the amount of damages to zero and that the manufacturer does not owe delictual interest,[16] that no liability exists if the claimant had bought the car after Volkswagen had publicly admitted to using the software,[17] and that the general three-year prescription period applies and commences at the latest with the expiry of 31 December 2016.[18]

On one apparent side aspect, however, the present judgment later had to be reversed. The *Bundesgerichtshof* had rejected a concurrent claim based on § 823 (2) BGB, which provides for damages in the case of a violation of a 'protective norm' (*Schutzgesetz*) aimed at the protection of the individual and which, importantly, does not require intent but merely negligence. The court regarded the relevant EU legislation on type approval as aiming only at the interest of the general public. When in March 2023 the CJEU clarified that these provisions did indeed also protect the individual,[19] the BGH had to open up a second avenue of redress based on § 823 (2) BGB, which entailed a further expansion of diesel litigation because it could also concern other manufacturers and other allegations,

[15] For further examples, see ETL 2020 (2021) 206, no 61 (*J Kleinschmidt*); ETL 2021 (2022) 194, no 50 ff (*W Wurmnest/J Kleinschmidt/S Gasche*); ETL 2022 (2023) 233, no 61 ff (*J Kleinschmidt*).

[16] BGH 30 July 2020 – VI ZR 354/19, NJW 2020, 2796 = ETL 2020 (2021) 206, no 59 (*J Kleinschmidt*).

[17] BGH 30 July 2020 – VI ZR 5/20, NJW 2020, 2798 = ETL 2020 (2021) 206, no 60 (*J Kleinschmidt*).

[18] On this aspect, see the cases reported in ETL 2022 (2023) 233, no 62 (*J Kleinschmidt*) as well as BGH 17 December 2020 – VI ZR 739/20, NJW 2021, 918 = ETL 2020 (2021) 206, no 61 (*J Kleinschmidt*).

[19] CJEU 21.3.2023, C-100/21, *QB v Mercedes-Benz Group AG*, ECLI:EU:C:2023:229 = ETL 2023 (2024) 721, no 57 ff (*BA Koch/T Thiede*).

such as the use of a so-called 'thermal window'.[20] This results in a private enforcement of EU law by a claim for damages under national law.

In view of the high number of potential litigants and of the considerable waiting period up to a ruling by the German Supreme Court, the litigation triggered by the diesel emissions scandal also fuelled the debate on how to deal with mass claims (in tort law and beyond) and on how to proceed with establishing means of collective redress in particular. While a decrease in docket numbers in civil courts has generally been observed over the past years, events affecting multiple persons (including the diesel emissions scandal or the 'Facebook data leak') led to thousands of similar (albeit not identical) cases flooding first instance courts. As a first intervention, the legislator introduced, in 2018, a 'model declaratory action' (*Musterfeststellungsklage*), which, however, falls short of a 'true' representative action, as the action merely aims at a declaratory ruling on specific factual and legal issues that are relevant for the existence or non-existence of individual claims and, in a second step, participating consumers still have to pursue their claims for damages, based on the binding findings of the model declaratory action, individually in separate proceedings.[21] In the diesel emissions scandal, the *Verbraucherzentrale Bundesverband* had initiated a model declaratory action against Volkswagen, which was terminated by a settlement out of court shortly before the decision presented here was rendered.[22] A second legislative initiative aimed at countering procedural tactics to avoid an unfavourable appeal decision that could potentially have provided guidance and orientation to many other pending proceedings. Created in 2024, the 'guideline decision procedure' (*Leitentscheidungsverfahren*) enables the Federal Court of Justice to express its opinion on the merits of a case even though the underlying appeal procedure has been terminated by the parties.[23] The new provisions were applied in the context of the so-called 'Facebook data leak'.[24]

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[20] BGH 26 June 2023 – VIa ZR 335/21, NJW 2023, 2259.

[21] ETL 2018 (2019) 221, no 1 ff (*J Kleinschmidt*); on a first unsuccessful attempt, see ETL 2017 (2018) 207, no 13 ff (*W Wurmnest/M Gömann*); on the implementation of the EU Directive on representative actions, see ETL 2023 (2024) 263, no 1 ff (*W Wurmnest/N Riemann*).

[22] ETL 2020 (2021) 206, no 49 f (*J Kleinschmidt*); ETL 2019 (2020) 205, no 9 ff (*W Wurmnest/M Gömann*), also on other examples.

[23] ETL 2024 (2025) 241, no 1 ff (*J Kleinschmidt/L Glöckner*).

[24] BGH 18 November 2024 – VI ZR 10/24, NJW 2025, 298 = ETL 2024 (2025) 241, no 55 ff (*J Kleinschmidt/L Glöckner*); see also OLG Hamm 15 August 2023 – 7 U 19/23, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2023, 1791 = ETL 2023 (2024) 263, no 36 ff (*W Wurmnest/N Riemann*).

4. BGH 29 November 2021, VI ZR 258/18 (Helmut Kohl)[25]

Turning again to personality rights, the Helmut Kohl case has to be mentioned in this compilation. Helmut Kohl served as German chancellor from 1982 until 1998. After his political career, he planned to publish his memoirs. For this reason, he worked with a ghost writer. In the course of preparing the multi-volume oeuvre, Helmut Kohl agreed that discussions and talks he had with the ghost writer, a historian, could be recorded. In the beginning, the cooperation worked well and three volumes of the book project were published. Later, Helmut Kohl terminated the collaboration as he mistrusted the ghost writer. Subsequently, the defendant publisher published a book written by the historian (who interviewed the former chancellor) and a co-author, which was based on the recordings made with Helmut Kohl, against the latter's explicit will. This book, entitled *'Vermächtnis: Die Kohl Protokolle'* (Legacy: The Kohl Protocols), became a bestseller as it contained several quotes about the former chancellor's political allies and opponents, which the authors had, however, 'beefed up' in part. Helmut Kohl sued the publisher and the two authors on the grounds that the recordings were confidential and many statements were distorted or quoted out of context or were even untrue. He claimed compensation for infringement of his general right to personality (*allgemeines Persönlichkeitsrecht*). Given the prominence of the claimant and the fact that many of the 'quotes' in the book were not very flattering to other politicians, the case received considerable media coverage.

In the beginning, the lawsuit went well for Helmut Kohl. The *Landgericht* Köln awarded him the sum of € 1 million as damages as many quotes were not correct. This was a record-breaking amount.[26] The defendants appealed. This move saved the defendants a lot of money as Helmut Kohl died after the appeal had been lodged and German law restricts the inheritability of claims for infringements of personality rights.

Kohl's surviving spouse and sole heir, Meike Kohl-Richter, pursued the compensation claim. The *Oberlandesgericht* Köln dismissed the action, however, holding that claims for monetary compensation awarded for infringements of personality rights cannot be inherited. The heirs cannot claim compensation unless, prior to the death of the claimant, a final judgment has been obtained (and the latter was not the case given

[25] ECLI:DE:BGH:2021:291121UVIZR258.18.1, NJW 2022, 868 = ETL 2021 (2022) 194, no 60 ff (*W Wurmnest/J Kleinschmidt/S Gasche*).

[26] LG Köln 27 April 2017 – 14 O 323/15, BeckRS 2017, 125934 = ETL 2017 (2018) 207, no 41 ff (*W Wurmnest/M Gömann*).

that the defendants had appealed).[27] The *Bundesgerichtshof* endorsed this reasoning.[28] The court affirmed that claims for an infringement of personality rights do not devolve to the heirs because the primary aim of monetary compensation is to give the victim satisfaction, and a payment to heirs cannot provide satisfaction to the deceased. The judgment was no surprise. The *Bundesgerichtshof* had already held in 2017 that bringing the case before a court does not make a claim for compensation for infringements of personality rights heritable (because it is unclear at that stage whether the law was infringed or not).[29] Based on this reasoning, the *Bundesgerichtshof* did not make an exception for scenarios in which the victim had already obtained a non-final judgment (which is provisionally enforceable), as did Helmut Kohl. Such a judgment can be reversed on appeal and consequently a claimant who provisionally enforces the judgment (or their heirs) would have to compensate the defendant. An heir can only enforce the claim of the deceased if it is endorsed in a final judgment or – as the BGH stated obiter – if there was an abusive delay of proceeding by the defendant (which was not so in the case at hand). As a consequence, the defendants prevailed and no compensation had to be paid to the widow. Meike Kohl-Richter filed a complaint before the *Bundesverfassungsgericht* but the Constitutional Court held in 2022 that no constitutional standards had been breached[30] so that the reasoning of the *Bundesgerichtshof* is still good law today.

It is obvious from a legal policy perspective that the outcome of the case is plainly wrong. In cases of elderly victims, a tort may pay off – if the claimant dies before they have obtained a judgment with *res iudicata* effect, unless the defendant had delayed the proceedings. This runs counter to the basic principle that unlawful behaviour deserves a remedy. But setting aside this legal policy argument, there are other arguments speaking in favour of the heritability of such claims. First, § 1922 BGB, according to which the assets are transferred as a whole to one or more heir(s) upon the death of a person, does not exclude the transfer of claims based on personality right violations. The reason why the *Bundesgerichtshof* decided otherwise lies in a 'technicality'. The BGB

[27] OLG Köln 29 May 2018 – 15 U 64/17, BeckRS 2018, 17910 = ETL 2018 (2019) 221, no 63 f (*J Kleinschmidt*).

[28] BGH 29 November 2021 – VI ZR 258/18, NJW 2022, 868 = ETL 2021 (2022) 194, no 60 ff (*W Wurmnest/J Kleinschmidt/S Gasche*).

[29] BGH 23 May 2017 – VI ZR 261/16, NJW 2017, 3004 = ETL 2017 (2018) 207, no 28 ff (*W Wurmnest/M Gömann*).

[30] BVerfG 24 October 2022 – 1 BvR 110/22, NJW 2023, 757 = ETL 2022 (2023) 233, no 2 f (*J Kleinschmidt*).

of 1900 generally restricted the heritability of compensation claims for pain and suffering. Even though the legislature altered this restriction in 1990 (so that today heirs can claim compensation for the pain a deceased victim suffered before passing away), the *Bundesgerichtshof* held that this reform does not affect compensation claims for violations of personality rights. Courts have derived claims for infringements of personality rights from the basic rights enshrined in the German Constitution (and not directly or analogously from § 253 (2) BGB, which applies merely to claims for pain and suffering). This reasoning is rather formalistic as it does not take into account the *ratio legis* that led the legislature to change the law. In addition, the satisfaction argument is not very strong as satisfaction is not only obtained when compensation is paid to the victim but already when the victim is certain that the tortfeasor will have to pay one day because the compensation claim will be passed on to the heir(s).

In any event, the German legislature decided to step in and correct the case law. A first attempt to alter the law was started in 2024 but was not pursued further.[31] In April 2025, a new draft bill to amend § 1922 BGB was, however, submitted to the German *Bundestag*.[32] The government proposes to add a new sentence to § 1922 (1) BGB to clarify that the assets which are transferred upon death include claims for monetary compensation for infringements of personality rights. The draft bill has not yet been debated by the *Bundestag* at the time of writing (December 2025). If this bill is passed by the German *Bundestag*, which is generally expected, the Helmut Kohl case will be 'overruled' and – which might be even more important – the legal term 'personality right' will for the first time be expressly mentioned in the BGB.

5. BGH 6 December 2022, VI ZR 168/21 (Nervous Shock)[33]

In the fifth and final case, the *Bundesgerichtshof*, in a somewhat unexpected but highly welcome decision, revised its long-standing approach to dealing with nervous shock suffered from witnessing or learning of injury to a close relative. The claimant, a father of a daughter, claimed

[31] See ETL 2024 (2025) 241, no 10 ff (*J Kleinschmidt/L Glöckner*).

[32] Printed Documents of the German Parliament (Bundestagsdrucksache, BT-Drucks) 21/15 of 2 April 2025, available at <https://dserver.bundestag.de/btd/21/000/2100015.pdf>. See ETL 2025 (forthcoming 2026) (*W Wurmnest/P Grasse*).

[33] ECLI:DE:BGH:2022:061222UVIZR168.21.0, NJW 2023, 983 = ETL 2022 (2023) 233, no 14 ff (*J Kleinschmidt*).

damages for pain and suffering. He submitted that he had suffered from a severe depressive reaction and been diagnosed with an adjustment disorder, after having learned that the defendant had repeatedly sexually abused the claimant's daughter who, at the time, had been between five and six years of age.

As German tort law, save for very few exceptions (§ 844 f BGB), does not compensate damage suffered exclusively as an indirect consequence of direct injury to a third party, the claimant in nervous shock cases must establish damage to their own health. It has long been accepted that psychological harm may amount to such injury if it gives rise to a medically recognisable illness. However, previous case law had erected a second condition that, in addition, the impairment go beyond the health issues to which close relatives of a deceased or seriously injured person are generally exposed.[34] In the present decision, the *Bundesgerichtshof* bids farewell to this second condition. Regarded as a hallmark of a restrictive German approach towards nervous shock cases, this additional threshold had been justified with the general reluctance to grant compensation to indirect victims. The court now accepts that, as legal scholarship had not tired of pointing out, this argument is in fact flawed, since claimants in nervous shock cases do not claim compensation for damage to a third person but for injury inflicted upon their own (mental) health. Furthermore, the *Bundesgerichtshof* rightly fears that a requirement to compare the claimant's individual impairment with the reaction generally expected of close relatives in a comparable situation may lead to inequitable results. Where serious psychological harm could likely be regarded as understandable and appropriate if triggered by intentional criminal conduct towards a close relative (so that the threshold would not be met), the same reaction could give rise to compensation if it resulted from a minor offence. Again, legal scholarship had already criticised that it is indeed inherently uncertain, even inappropriate (and prone to causing additional pain) to establish and assess which kinds of reaction fall outside the 'normal' range. Although the lower courts had in fact held that the claimant's reaction had passed the threshold (and, therefore strictly speaking, the case did not necessarily call for giving up the condition), the *Bundesgerichtshof*'s change of mind has the fortunate consequence of removing any need for speculation about what can be expected of a father who must live through such horrific news.

It is an important achievement of the decision to have placed physical and psychological harm on the same footing. One commentator has

[34] The seminal case is BGH 11 May 1971 – VI ZR 78/70, NJW 1971, 1883.

offered a very convincing explanation of the decision in describing a profound change in how society (and judges) have experienced and regarded traumatic events and rationalising the revised approach as a (however belated) reflection of this change.[35]

Fears that the revised approach might open the floodgates to compensation are not justified. A claimant will still have to show a medically recognisable illness. Furthermore, the requirement of attribution (*Zurechnungszusammenhang*) will continue to work as a filter and exclude compensation where merely the general risk of life materialises. Therefore, the claimant and the person whose injury triggered the psychological impairment must be in a close personal relationship.[36] However, the decision clarifies that it is not a requirement that the claimant actually witness the injury ('distant shock') and that, moreover, neither an accident (which had previously shaped the image of nervous shock cases)[37] nor death or serious injury of the primary victim must be ascertained in order to attribute the psychological harm to the defendant's conduct.[38]

From a broader perspective, the decision can be described as part of a more general trend to extend compensation for immaterial damage. In 2002, a reform of the law of damages made available damages for pain and suffering, which had previously been limited to (fault-based) delictual liability, also for claims based on strict liability (or on contract law).[39] Furthermore, in 2017, the legislator introduced (as one of the last legal systems in Europe) a German version of 'bereavement damages', ie a claim by secondary victims for reasonable monetary compensation (*Hinterbliebenengeld*) of the emotional distress suffered in the case of fatal injury inflicted upon a person with whom the victim had been in a particularly close personal relationship.[40] The new provision does not require

[35] *N Jansen*, Zeit, Sprache und dogmatische Jurisprudenz, JuristenZeitung (JZ) 2023, 573, 579 f.

[36] Eg, no claim exists for psychological harm caused by witnessing one's dog being fatally run over by a tractor, BGH 20 March 2012 – VI ZR 114/11, NJW 2012, 1730.

[37] A first extension in this regard had been brought about by a decision which applied the case law on nervous shock to psychological harm caused to the wife of a victim of medical malpractice, see BGH 21 May 2019 – VI ZR 299/17, NJW 2019, 2387 = ETL 2019 (2020) 205, no 57 (*W Wurmnest/M Gömann*).

[38] For further details, see *G Wagner* in: Münchener Kommentar zum BGB (9th edn 2024) § 823 no 250 ff.

[39] § 253 (2) BGB; see ETL 2002 (2003) 206, no 1 ff (*J Fedtke*); ETL 2001 (2002) 229, no 1 ff (*J Fedtke*).

[40] § 844 (3) BGB; see ETL 2017 (2018) 207, no 1 ff (*W Wurmnest/M Gömann*); ETL 2016 (2017) 214, no 1 f (*J Fedtke*). Parallel provisions were introduced in various statutes on strict liability, eg § 10 (3) StVG.

the distress to be medically recognisable and thereby offers compensation below the requirements imposed in nervous shock cases.[41]

[41] See BGH 6 December 2022 – VI ZR 73/21, NJW 2023, 1438 = ETL 2022 (2023) 233, no 40 ff (*J Kleinschmidt*), where it was convincingly argued that, because of this gradation, the amount awarded to a claimant under § 844 (3) BGB must, as a rule, fall short of the amount recoverable had they suffered a medically recognisable condition. On the amounts awarded, see also ETL 2024 (2025) 241, no 90 ff (*J Kleinschmidt/L Glöckner*).