Wolfgang Wurmnest and Merlin Gömann*

XI. Germany

A. Legislation

1. Act on the Protection of Trade Secrets[1]

As already briefly mentioned in last year's report,[2] the new law for the protection of trade secrets came into force in April 2019. Transposing Directive (EU) 2016/943 on the protection of trade secrets[3] into national law, the *Gesetz zum Schutz von Geschäftsgeheimnissen* (GeschGehG) contains both substantive and procedural rules on the protection of trade secrets. Former solutions in the field of private law, which were mainly based on general tort law (§§ 823, 826, 1004 German Civil Code, *Bürgerliches Gesetzbuch*, BGB) and criminal law (§§ 17 ff Act Against Unfair Competition, *Gesetz gegen den unlauteren Wettbewerb*, UWG),[4] have been replaced by a stand-alone statute largely aligning the protection of business secrets with the protection of (other) intellectual property rights.[5] Although trade secrets do not enjoy the status of an exclusive right (cf 1

* The authors wish to thank *Andrew Wright*, LLM (Bruges) for the linguistic review of the first draft of this chapter.

1 Gesetz zum Schutz von Geschäftsgeheimnissen (GeschGehG), 18 April 2019, Federal Law Gazette (Bundesgesetzblatt, BGBl) I, 466, accessible in German only at <https://www.gesetze-im-internet.de/geschgehg/BJNR046610019.html>.

2 *J Kleinschmidt*, Germany, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 221, no 12.

3 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] Official Journal (OJ) L 157/1.

4 Cf Federal Court of Justice (Bundesgerichtshof, BGH) 22 March 2018 – I ZR 118/16, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2018, 1161; BGH 27 April 2006 – I ZR 126/03, Neue Juristische Wochenschrift (NJW) 2006, 3424; BGH 18 February 1977 – I ZR 112/75, GRUR 1977, 539, 541 f. The former legal status is described briefly by *S Rosenthal*/*G Hamann*, Das neue Geschäftsgeheimnisgesetz – Ein Überblick, Neue Justiz (NJ) 2019, 321 f. For the interpretation of these rules in conformity with Directive (EU) 2016/943 after the lapse of the transposition period on 9 June 2019 see *D Scherp*/*D Rauhe*, Datenklau!? – Entwurf eines Gesetzes zum Schutz von Geschäftsgeheimnissen – Teil 1, Compliance Berater (CB) 2019, 20.

5 *A Ohly*, Das neue Geschäftsgeheimnisgesetz im Überblick, GRUR 2019, 441, 445, 450; *R Werner*, Das neue Gesetz zum Schutz von Geschäftsgeheimnissen, Steuer- und Wirtschaftsrecht (NWB) 2019, 1458.

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Recital 16 Directive (EU) 2016/943), their standard of protection has been adapted to meet the protection granted to such rights in the areas of trademark, patent and copyright law.[6] Perceived as enhancing legal certainty and clarity, the codification of specific rules on trade secret protection has predominantly been welcomed as a significant improvement in an increasingly important field.[7]

2 As far as substantive private law is concerned, the second section of the GeschGehG provides the owner of a trade secret with extensive judicial protection ranging from injunctions and removal (§ 6 GeschGehG) to recall, delivery and even destruction of infringing products (§ 7 GeschGehG). To facilitate enforcement of these claims, the law provides the owner with comprehensive rights to information about the circumstances and extent of the breach of confidentiality (§ 8 GeschGehG). For a claim to be made out, there must be an infringement as defined by § 4 GeschGehG, namely an unauthorised appropriation, use or disclosure of the trade secret.[8] If the infringer obtained the business secret from a third party and knew or should have known that this party had infringed the law to obtain it, possible infringements explicitly extend to the manufacturing, offering, placing on the market, import, export and storing of products based on the primary infringement ('strict producer's liability').

3 In case the infringement was committed intentionally or negligently, the owner of the business secret is entitled to claim damages for pecuniary (§ 10(1) GeschGehG) and non-pecuniary loss (§ 10(3) GeschGehG). In accordance with previous case law,[9] the calculation of the pecuniary loss may still take into account profits made by the infringer and the hypothetical remuneration for licensing the use of the trade secret (§ 10(2) GeschGehG).[10]

4 To counterbalance the strength of judicial protection afforded to owners of trade secrets, the legislature has however curtailed it in a threefold way. First, the material scope of the GeschGehG is limited, especially in comparison to the

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6 *S Apel*/*S Walling*, Das neue Geschäftsgeheimnisgesetz: Überblick und erste Praxishinweise, Der Betrieb (DB) 2019, 891; *Ohly*, GRUR 2019, 441, 449; *Werner*, NWB 2019, 1458 f.

7 *Apel*/*Walling*, DB 2019, 891; *D Müllmann*, Mehr als nur Whistleblowing: Gesetz zum Schutz von Geschäftsgeheimnissen, Zeitschrift für Rechtspolitik (ZRP) 2019, 25, 26; *Ohly*, GRUR 2019, 441; *Rosenthal*/*Hamann*, NJ 2019, 321, 323 ff; more critical with regard to procedural law *RM Schregle*, Neue Maßnahmen zum Geheimnisschutz in Geschäftsgeheimnisstreitsachen – Wegbereiter für den effektiven Rechtsschutz? GRUR 2019, 912, 917.

8 So-called 'cascade structure', for more details see *Ohly*, GRUR 2019, 441, 445 ff with further refs.

9 Cf BGH 18 February 1977 – I ZR 112/75, GRUR 1977, 539, 541 f.

10 So-called 'treble calculation of damages', see *Ohly*, GRUR 2019, 441, 449; *Rosenthal*/*Hamann*, NJ 2019, 321, 325.

former protection of business secrets under German law.[11] According to § 2 no 1 GeschGehG, only information which is not generally known or readily accessible to persons usually handling this type of information and which therefore has commercial value may qualify as a protected trade secret.[12] Further, the German implementation goes beyond Directive (EU) 2016/943 in requiring that trade secrets may still only protect legitimate interests in confidentiality.[13] Most importantly, the secrets must now be subject to appropriate confidentiality measures by their rightful owner, ie physical access restrictions and precautions as well as contractual security mechanisms.[14] The appropriateness of such measures will most likely depend on balancing several factors, including the nature of the information, its commercial value and the size and position of the owner's undertaking, and fall to be determined on a case-by-case basis.[15]

Second, § 3 GeschGehG explicitly provides for ways in which trade secrets may be obtained without infringing the owner's rights. Since business secrets do not grant exclusive intellectual property rights, autonomous discovery or creation of the secret remain legal (§ 3(1) no 1 GeschGehG). Similarly, trade secrets may still be obtained in all circumstances specifically permitted for by law and contract, for example through the exercise of information, consultation or participation rights of employees and their representatives (§ 3(1) no 3 GeschGehG). While these principles already existed before the enactment of the *Geschäftsgeheimnisgesetz*, permitting 'reverse engineering', ie the in-depth analysis of products freely available on the market (§ 3(1) no 2 GeschGehG), brings forth a notable change in comparison to former German law.[16] In a similar vein, § 5 GeschGehG excludes obtaining, use or disclosure from the infringements in § 4 GeschGehG where it serves an overriding legitimate interest, namely the ex- 5

11 *S Maaßen*, „Angemessene Geheimhaltungsmaßnahmen" für Geschäftsgeheimnisse, GRUR 2019, 352; *Ohly*, GRUR 2019, 441, 442; *Rosenthal/Hamann*, NJ 2019, 321, 322, 325.

12 Under the previous law, commercial value was not required, cf BGH 27 April 2006 – I ZR 126/03, NJW 2006, 3424; *Maaßen*, GRUR 2019, 358 f; *Ohly*, GRUR 2019, 441, 443; *Rosenthal/Hamann*, NJ 2019, 321, 322 with further refs.

13 However, it seems questionable whether this added condition is in conformity with EU law, see *Ohly*, GRUR 2019, 441, 444 f. Cf BGH 22 March 2018 – I ZR 118/16, GRUR 2018, 1161 no 28; BGH, 27 April 2006 – I ZR 126/03, Neue Zeitschrift für Strafrecht (NStZ) 2007, 568; *Müllmann*, ZRP 2019, 25, 26.

14 Document of the Federal Parliament (Bundestagsdrucksache, BT-Drucks) 19/4724, 24. For a comprehensive discussion of this requirement see *Maaßen*, GRUR 2019, 352, 353 ff; *Ohly*, GRUR 2019, 441, 443 f.

15 BT-Drucks 19/4724, 24 f; *Maaßen*, GRUR 2019, 354; *Rosenthal/Hamann*, NJ 2019, 321, 323; *Werner*, NWB 2019, 1458, 1460.

16 For more details see *Ohly*, GRUR 2019, 441, 447 f; *Rosenthal/Hamann*, NJ 2019, 321, 325.

ercise of the right to freedom of expression and information, whistleblowing or the exercise of employees' participatory rights.[17] Thirdly and finally, § 9 GeschGehG subjects judicial protection based on §§ 6–8 GeschGehG (with the notable exception of damages under § 10 GeschGehG) to a proportionality test which inter alia takes into account the legitimate interests of the infringer.[18]

6 Notwithstanding these limits, the adoption of the GeschGehG on balance leads to a significant strengthening of substantive trade secret protection in German law.[19] These improvements would, however, only be worth half as much if they were not accompanied by corresponding procedural safeguards.[20] As long as claimants had to name the infringed secret as precisely as possible to comply with general procedural rules, they often faced the unenviable choice of losing either the lawsuit or the trade secret.[21] To mitigate this problem, § 19 GeschGehG provides for confidentially rings potentially restricting those in attendance at trial to one natural person per party as well as their respective counsel and allowing for an exclusion of the public.[22] Also, the competent court[23] may upon request of either party classify information as confidential (§§ 16(1), 20(3) GeschGehG) and oblige all parties to maintain confidentiality (§ 16(2) GeschGehG) even after conclusion of the trial (§ 18 GeschGehG).[24] Although these procedural safeguards do take steps in the right direction, they are incapable of solving the fundamental problem at the core of trade secret litigation, ie the fact that the owner may still be obliged to disclose the contested trade secret to the opposing party.[25]

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17 For more details including on the legislative process leading to these exceptions see *Müllmann*, ZRP 2019, 25 f; *Ohly*, GRUR 2019, 441, 448; *Rosenthal/Hamann*, NJ 2019, 321, 325.

18 *Ohly*, GRUR 2019, 441, 449; *Rosenthal/Hamann*, NJ 2019, 321, 325.

19 *Müllmann*, ZRP 2019, 25, 26; *Ohly*, GRUR 2019, 441; *Rosenthal/Hamann*, NJ 2019, 321, 323 ff.

20 For a more detailed overview see *B Kalbfus*, Rechtsdurchsetzung bei Geheimnisverletzungen – Welchen prozessualen Schutz gewährt das Geschäftsgeheimnisgesetz dem Kläger? Wettbewerb in Recht und Praxis (WRP) 2019, 692; *Ohly*, GRUR 2019, 441, 449 f; *RM Schregle*, GRUR 2019, 912.

21 *Ohly*, GRUR 2019, 441, 449 with further refs; *J Semrau-Brandt*, Patentstreit zwischen Qualcomm und Apple: Schwächen des Geschäftsgeheimnisschutzes im Zivilprozess, Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht (GRUR-Prax) 2019, 127.

22 So that no so-called '*in camera* proceedings' are created either, see *Ohly*, GRUR 2019, 441, 450; *Schregle*, GRUR 2019, 912, 914 f.

23 Under § 15(3) GeschGehG, the Federal States may concentrate trade secret litigation at one of several Regional Courts (Landgericht, LG).

24 For more details see *Ohly*, GRUR 2019, 441, 450; *Schregle*, GRUR 2019, 912, 913 ff.

25 *Ohly*, GRUR 2019, 441, 451; *Schregle*, GRUR 2019, 912, 917.

2. Draft 10th Amendment to the Act against Restraints of Competition, Focusing on Competition in Digital Markets[26]

Officially published at the time of writing, the preliminary Draft (*Referentenentwurf*) for the 10th Amendment to the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) focusing on competition in Digital Markets had already become public in October 2019. Triggered by the need to implement the EU Directive on the strengthening of the European Competition Network (so-called 'ECN+-Directive'),[27] the Draft mainly addresses specific aspects of competition law and only partially touches upon substantive tort law. Besides enhancing the European competition authorities' capabilities to cooperate and effectively enforce European competition law within the internal market (§§ 50a ff GWB), it addresses several challenges the regulators have recently faced on digital markets. Through its proposal, the government mainly aims to modernise some of competition law's key elements for the digital sphere, such as the rules on abuse of market power (§§ 18 ff GWB) and merger control (§§ 35 ff GWB). **7**

However, the Draft also aims at improving the private enforcement of competition law, largely shaped by the implementation of the Cartel Damages Directive[28] into German law through the 9th Amendment to the Competition Act.[29] Although only applicable to damages sustained after 26 December 2016, the first proceedings have already revealed that some provisions need adjusting to effectively support the private enforcement of legitimate damages claims. By consequence, the current preliminary Draft adds a new paragraph to § 33a GWB, according to which it will be rebuttably presumed that transactions with cartel participants on goods or services within the cartel's scope were affected by the **8**

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26 Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), 24 January 2020, accessible at <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?_blob=publicationFile&v=10>.

27 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] Official Journal (OJ) L 11/3.

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

29 For more details see *W Wurmnest/M Gömann*, Germany, in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 207, no 11 f.

cartel, ie were subject to a so-called 'overcharge'. This presumption shall also apply to transactions made by indirect purchasers further downstream (§ 33c(3) of the preliminary Draft) to include the so-called 'passing-on' effect. Moreover, the rules on victims' rights to information will be strengthened. In this regard, the Draft eliminates the condition of urgency adopted by German courts[30] (§ 89b(5) of the preliminary Draft) and explicitly provides the courts with the possibility to appoint an expert to decide on the appropriate extent of trade secret protection in each individual case (§ 89b(7) of the preliminary Draft).

3. State of Play of the Newly Adopted Collective Redress Mechanism (*Musterfeststellungsklage*)

9 As was comprehensively reported in last year's report,[31] the adoption of a new collective redress mechanism (*Musterfeststellungsklage*)[32] in 2018 has brought forth fundamental changes to German mass tort litigation. Conceived as a tool to allow consumers to pursue claims without the financial risks inherent to ordinary court procedures,[33] the *Musterfeststellungsklage* has been welcomed by some authors in principle but its specific design has mostly been criticised.[34] Most importantly, as collective action is only available in respect of a certain range of factual and legal issues common to all cases encompassed, each and every of its registered consumers is required to follow up individually on their claim in a second lawsuit once the declaratory judgment on the issues subject to the collective action has been handed down.[35] Although binding for the parties to the extent of these findings, a litigation risk resulting from the peculiarities of each individual case still remains. Thus, providing rational apathy of the claimants does not prevail anyway, courts may still be confronted with a largely

30 Cf OLG Düsseldorf 3 April 2018 and 7 May 2018 – VI-W (Kart) 2/18, Wirtschaft und Wettbewerb (WuW) 2018, 415.

31 *Kleinschmidt* (fn 2) no 1 ff.

32 Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage, 12 July 2018, BGBl I, 1151.

33 BT-Drucks 19/2507, 15.

34 See *M Heese*, Die Musterfeststellungsklage und der Dieselskandal, JuristenZeitung (JZ) 2019, 429, 434 ff; *Kleinschmidt* (fn 2) no 5 with further refs; *A Stadler*, Kollektiver Rechtsschutz quo vadis? JZ 2018, 793.

35 See *Kleinschmidt* (fn 2) no 4 with further refs; *A Stadler*, Musterfeststellungsklagen im deutschen Verbraucherrecht? Verbraucher und Recht (VuR) 2018, 83, 86 f.

unchanged number of similar proceedings.[36] Moreover, critics have pointed out that the collective redress mechanism is limited to consumers, does not foresee any liability of qualified bodies representing consumers and binds the latter to an unfavourable judgment even if they did not actively partake in the proceedings.[37]

10 At the end of 2018, the legislature hurriedly enacted the *Musterfeststellungsklage* to support consumers affected by the so-called 'dieselgate'[38] in due time.[39] Indeed, soon after the law came into force in November 2018, a model action was lodged at the Higher Regional Court (*Oberlandesgericht*, OLG) of *Braunschweig* against *Volkswagen AG* (VW AG).[40] Acting on behalf of thousands of consumers, the *Bundesverband der Vebraucherzentralen* (vzbv) mainly seeks to establish the German carmaker's tort liability for the mass-scale manipulation of certain exhaust systems.[41] By 31 December 2018, more than 300,000 consumers had already joined the lawsuit, thereby suspending the limitation period of their claims otherwise potentially expiring on this date.[42] Another 140,000 individuals followed their example before the registration period lapsed on 30 September 2019,[43] the day of the opening of the oral proceedings before the OLG *Braun-*

36 *J Basedow*, Trippelschritte zum kollektiven Rechtsschutz, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2018, 609 ff; *Kleinschmidt* (fn 2) no 5.

37 *Heese*, JZ 2019, 429, 434 ff; *Kleinschmidt* (fn 2) no 5 with fn 12; *Stadler*, JZ 2018, 793.

38 Cf, amongst others, *Heese*, JZ 2019, 429, 434 ff; *Stadler*, JZ 2018, 793 ('lex Volkswagen'); *A Staudinger/R Ruks*, Hinweise aus Karlsruhe zu § 439 BGB im „Dieselskandal", NJW 2019, 1179, 1181.

39 For details on the prescription of claims related to 'dieselgate' see below no 18 ff.

40 Where it is still pending at the time of writing, see OLG Braunschweig 23 November 2018 – 4 MK 1/18, beck-online.Rechtsprechung (BeckRS) 2018, 30499; as well as the information published at <https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Klagen/201802/KlagRE_2_2018_node.html>.

41 See, amongst others, *M Heese*, Herstellerhaftung für manipulierte Diesel-Kraftfahrzeuge, NJW 2019, 257, 259 ff; *Kleinschmidt* (fn 2) no 6; *Wurmnest/Gömann* (fn 29) no 13 ff.

42 *C Germis*, Mehr als 300.000 Dieselfahrer wollen Schadenersatz von VW, Frankfurter Allgemeine Zeitung (FAZ), 2 January 2019, <https://www.faz.net/aktuell/wirtschaft/auto-verkehr/vw-musterfeststellungsklage-dieselfahrer-wollen-schadenersatz-15969350.html>. However, not all the registered individuals necessarily own a vehicle affected by the scandal, as this condition is to be examined in the course of the follow-up action only, cf Focus Online, Interview mit dem MyRight-Gründer, 6 September 2019, <https://www.focus.de/auto/news/abgas-skandal/interview-mit-dem-myright-chef-das-ist-wie-bei-bares-fuer-rares-warum-vw-bei-diesel-klagen-ein-milliarden-risiko-eingeht_id_11114439.html>.

43 *Editorial beck-aktuell*, 30 September 2019, becklink 201427. In addition to the hurdles in substantive and procedural law, these claims might however be time-barred, see below no 18 ff.

schweig (cf § 608(3) of the German Code of Civil Procedure, *Zivilprozessordnung*, ZPO). On this occasion, the presiding judge of the deciding chamber underscored that the ample case law on similar individual actions would not affect the Court, which would instead pay special attention to the assessment of the damage incurred by the consumers since, in the vast majority of cases, the vehicles were in continuous use.[44] Further, he pointed out that these benefits ought to be offset even if the manipulations ultimately amounted to actual damage.[45] Yet, the Court also expressed serious doubts as to the argument that the mere possibility of seizure and immobilisation of the vehicles amounts to endangerment of their owners' assets to a degree equalling actual damage.[46] Less scepticism has been voiced with regard to wilful immoral misconduct (§ 826 BGB) as the potential head of claim.[47] However, as this head presupposes the existence of concrete damage, its affirmation might not be of great help to claimants.

11 Promising little for the claimants, these preliminary remarks as well as an earlier dismissing judgment of the same Court[48] fuelled an already existing trend towards claimants withdrawing from the *Musterfeststellungsklage* to pursue their claims individually.[49] For the reasons pointed out above, practitioners have been quick to advise against the two-step procedure of the collective redress mechanism and instead recommend individual actions. At the time of writing, at least 77,000 claimants have followed this advice.[50] In the light of these developments, the OLG chamber called upon the parties to elucidate the potential for a settlement of the case by 31 December 2019.[51] On 2 January 2020, ie two days after claims which had come to be known in 2016 but were not registered for the collective action before the end of 2019 had potentially become time-barred,[52] confidential settlement negotiations between the VW AG and the vzbv

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44 For more details on this issue see below no 14.

45 *Editorial beck-aktuell* (fn 43) 30 September 2019; *Editorial beck-aktuell*, 19 November 2019, becklink 2014751.

46 *Editorial beck-aktuell* (fn 43) 30 September 2019.

47 *Editorial beck-aktuell* (fn 45) 19 November 2019.

48 OLG Braunschweig 19 February 2019 – 7 U 134/17, Deutsches Autorecht (DAR) 2019, 261, accessible at <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=KORE207482019&st=null&showdoccase=1>; very critical *M Heese*, Was der Dieselskandal über die Rechtsdurchsetzung, deren Protagonisten und die Funktion des Privatrechts verrät, Neue Zeitschrift für Verkehrsrecht (NZV) 2019, 273, 274.

49 Cf *Editorial beck-aktuell* (fn 45) 19 November 2019.

50 Cf ibid.

51 Ibid.

52 For more details see below no 18 ff.

were officially announced in a joint press statement.[53] Previously, the defendant had not seen itself in a position to settle, since the precise number of registered consumers had remained unclear due to the fact that some of the withdrawal declarations may affect several consumers.[54] However, presumably upon receipt of the exact figures from the competent Federal Office of Justice (*Bundesamt für Justiz*, BfJ), the way for the opening of settlement negotiations was cleared.

12 In principle, these recent developments are to be welcomed, since a settlement certainly constitutes the fastest way to achieve legal certainty (at least) for the remaining approximately 400,000 consumers, possibly even extending beyond the factual, legal and personal limits of the *Musterfeststellungsklage*.[55] Yet, as stressed by the parties themselves, it is at this early stage completely unclear whether a settlement will actually be reached.[56] Beyond the general agreement on the substance, a settlement of a *Musterfeststellungsklage* requires the approval of at least 70% of the registered consumers to be legally valid (§ 611(4), (5) ZPO). If more than 30% of these individuals opt-out within a month, the collective action is to be pursued in its entirety by the claimant.[57] Further, it remains to be seen and is currently a subject of debate whether the claimant will also have to pursue the collective action for a lower proportion (eg 25%) of consumers opting out of the settlement.[58] In any case, if the *Musterfeststellungsklage* against VW AG is not entirely brought to an end by settlement, a declaratory judgment is not to be expected before mid-2020, with exactly when depending on whether the OLG *Braunschweig* decides to await a lead decision of the BGH on comparable damages claims pursued through an individual action.[59] As the BGH is the competent instance for revising a potential judgment of the OLG (§ 614 ZPO), it goes without saying that such a lead decision would

53 *Verbraucherzentrale Bundesverband (Vzbv)* 2 January 2020, Musterfeststellungsklage: Vergleichsverhandlungen zwischen vzbv und VW, accessible at <https://www.vzbv.de/pressemitteilung/musterfeststellungsklage-vergleichsverhandlungen-zwischen-vzbv-und-vw>.

54 *Editorial beck-aktuell* (fn 45) 19 November 2019.

55 Cf BT-Drs. 19/2439, 28.

56 Cf *Vzbv* (fn 53) 2 January 2020.

57 *M Schmidt-Kessel*, Opinion for the Parliamentary Committee on Legal Affairs (Stellungnahme zum Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage zur Anhörung im Rechtsausschuß) of 8 June 2018, 19, accessible at <http://www.schmidt-kessel.uni-bayreuth.de/pool/dokumente/news-termine-pdfs/Stellungnahme-Musterfeststellungsklage.pdf>.

58 Affirmed by *Schmidt-Kessel* (fn 57) 8 June 2018, 19; negated by *A Stadler* in: HJ Musielak/W Voit (eds), Zivilprozessordnung mit Gerichtsverfassungsgesetz (16th edn 2019) § 611 ZPO no 17.

59 For more details see below no 14.

also have major impact on both conclusion and content of a potential settlement.

13 In addition to the *Musterfeststellungsklage* against VW AG, the new collective redress mechanism has to date been deployed in five different instances.[60] Only the lawsuit against the *Mercedes Benz Bank AG* concerning the revocation of consumer contracts financing the purchase of Mercedes vehicles[61] and the action against a housing association on the lawfulness of a collective rent increase[62] have so far resulted in a decision by a court of first instance. However, both cases have been appealed and will be dealt with by the BGH in the course of 2020. It is thus too early for a preliminary assessment of how well the new collective redress mechanism is achieving its objectives in practice. That said, the criticism briefly mentioned above[63] suggests that, although well-intentioned, the tool might not be able to reach its ambitious aims without further legislative adjustments.[64] Still, one could argue that the *Musterfeststellungsklage* has its merits in bundling consumer claims which might otherwise not be raised due to rational apathy, thereby augmenting the (public) pressure on (corporate) defendants to settle. However, such indirect effects should at the very least not be hampered by a lack of administrative coordination within the competent public authorities. In this vein, the fact that more than 77,000 claimants have to date already lost their trust in the collective action against VW AG, perceived as the litmus test for the functioning of the new mechanism, can certainly be understood as raising a significant early alarm.

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60 All pending collective redress actions can be retrieved at <https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Bekanntmachungen/Klagen_node.html;jsessionid=F4533F208CE8C2C6D14E782B6E0AF27A.1_cid361>.

61 Deemed inadmissible on grounds of the suing association's structure by OLG Stuttgart 20 November 2018 – 6 MK 1/18, Zeitschrift für Bank- und Kapitalmarktrecht (BKR) 2019, 298.

62 Partially successful, see OLG München 15 October 2019 – MK 1/19, Neue Zeitschrift für Miet- und Wohnungsrecht (NZM) 2019, 933.

63 See no 9.

64 In this vein, but much more critical, *Heese*, JZ 2019, 429, 434 ff; *Stadler*, JZ 2018, 793, 794 ff; *Stadler*, VuR 2018, 83, 86 f, all with further refs.

B. Cases

1. State of Play in Diesel Litigation

a) Decisions on Lawsuits brought before 2019

With regard to the substantive assessment of tort claims pursued through individual actions brought before the end of 2018, there are no definitive developments since last year to report.[65] Due to Volkswagen's double strategy of buying time[66] and settling with claimants threatening to take their case through all instances,[67] no legally binding decision has been handed down by the *Bundesgerichtshof* to date. All that can be gleaned from an exceptionally published preliminary order ('*Hinweisbeschluss*') is a firm tendency of the BGH to, in substance, accept contractual liability of retailers,[68] whereas tort liability of producers is not directly touched upon. Nonetheless, some commentators argue that the chances of successful tort litigation have increased indirectly, since the presence of a (contractual) defect may very well lead to the assumption of damage,[69] be it on grounds of reduced value[70] or frustrated legitimate expectations of the end-customer.[71] By contrast, it has been argued in recent legal opinions that even if there had been damage initially, it would have been remedied by the software updates installed by Volkswagen on the affected vehicles in the meantime.[72] Overall, although proving damage is necessary, it is only one **14**

65 *Kleinschmidt* (fn 2) no 7 ff.

66 For more details see *J Bruns*, Aktuelles zur Haftung wegen vorsätzlicher sittenwidriger Schädigung im Diesel-Skandal, NJW 2019, 2211, 2212; *Heese*, NZV 2019, 273, 275; as well as below no 19.

67 *M Heese*, NZV 2019, 273, 274 f; *A Sievers*, Rechtsprechungsübersicht zur VW-Abgasthematik (EA189) – Teil IV, DAR 2019, 489, 491f; *Kleinschmidt* (fn 2) no 9; *Editorial beck-aktuell*, 12 December 2018, becklink 2011716.

68 BGH 8 January 2019 – VIII ZR 225/17, NJW 2019, 1133; for more details see *Kleinschmidt* (fn 2) no 9 with further refs.

69 *Staudinger/Ruks*, NJW 2019, 1179, 1181; rejected by *Lempp*, Anmerkung zu OLG Köln, Beschluss vom 3.1.2019 – 18 U 70/18; NZV 2019, 253; *Sievers*, DAR 2019, 489, 490 f.

70 OLG Köln 3 January 2019 – 18 U 70/18, BeckRS 2019, 498 no 34. However, no damage may be assumed if the car has been resold without the reduced value manifesting itself in the price, cf OLG Celle 4 December 2019 – 7 U 434/18, BeckRS 31440.

71 OLG Karlsruhe 5 March 2019 – 13 U 142/18, BeckRS 2019, 3395 no 18.

72 *T Pfeiffer*, Dieselschaden durch Zweckverfehlung, NJW 2019, 3337, 3343; *F Weiler*, Der Vertrag als Schaden in VW-Abgasverfahren gegen den Hersteller, NZV 2019, 545, 557 f.

among several required but disputed conditions.[73] Hence, only a legally binding final judgment of the BGH on tort claims will bring legal clarity. At the time of writing, such a judgment is expected for mid-2020.[74]

15 Yet, one level below the Supreme Court, a clear tendency can be discerned in the case law of the vast majority of the *Oberlandesgerichte* to find in favour of VW customers' tort claims against the carmaker, albeit predominantly after deduction of their benefits of use.[75] Highly contested by the literature[76] and some courts of lower instance[77] as it would further incentivise the delaying of proceedings, the recognition of substantial benefits of use might very well trigger a

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73 For more details see *Heese*, NJW 2019, 257, 259 ff; *Kleinschmidt* (fn 2) no 10 with further refs; *Sievers*, DAR 2019, 489, 491 f; *M-P Weller*/*J Smela*/*V Habrich*, Abgasskandal – Ansprüche der Autokäufer auf dem Prüfstand, JZ 2019, 1015.

74 Since a professional litigation vehicle (see below no 14) is the claimant of the action dismissed by the OLG Braunschweig (see below fn 80), a settlement seems highly unlikely in this case; cf *Heese*, NZV 2019, 273; *Heese*, JZ 2019, 429, 438; *Sievers*, DAR 2019, 489, 492; FAZ, Diesel-Klage gegen VW geht an den BGH, 19 Feburary 2019, <https://www.faz.net/aktuell/wirtschaft/myright-zieht-nach-urteil-im-dieselskandal-vor-bgh-16048969.html>; Focus Online (fn 42), 6 September 2019. An oral hearing is scheduled for 5 May 2020, see *P Lorenz*, LG Braunschweig billigt Myright-Geschäftsmodell, Legal Tribune Online (LTO), 8 January 2020, < https://www.lto.de/recht/zukunft-digitales/l/lg-braunschweig-3-o-5657-18-vw-abgasskandal-klage-myright-modell-abtretung-zulaessig/>.

75 Most recently and amongst others OLG Koblenz 4 December 2019 – 10 U 738/19; BeckRS 2019, 31781; OLG Stuttgart 28 November 2019 – 14 U 89/19, BeckRS 2019, 30073; OLG Schleswig 22 November 2019 – 17 U 44/19, BeckRS 2019, 29874; OLG Celle 20 November 2019 – 7 U 244/18, BeckRS 2019, 29589; OLG Karlsruhe 19 November 2019 – 17 U 146/19; BeckRS 2019, 28963; KG (Kammergericht, Higher Regional Court of) Berlin 18 November 2019 – 24 U 129/18, BeckRS 2019, 29883; OLG Oldenburg 30 October 2019 – 14 U 93/19, BeckRS 2019, 28349; OLG Naumburg 27 September 2019 – 7 U 24/19, BeckRS 2019, 24547; OLG Frankfurt am Main (aM) 25 September 2019 – 17 U 45/19, BeckRS 2019, 22222; see as well above fn 70 and the extensive refs at *Heese*, NZV 2019, 273 ff.

76 *J Bruns*, Vorteilsanrechnung beim Schadensersatz für abgasmanipulierte Diesel-Fahrzeuge, NJW 2019, 801; *JD Harke*, Herstellerhaftung im Abgasskandal, VuR 2017, 83, 90 f; *M Heese*, Nutzungsentschädigung zugunsten der Hersteller manipulierter Diesel-Kraftfahrzeuge? VuR 2019, 123, 124 ff; NZV 2019, 273, 274; NJW 2019, 257, 261; *S Otte-Gräbener*, Vorsätzliche sittenwidrige Schädigung gem. § 826 BGB durch unzulässige Abschalteinrichtung („Abgasskandal"), Gesellschafts- und Wirtschaftsrecht (GWR) 2019, 149; *B Ulrici*, Dieselskandal: Anrechnung gezogener Nutzungen auf deliktischen Schadensersatz, JZ 2019, 1131 with further refs.

77 See the refs at *Heese*, NZV 2019, 273, 274. At the time of writing, even the OLG Hamburg in an unpublished *Hinweisbeschluss* (15 U 190/19) seems however to have subscribed to this view at least with regard to the time of pendency; cf *M Jung*/*C Germis*, „Die Zeit läuft ab sofort gegen Volkswagen"; FAZ, 29 January 2020, <https://www.faz.net/aktuell/wirtschaft/unternehmen/abgas-skandal-nutzungsersatz-fuer-volkswagen-ist-unangemessen-16605117.html>.

referral to the Court of Justice of the European Union (CJEU).[78] In turn, the *Oberlandesgericht* as well as the Regional Court (*Landgericht*, LG) Braunschweig, before which a particularly large number of (individual) lawsuits have been brought,[79] still tend to be hesitant to grant (tort) damages.[80]

Not only will this scepticism at least temporarily impact the *Musterfeststellungsklage*,[81] but also influence the outcome of the 'improvised class action' introduced into German procedural law through the back door in 2017.[82] Using a procedural design based on the assignment of the customers' claims to a legal vehicle in exchange for a considerable share of the potential profits of the future action,[83] the first 'improvised class action' still pending at the LG *Braunschweig* at the time of writing has, according to the claimants, attracted more than 45,000 potentially affected VW customers.[84] Immediately attacked by VW,[85] the acceptability of this procedural innovation recently gained momentum when the BGH in a comparable constellation approved a similar assignment model.[86] 16

78 Such a referral is at least explicitly envisaged by the claimant of the proceedings pending before the BGH (fn 74); Focus Online (fn 42), 6 September 2019.

79 Cf *Sievers*, DAR 2019, 489, 491f, mentioning approximately 1,450 diesel lawsuits pending at the level of the OLG and another several hundred at the level of the LG.

80 OLG Braunschweig 19 February 2019 – 7 U 134/17, DAR 2019, 261; confirming LG Braunschweig 31 August 2017 – 3 O 21/17, BeckRS 2017, 122797; LG Braunschweig 31 August 2018 – 3 O 21/17, BeckRS 2017, 122797; see also above no 11; *C Armbrüster*, Herstellerhaftung für abgasmanipulierte Fahrzeuge – Zugleich Besprechung OLG Braunschweig v. 19.2.2019 – 7 U 134/17, Zeitschrift für Wirtschaftsrecht (ZIP) 2019, 837; *T Riehm*, Deliktischer Schadensersatz in den „Diesel-Abgas-Fällen", NJW 2019, 1105, 1111 (both authors apparently acted as legal experts for Volkswagen). Very critical towards this approach *Heese*, NZV 2019, 273, 274 f with further refs.

81 See above no 10 ff.

82 For more details see *Heese*, JZ 2019, 429, 437; *Heese*, NZV 2019, 273, 275 with further refs.

83 On an individual basis, this model has already been successfully employed for diesel tort litigation in LG Krefeld 13 February 2019 – 2 O 313/17, Wertpapier-Mitteilungen (WM) 2019, 476.

84 *Stiftung Warentest*, US-Kanzlei hat Sammelklage erhoben, 30 August 2019, <https://www.test.de/Abgasmanipulation-bei-VW-US-Kanzlei-startet-deutsche-Sammelklage-4982816-0/>; *Heese*, JZ 2019, 429, 437. A second identical lawsuit which is said to be prepared by the claimant will however face the additional prescription problems described below at no 18 ff.

85 On the basis of *M Henssler*, Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts? NJW 2019, 545; rightfully contested by *V Römermann*/*T Günther*, Legal Tech als berufsrechtliche Herausforderung – Zulässige Rechtsdurchsetzung mit Prozessfinanzierung und Erfolgshonorar, NJW 2019, 551.

86 Cf BGH 27 November 2019 – VIII ZR 285/18, BeckRS 2019, 30591, accessible at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=101936&pos=0&anz=1>.

Although this approval did not cover the bundling of *several* claims in the hands of a litigation vehicle,[87] the LG *Braunschweig* felt compelled to indicate in a recent *Hinweisbeschluss* that it would not at this early stage dismiss the 'improvised class action' on procedural grounds.[88] However, the uncertainties with regard to substantive (tort) law will most likely persist until a final decision on VW's tort liability is handed down by the BGH.[89]

17 All in all, this situation of perpetuated legal uncertainty aggravated by the lack of reliable class action instruments – at least at the time when 'dieselgate' first emerged – has so far led to an immense challenge for the German judiciary and a burden of several billions of euros for legal insurers.[90]

b) Decisions on Lawsuits brought from 2019 on

18 According to Volkswagen, 45,000 further diesel lawsuits were initiated against the carmaker throughout Germany in 2019.[91] In addition to the substantive issues briefly described above,[92] these claims face a substantial hurdle generally less relevant for claims instituted before the end of 2018[93]: the potential lapse of the regular prescription period under §§ 199(1), 195 BGB.[94] Running for a period of three years (§ 195 BGB), the start of the regular prescription period is triggered by the end of the year in which the claim arose and the creditor has become or should without gross negligence have become aware of the circumstances giving rise to the claim, including the person of the tortfeasor, § 199(1) BGB. According to the general case law of the BGH, sufficient knowledge of the circumstances is obtained when, on its basis, the injured party is able to institute a potentially successful action for damages, albeit not without any risk.[95] While

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87 Giving the defendant enough reason to keep questioning the admissibility of the collective action at stake, cf *Lorenz* (fn 74) 8 January 2020; FAZ print, Rückenwind für My Right in den Prozessen gegen Volkswagen – Gericht hält Geschäftsmodell für zulässig, 9 January 2020.

88 LG Braunschweig 23 December 2019 – 3 O 5657/18, not yet published. Cf FAZ print, 9 January 2020.

89 See above fn 74.

90 *Heese*, JZ 2019, 429, 437; *Staudinger/Ruks*, NJW 2019, 1179, 1182.

91 *Editorial beck-aktuell*, 17 December 2019, becklink 2015040.

92 See no 14 ff. For more details see *Kleinschmidt* (fn 2) no 10.

93 As prescription requires an assessment on a case-by-case basis, it can however not be excluded that its conditions are fulfilled for some of the lawsuits initiated before 2019, too.

94 See already *Kleinschmidt* (fn 2) no 1 f.

95 BGH 15 March 2016 – XI ZR 122/14, Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht (NJW-RR) 2016, 1187, 1188 f.

the burden of proof lies with the defendant, it is neither required that the claimant is fully aware of all particular factual circumstances that may be of significance, nor that he correctly legally assesses his claims, not even from a layman's perspective.[96] However, where the assessment of the claim requires complicated economic analysis[97] or where the legal situation is too uncertain and doubtful for the injured to institute cost-incurring proceedings,[98] the start of the prescription period may exceptionally be deferred until the factual and legal situation is clarified.

19 Consequently, the question whether the buyers of a VW vehicle potentially affected by the software manipulation of emission values collectively 'became aware' of their potential claims in autumn 2015 became the crucial point around which all claims instituted in 2019 revolved. At that time, VW had informed its shareholders and the general public about 'irregularities' with regard to the use of a certain software on its diesel engines,[99] triggering extensive coverage from both German and international media. Since then, Volkswagen's main litigation strategy has consisted in time buying,[100] favouring the prescription of potential claims and their offsetting by counterclaims stemming from the continued use of the vehicles. Incidentally, the increased risk of prescription explains why both the legislature and the claiming vzbv hurried to allow for the *Musterfestellungsklage* and its suspending effect to be initiated before the end of 2018.[101]

20 Whilst the BGH has not so far had the opportunity to pronounce itself on the prescription of potential tort claims, the OLG *München* in its most recent *Hinweisbeschluss* held that claims instituted in 2019 would indeed be time-barred, taking the position that the prescription period had been triggered upon general awareness of the diesel scandal.[102] Having been covered by all German media extensively since autumn 2015, it would not appear conceivable to the Court that an owner of a potentially manipulated VW vehicle living in Germany would have remained unaware of his/her potential claims any longer. If that was the case, their ignorance would at least have to be deemed grossly negligent in the

96 BGH 15 March 2016 – XI ZR 122/14, NJW-RR 2016, 1187, 1189 with further refs.

97 BGH 20 September 1994 – VI ZR 336/93, NJW 1994, 3092, 3093 (on investment fraud).

98 BGH 23 September 2008 – XI ZR 262/07, NJW-RR 2009, 547.

99 Accessible at <https://www.volkswagenag.com/de/news/2015/9/Ad_hoc_US.html>.

100 See the refs above in fn 66.

101 See above no 10.

102 OLG München 3 December 2019 – 20 U 5741/19, BeckRS 2019, 31911, accessible at <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-31911?hl=true&AspxAutoDetectCookieSupport=1>; similarly OLG Braunschweig 2 November 2017 – 7 U 69/17, BeckRS 2017, 147936.

sense of § 199(1) BGB. Hence, in the eyes of the OLG, the prescription period had begun to run no later than at the end of 2015, time-barring corresponding claims at the beginning of 2019. In line with the decision of the court of first instance,[103] the OLG thus intended to dismiss the claim at hand, which – just like 45,000 others – had been instituted in 2019 only. At the time of writing, it can however not be predicted with certainty whether a final judgment on this matter must be handed down, since the OLG had recommended to the plaintiff to withdraw the appeal.

21 This preliminary opinion of the OLG *München* stands in sharp contrast to two decisions of the *Landgerichte* of *Osnabrück* and *Trier*. While differing on the factual and legal reasons, both Regional Courts conclude that claims instituted in 2019 are not prescribed by the fact that 'dieselgate' became public in 2015.

22 Essentially, the decision of the LG *Osnabrück* revolves around the argument that even if the 'diesel scandal' had become public knowledge in autumn 2015, the public at this early stage was not fully aware of which of VW's officials or employees decided on the development and use of the manipulation software.[104] Constituting a crucial circumstance in the sense of § 199(1) BGB for the potential liability of the defending VW AG as a whole, the prescription period would not have started to run before more light had been shed on the question of internal responsibility. However, such clarity did in the eyes of the LG *Osnabrück* not set in before the first tort claims were granted, leading to a start of the prescription period not before the end of 2016.

23 In a similar manner, the LG *Trier* held that setting off the prescription period of the diesel claims required a higher level of clarity than reached in 2015,[105] as it assumed complex factual circumstances comparable to the BGH's exceptional case law.[106] According to the Regional Court, such factual clarity would at least have required a personalised information letter to the respective customer, specifying the affected vehicle and the necessary remedies. Going beyond the decision of the LG *Osnabrück*, the LG *Trier* added that the prescription period may also not start to run before a lead decision clarifying on the diesel tort claims is rendered by the BGH. In the eyes of the LG, the legal situation was too

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103 LG Landshut 6 September 2019 – 54 O 691/19, not published.

104 LG Osnabrück 3 September 2019 – 6 O 918/19, becklink 201443, not published in full.

105 LG Trier 19 September 2019 – 5 O 417/18, Betriebs-Berater (BB) 2019, 2707, accessible at <https://betriebs-berater.ruw.de/wirtschaftsrecht/urteile/Verjaehrung-von-Schadensersatzanspruechen-im-Dieselskandal-ungeklaerte-Rechtslage-kann-den-Beginn-der-Verjaehrungsfrist-hinausschieben-39614>.

106 See above fn 97.

problematic and unclear to be properly assessed, so that a clarifying lead decision would exceptionally be required to set off the prescription period in accordance with the BGH's case law.[107] As to date no such decision has been handed down, the prescription period of tort claims based on the manipulation of the exhaust values by VW would, according to the reasoning of the LG *Trier*, still not be running.

Unsurprisingly, both decisions have been appealed by the defendant, with the respective appellate decisions still pending at the time of writing. To the limited extent to which a forecast is possible, it seems however very unlikely that the far-reaching decision of the LG *Trier* on the necessity of a clarifying decision of the BGH will withhold scrutiny of higher instances. Behind the case law's exception for unclear legal situations stands the guiding principle that it must be unbearable for the plaintiff to pursue the claim through a potentially cost-incurring legal action because of the existing legal insecurity.[108] Such a degree of legal insecurity can however not be reasonably assumed for the claims at stake, since their legal assessment on the basis of §§ 823(2), 826 BGB does not *per se* raise questions fundamentally novel to German tort law. **24**

Arguments revolving around the lack of factual clarity in 2015 seem a little more promising. This holds particularly true for the remark of the LG *Osnabrück* that personal responsibility was still unclear in 2015, having been denied by VW and its employees until at least autumn 2016.[109] Contrary to the reasoning of the LG *Trier,* this argument does not primarily rely on recourse to exceptional case law, but on a plain reading of § 199(1) BGB, which requires an awareness of (all) the circumstances giving rise to the claim. However, it can by no means be excluded that the Higher Regional Courts and ultimately the BGH will follow the opinion of the OLG *München* and limit the relevant circumstances under § 199(1) BGB to the broader public knowledge of the diesel manipulation, thereby dismissing the 45,000 claims instituted in 2019 as time-barred. **25**

107 Cf above fn 98.

108 BGH 25 February 1999 – IX ZR 30–98, NJW 1999, 2041, 2042.

109 Cf Süddeutsche Zeitung, Erster VW-Ingenieur gesteht Abgas-Betrug, 10 September 2016, <https://www.sueddeutsche.de/panorama/kriminalitaet-erster-vw-ingenieur-gesteht-abgas-betrug-dpa.urn-newsml-dpa-com-20090101-160910-99-401134>.

2. BGH 2 April 2019, VI ZR 13/18:[110] Human Life is an Absolute Non-Harm

a) Brief Summary of the Facts

26 The plaintiff's father suffered from several diseases, amongst them advanced dementia. In a state of immobility and inability to communicate, he was placed under legal care and artificially nourished from September 2006 until his death in 2011. As he had not prepared a patient decree and his will on the use of life-sustaining measures could not be determined otherwise, the responsible physician did not question the artificial feeding. Claiming that from at least 2010 on it had only led to a senseless prolongation of his father's disease-related suffering, the plaintiff sued the physician as heir for compensation of pain and suffering sustained by his father during this period of alleged senseless life extension. He argued that the defendant had been obliged to change the therapeutic measures and end the artificial feeding, thereby permitting the patient's death. In addition to compensation for pain and suffering, the son thus demanded reimbursement of the treatment and nursing expenses incurred from 2010 until his father's death.

27 While the Regional Court had dismissed the claim in its entirety,[111] the Higher Regional Court awarded the plaintiff damages for pain and suffering in the amount of € 40,000.[112] According to the OLG *München*, the defendant had been required to discuss the question of continuation or termination of the artificial feeding in detail with the patient's legal caretaker as part of his duty to inform. Having failed to do so, the defendant was held responsible for the prolongation of the patient's life and, thereby, his suffering, which the OLG deemed eligible for compensation.

b) Judgment of the Court

28 On appeal of the defendant, the BGH dismissed the action. According to the Federal Court of Justice, it could be left open whether the defendant had infringed his duties, since the patient did not incur any damage attributable to the

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110 NJW 2019, 1741 = JZ 2019, 837, accessible at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=95016&pos=0&anz=1>.

111 LG München I 18 January 2017 – 9 O 5246/14, BeckRS 2017, 112362.

112 OLG München 21 December 2017 – 1 U 454/17, Zeitschrift für das gesamte Familienrecht (FamRZ) 2018, 723.

physician. Firstly, non-pecuniary damages in compensation for pain and suffering (cf § 253(2) BGB) could not be awarded since, in the eyes of the Court, the preservation of life as an alternative to death could never be regarded as damage. Relying on human dignity (art 1(1) of the German Constitution, *Grundgesetz*, GG) and the State's obligation to protect human life (art 2(2) sent 1 GG), the BGH held that 'human life is a legal good of the highest rank and absolutely worth preserving', so that 'no third party is entitled to judge its value'.[113] Consequently, regarding life – even a life of suffering – as damage in comparison to the alternative of death would infringe the core values of the GG, even if the patient himself regarded his life as unworthy to live. While in such a situation life-sustaining measures had indeed to be stopped due to the patient's conflicting constitutional right to self-determination (art 2(1) GG), State authorities including the judiciary would not be entitled to deduce that his life would constitute harm.

Secondly, the plaintiff was also not entitled to pecuniary compensation for **29**
treatment and nursing expenses resulting from the patient's survival. Although such costs may under certain (constitutional) conditions be classified as compensable damage, they could in the case at hand not be attributed to the acts of the defendant. A physician's duties of treatment with and information on life-sustaining measures would not serve the purpose of preventing economic burdens resulting from the survival of the patient, but only the patient's right to self-determination, exercised, if necessary, by his legal caretaker, and his right to a peaceful death. Thus, even if the defendant had infringed his duties, pecuniary damage could not be attributed to him.

c) Commentary[114]

The tragic case at hand is representative of an ageing society in which an increas- **30**
ing number of patients continues to live despite the most serious illnesses, often due to the high medical skill and self-sacrificing help of caregivers.[115] However, especially where the prospects of health improvement are very low or virtually

113 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1742 no 14 ('Das menschliche Leben ist ein höchstrangiges Rechtsgut und absolut erhaltungswürdig. Das Urteil über seinen Wert steht keinem Dritten zu.').

114 See the case notes of *M Hermes*, Neue Zeitschrift für Familienrecht (NZFam) 2019, 487, 491; *S Kunz-Schmidt*, NJ 2019, 435; *H Lemcke*, Recht und Schaden (r+s) 2019, 352; *S Omlor*, Juristische Schulung (JuS) 2019, 577; *S Sarangi*, Gesundheit und Pflege (GuP) 2019, 151; *A Schneider*, FamRZ 2019, 999.

115 *Lemcke*, r+s 2019, 352.

excluded, such cases may lead to extreme psychological and economic hardship for the patients and their relatives alike. This situation is further aggravated if the patient is not (or no longer) able to adequately communicate his/her potential will to refrain from (further) medical treatment preventing his/her death, which he/she may very well perceive as unduly burdensome for all the affected. Conversely, the naked will to survive is an extremely powerful basic human instinct, which can and should not be denied to anyone lightheartedly. As if these legal and ethical questions the BGH was confronted with did not carry enough weight, the case inevitably evokes memories of notions such as 'unworthy life', particularly sensitive in Germany because of their use as a pseudo-justification for the 'euthanasiation' of at least 216,000 sick and disabled by the Nazi regime.[116]

31 Very aware of these fundamental dimensions of the case, the BGH dismissed all the claims raised by the plaintiff, referring back to its earlier case law on the so-called 'wrongful life' of children born severely disabled and/or against the will of their parents due to medical malpractice.[117] In line with the case law of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG),[118] the *Bundesgerichtshof* had in these cases already decided that the life of the child, whether sick or healthy, could not constitute damage if the only alternative was not to live. However, the Court held that the law may grant the parents compensation for additional expenses and maintenance if the medical counselling was specifically designed to protect against such additional burdens.[119]

32 On this basis, it had not been obvious that the Court would dismiss the claim for pecuniary damages on a rather terse statement of reasons. With regard to the expenses of treatment and nursing, the BGH held that while a physician's informational duties on life-sustaining measures serve the patient's right to self-determination, their aim was not to protect against economic burdens flowing from the patient's survival and treatment of his/her suffering.[120] However, since economic factors may very well constitute one out of several relevant factors of a patient's self-determined decision to (dis)continue life-sustaining measures, the BGH's reasoning threatens the patient's right to take this decision on a com-

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116 *H Faulstich*, Die Zahl der „Euthanasie"-Opfer, in: A Frewer/C Eickhoff (eds), „Euthanasie" und die aktuelle Sterbehilfe-Debatte – Die historischen Hintergründe medizinischer Ethik (2016) 218 ff.

117 BGH 18 January 1983 – VI ZR 114/81, NJW 1983, 137; BGH 16 November 1993 – VI ZR 105/92, NJW 1994, 788.

118 BVerfG 28 May 1993 – 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, NJW 1993, 1751.

119 Approved by BVerfG 12 November 1997 – 1 BvR 479/92 & 1 BvR 307/94, NJW 1998, 519.

120 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1744 f no 33.

plete factual basis, taking full account of the relevant information only assessable by the physician, such as the likelihood of recovery and the duration and cost of the treatment. In particular, it seems highly questionable why economic factors should *a priori* and exceptionally be excluded from the patient's right to exercise medical self-determination, whereas they are otherwise, and in particular beyond a person's own death (cf §§ 1922 ff BGB), recognised as legitimate by and even central to the German civil law system.[121] Rather, a patient should at least be given the opportunity to make his/her decision to (dis)continue treatment on the basis of complete information about its current and future status and his/her own weighing of the relevant factors, which could of course still mean that economic factors could play no part at all. Should it have been the concern of the Federal Court of Justice to prevent treatment costs from exerting additional pressure on the patient to end his/her life, it would by its reasoning, in a paternalistic manner, deprive the patient of the autonomous decision to rather leave the assets at stake to his/her heirs, protected constitutionally through the right to self-determination (cf art 2(1) GG).

33 Neither can this restrictive reasoning be justified by the fact that the patient at the relevant time could not himself validly exercise this right anymore, since the exercise of the right itself and the right to receive the information relevant for it must in this case be assigned to his legal caretaker. Being responsible for the exercise of the duties of care for the benefit of and in accordance with the patient's wishes (cf § 1901(2), (3) BGB), the caretaker, on the basis of this information, ought to take the decision that best balances the diverging interests of the patient. Thus, if the patient himself/herself may weigh in economic factors, the caregiver must also be enabled to include these in his/her decision-making. However, if the responsible physician infringes his/her duties to correctly inform about the prospects opened up by the life-prolonging measures, the caregiver cannot take such a fully informed decision. By consequence, the patient's right of self-determination, exercised by the caregiver on behalf of the patient, would therefore be unjustifiably curtailed by the doctor's breach of duties. As it held that pecuniary damage was in no way attributable to an infringement of the physician's informational duties, the Federal Court of Justice did however not (have to) examine potential infringements any further. In view of the foregoing and the findings of the Court of Appeal, the BGH at this point however should have dedicated more effort to the analysis of the alleged infringements,

121 In this vein, accepting maintenance expenditures for one's own life as a damage, *J Prütting*, Lebenserhaltung als Haftungsmoment – Eine kritische Analyse, Zeitschrift für Lebensrecht (ZfL) 2018, 94, 102.

since the supposed lack of attributability of pecuniary damage to infringements of informational duties by responsible physicians cannot fully persuade.

34 Moreover, as the Court itself admits,[122] with regard to the compensation of pain and suffering the case at hand is certainly not identical to those of 'wrongful life', as it is not about an unborn child, but about a person in the very last phase of his life.[123] By contrast to a *nasciturus*, an adult is however principally granted the right to freely decide on the extent and nature of the medical treatment received, flowing from his/her right to self-determination (cf art 2(1) GG). Hence, where the unborn is only *protected* by human dignity (art 1(1) GG) and the right to live (art 2(2) sent 1 GG), fundamental constitutional principles *collide* in the case of a person in their twilight years. Within this field of tension, the legislature has, through the introduction of the rules on patient decrees (§ 1901a BGB) inter alia declaring the patient's will authoritative 'irrespective of the type and stage of an illness' recently strengthened the right to self-determination,[124] as the BGH rightly notes.[125] Nonetheless, the Court would deny compensation for pain and suffering even if, different from the case at stake, such a will *could indeed* be identified, but the life-sustaining measures were upheld nonetheless, as otherwise the constitutionally prohibited conclusion that life may constitute damage would need to be drawn.[126]

35 While it seems already questionable if the constitutionally protected right to self-determination has been sufficiently considered by the *Bundesgerichtshof* for the case at stake, ie in a scenario in which the patient's will is unclear and would need to be substituted by the caretaker's decision, it appears that at least this far-reaching *obiter dictum* stretches the right to life beyond the protection required set by the *Grundgesetz* and counterbalanced by the legislature through its reform of § 1901a BGB.[127] If a patient has validly declared to prefer death to a life he/she considers unworthy to live, on what basis would a physician or the public authorities have the right to substitute such an autonomous decision? Why would he/she be legally entitled to die – as the BGH itself rightly admits –[128] but not to claim damages for a period of apparent suffering he/she took all the

122 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1743 no 18.
123 See also *Hermes*, NZFam 2019, 487, 491.
124 Drittes Gesetz zur Änderung des Betreuungsrechts, 29 July 2009, BGBl I, 2286.
125 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1743 no 19.
126 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1743 no 20.
127 In this direction *Omlor*, JuS 2019, 577, 579.
128 BGH 2 April 2019 – VI ZR 13/18, NJW 2019, 1741, 1743 no 19.
128 BGH 2 April 2019 – VI ZR, 1741, 1743 no 19.

necessary precautions to avoid? The answer cannot reasonably lie in the fear that doctors might shy away from taking the necessary life-sustaining measures for fear of liability,[129] since in this unequivocal scenario the patient's will is already apparent from the valid declaration. Where this is not the case, life-sustaining measures must self-evidently be taken and upheld until the (presumable) patient's will is determined with the necessary degree of certainty, without the caregivers being exposed to any kind of potential liability.

However, where the patient's will has actually been expressed, for example through a valid patient's decree, or can be deducted with the necessary degree of certainty from his/her previous statements, it shall always prevail over any life-prolonging measures suggested by third parties, no matter how well-intentioned they may be. The specific tragedy of the case at hand lies in the fact that such findings were apparently not possible for the patient given his poor state of health. Accordingly, the judgment certainly has its merits in showing that it is indispensable for each and every one to take their own precautions for the unfortunate case of finding themselves within a similarly unfavourable health situation, unable to express unequivocal preferences with regard to (further) medical assistance and/or the continuation of life-sustaining measures.[130] Although under the current case law of the BGH patients would still not be entitled to any kind of compensation for pain and suffering if such precautions are neglected by their doctors, and to pecuniary damages at best if more than just the physician's duties to inform are infringed, at least the time of suffering would be limited to the period necessary for the judicial enforcement of the patient's decree. **36**

3. BGH 26 March 2019, VI ZR 236/18:[131] Attribution of the Operational Hazard in the Case of Delayed (Fire) Damage

a) Brief Summary of the Facts

In this case, a building and household contents insurance company sued two vehicle liability insurers whose policyholders were involved in a traffic acci- **37**

129 Cf *C van Lijnden,* Wenn das Leben nur noch Leiden ist, FAZ-Einspruch, 13 March 2019, <https://einspruch.faz.net//recht-des-tages/2019-03-13/wenn-das-leben-nur-noch-leiden-ist/219189.html/>.

130 *Hermes*, NZFam 2019, 487, 491; *Lemcke*, r+s 2019, 352f; *Omlor*, JuS 2019, 577, 579.

131 NJW 2019, 2227 = MDR 2019, 735, accessible at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=95914&pos=0&anz=1>.

dent. Caused by the policyholder of the second defendant, the accident had damaged the car of the first defendant's policyholder to a degree that it was no longer roadworthy. Thus, this vehicle was taken to the premises of a towing company and to a car garage at the instigation of the policyholder of the first defendant on the following day. The owner of the garage pushed the car into his workshop and removed the key but did not disconnect the battery. The following night, about 1.5 days after the accident, a short-circuit occurred, caused by the mechanical impact of the accident on the electric conductors within the engine compartment of the vehicle. This short-circuit led to a large-scale fire in the workshop, spreading to the neighbouring residential building. The plaintiff compensated the damage caused to insured household contents in one of the apartments and sued the car insurers for damages on the basis of corresponding assigned rights.

38 The Regional Court essentially granted the claim but deducted 40% for contributory negligence as the battery had not been disconnected.[132] On the defendants' appeal, the Higher Regional Court dismissed the action in its entirety. It held that the damage could not be attributed to the operation of the vehicle, which is a prerequisite for the strict liability under § 7 Road Traffic Act (*Straßenverkehrsgesetz*, StVG).[133]

b) Judgment of the Court

39 These considerations of the Higher Regional Court did however not withhold scrutiny of the *Bundesgerichtshof*. According to the BGH, the criterion that the damage must occur 'during the operation of a motor vehicle' ('*bei dem Betrieb eines Kraftfahrzeugs*') has to be interpreted broadly, in accordance with the comprehensive protective purpose of § 7 StVG. Hence, it would only need to be evaluated whether the damage had (at least partially) been shaped by the specific dangers emanating from the motor vehicle. This includes that the damage occurred needs to be an effect of one of the specific dangers § 7 StVG aims to protect against.[134] In the eyes of the Court, these conditions were met, since the fire damage at hand had been caused by a short-circuit in the vehicle's engine and that short-circuit was indeed caused by the previous accident. Thus, the connection between the traffic accident and the fire had not been interrupted.

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132 LG Verden 9 October 2017 – 8 O 6/17, BeckRS 2017, 156433.

133 OLG Celle 3 May 2018 – 5 U 132/17, not published.

134 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227 no 8.

Accordingly, it could neither be held that the fire was based on a cause which had already completely abated nor that it had erupted quasi-incidentally.[135] In conclusion, the BGH set aside the decision of the Higher Regional Court and referred the case back, not without indicating that this court will have to further assess the potential negligence of not disconnecting the battery.[136]

c) Commentary[137]

The BGH's decision is of paramount importance for practitioners in the field, since it further clarifies on the much-disputed attribution of damage to the operational dangers of a motor vehicle in the framework of § 7 StVG. Citing – but not necessarily confirming –[138] its previous case law,[139] the BGH once again interpreted the condition of the damage's occurrence 'during the operation of a motor vehicle' (*'bei dem Betrieb eines Kraftfahrzeugs'*) extensively.[140] In its much criticised previous 2014 case law,[141] the Court held that even a purely spontaneous self-ignition of a motor vehicle could cause damage attributable to its operational hazard, even if the vehicle had been parked early in the morning of one day and caught fire during the following night only.[142] In the case at hand, the BGH assumed liability even though the vehicle had been taken off the road for approximately 1.5 days. It needs to be noted, however, that the two cases are hard to compare. In the matter decided in 2014 the car caught fire independently due to a technical defect of its equipment, whereas in the case at hand the vehicle inflamed due to the car's specific operational dangers, namely the short-circuit resulting from the traffic accident. With respect to the decision of 2014, the constellation at hand thus allowed the BGH to clarify that § 7 StVG applies in

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135 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227, 2228 no 12.

136 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227, 2228 nos 14, 17.

137 See the case notes of *H Diehl*, Zeitschrift für Schadensrecht (zfs) 2019, 490; *S Herbers*, NJW 2019, 2228; *O Kääb*, Fachdienst Straßenverkehrsrecht (FD-StrVR) 2019, 417878; *T Rapp*, Kommentierte BGH-Rechtsprechung Lindenmaier-Möhring (LMK) 2019, 419010; *M Schwab*, Schuldrecht: Halterhaftung bei stark verzögert eingetretenen Unfallfolgen, JuS 2019, 1210; *S Syrbe*, Straßenverkehrsrecht (SVR) 2019, 381.

138 Cf *Schwab*, JuS 2019, 1210, 1212.

139 BGH 21 January 2014 – VI ZR 253/13, NJW 2014, 1182 = MDR 2014, 339.

140 *Herbers*, NJW 2019, 2228, 2229; *Kääb*, FD-StrVR 2019, 417878; *Rapp*, LMK 2019, 419010.

141 Cf *Schwab*, JuS 2019, 1210, 1212 with further refs.

142 BGH 21 January 2014 – VI ZR 253/13, NJW 2014, 1182f.

circumstances in which the specific danger of a motor vehicle realised itself in concrete damage,[143] regardless of how much time has passed since it has been driven.[144]

41 Further, while in the matter decided in 2014 the vehicle caught fire without any human intervention, in the present case the owner of the garage to which the vehicle had been towed forgot to disconnect the battery. In the eyes of the BGH, this did however not interrupt the car holder's/insurer's liability, since the risk of a short-circuit existing after the accident had merely been perpetuated.[145] Instead, the responsibility of the garage's owner had to be considered on the level of contributory (gross) negligence only.[146] The attribution of the damage to the specific dangers of the car would have only been interrupted by 'a completely unusual and improper behaviour of another person',[147] which the simple mistake of the garage owner was not considered to be. However, the judgment makes it clear that exceptional cases are indeed conceivable in which the (non-)intervention of a third party puts an end to the continuous effect of the car's operational risk.[148] Although this leaves room for legal uncertainty in borderline cases, the reasoning of the BGH is preferable to an unlimited attribution of damage to the car's specific dangers even after the intervention of a third party. Strict liability should by no means extend to covering purely incidental damage arising from all events in which the vehicle was somehow involved.[149]

42 Notably, the reasoning of the *Bundesgerichtshof* even in its more disputed 2014 decision aligns well with the subsequent judgment of the CJEU on Directive 2009/103/EC[150], holding that the spontaneous ignition of a vehicle parked in a private garage for more than 24 hours constitutes 'use of a vehicle' in the sense

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143 *Herbers*, NJW 2019, 2228, 2229; *Rapp*, LMK 2019, 419010; *Schwab*, JuS 2019, 1210, 1211.

144 For more details see *Syrbe*, SVR 2019, 381. *Rapp*, LMK 2019, 419010 with further refs, however advocates for a time-limit of a year after immobilisation of the vehicle.

145 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227, 2228 no 13. For an in-depth analysis see *Schwab*, JuS 2019, 1210, 1211.

146 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227, 2228 no 14. Cf *Schwab*, JuS 2019, 1210, 1211 f.

147 BGH 26 March 2019 – VI ZR 236/18, NJW 2019, 2227, 2228 no 12 ('ein völlig ungewöhnliches und unsachgemäßes Verhalten einer anderen Person').

148 *Rapp*, LMK 2019, 419010; *Syrbe*, SVR 2019, 381, 382.

149 *Syrbe*, SVR 2019, 381, 382; cf the criticism levelled at the BGH's 2014 decision, *Schwab*, JuS 2019, 1210, 1212 with further refs.

150 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L 263/11.

of art 3(1) of the Directive.[151] Hence, a similarly extensive interpretation of the liability regime of § 7 StVG by German courts is indeed to be expected for the foreseeable future.[152]

4. BGH 4 April 2019, III ZR 35/18:[153] Liability of a Teacher for Failure to Provide First Aid during Sports Lessons

a) Brief Summary of the Facts

The claimant, who at the time was 18 years old, took part in sports lessons as a graduating pupil in January 2013. About five minutes after the start of the warm-up, he stopped running, stood against the side wall of the gym, slipped into a sitting position and no longer reacted to speech. At 3:27 pm, the rescue control centre received the emergency call from the sports teacher, who had also sent for a colleague. Asked whether her pupil was still breathing, the teacher turned to the other students for an answer. However, until the end of the trial the content of their responses could not be determined with certainty. She then received instructions from the control centre to put the plaintiff in the stable lateral position. After their respective arrival at 3:32 pm and 3:35 pm, the paramedics and the emergency doctor immediately began professional resuscitation measures, lasting for about 45 minutes. Subsequently, the intubated and ventilated plaintiff was transferred to a clinic, which, amongst other things, noted in its medical report that the plaintiff had been unconscious for eight minutes before the arrival of the emergency doctor 'without any amateurish resuscitation measures'. Later a hypoxic brain damage following a ventricular fibrillation was diagnosed, whose genesis could not exactly be traced. In the course of the hospitalisation, further partly life-threatening diseases were discovered. By consequence, the plaintiff was recognised as severely disabled to a degree of 100%. Arguing that this state of health was a direct consequence of the continued lack of oxygen supply to the brain and thus of the teachers' failure to carry out resuscitation measures, the claimant sued their employer, the State of Hesse, for damages on the basis of State liability (cf art 34 GG, **43**

151 CJEU 20 June 2019, C-100/18, *Línea Directa Aseguradora v Segurcaixa Sociedad Anónima de Seguros y Reaseguros*, ECLI:EU:C:2019:517.

152 *Rapp*, LMK 2019, 419010.

153 NJW 2019, 1809 = VersR 2019, 881, accessible at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=94836&pos=0&anz=1>.

§ 839 BGB). Had the teachers carried out the necessary breath check and, after detection of the respiratory arrest, taken subsequent emergency measures, the brain damage would in the eyes of the claimant not have occurred.

44 Both the Regional and the Higher Regional Court dismissed the action on factual grounds.[154] Since the moment at which the claimant had stopped breathing could not be sufficiently determined, it would also not be possible to determine with the necessary certainty from when on resuscitation measures would have been absolutely required. Hence, it could neither be ruled out that the plaintiff's breathing had only stopped shortly before the arrival of the rescue services nor that the plaintiff's health would have been equally affected even if an amateurish resuscitation had been carried out. Thus, it could not be finally established that the failure to carry out adequate monitoring and resuscitation measures until the arrival of the rescue services had had a causal effect on the applicant's state of health.

b) Judgment of the Court

45 The *Bundesgerichtshof*, however, referred the case back to the Higher Regional Court for a new hearing and decision since, on the basis of the previous findings and without further examination, a claim for damages could not be ruled out. More specifically, the Court held that the rejection of the applicant's request for an expert opinion on the crucial question of causation amounted to a procedural irregularity. As it could not be excluded with certainty that an expert would, on the basis of the information at hand, have been able to establish the time of respiratory arrest and hence further clarify the actual reasons of the brain damage incurred, it would have been necessary to order the consultation of an expert's opinion.[155]

46 While the further clarification of the facts was left to the Higher Regional Court, the Federal Court of Justice did provide it with some legal guidance. On the one hand, the applicant could not invoke the reversal of the burden of proof developed for medical liability for cases of severe malpractice. Here, the reversal serves the protection of the patient who, in view of the broad spectrum of potential causes, would otherwise have difficulties in proving the facts of the malpractice. Although this principle would also apply in other instances of gross

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154 LG Wiesbaden 30 November 2016 – 5 O 201.15, BeckRS 2016, 129732; OLG Frankfurt aM 25 January 2018 – 1 U 7/17, MDR 2018, 670.

155 BGH 4 April 2019 – III ZR 35/18, NJW 2019, 1809, 1810 no 13 ff.

violation of professional or organisational duties, it was required by the BGH that these professional duties specifically serve the protection of life and health of others, similar to medical professions. As the principal duty of a sports teacher is to provide physical education, the performance of first aid measures in the case of emergencies was deemed a secondary obligation only. By consequence, the applicant had to prove the causation of the potential infringements committed by the sports teachers, at most facilitated by a certain likelihood of a causal link.[156]

On the other hand, the defendant could not invoke § 680 BGB, limiting the liability of emergency helpers to malice and gross negligence, since its *ratio legis* is to protect bystanders who spontaneously decide to provide first aid in the case of necessity. In such situations, quick decisions are required in a dangerous context so that calm and considered decision-taking is rarely possible and mistakes are committed rather easily.[157] However, since as a general rule any first aid is better than none, nobody should refrain from attempts for fear of liability. The situation of a sports teacher responsible for emergencies during his/her class could however not be compared to the one of uninvolved bystanders. Indeed, sports teachers would be officially obliged to carry out necessary and reasonable first aid measures in a timely and proper manner, not least for their position as State officials. Otherwise it would hardly be appropriate for the State to oblige pupils to participate in physical education while in the event of emergencies avoiding liability up to a degree of gross negligence.[158] **47**

c) Commentary[159]

Having rejected the applicability of § 680 BGB for professional emergency helpers like doctors, lifeguards[160] or firefighters in 2018 after a long time of legal un- **48**

156 BGH 4 April 2019 – III ZR 35/18, NJW 2019, 1809, 1811 no 22 f.

157 BGH 4 April 2019 – III ZR 35/18, NJW 2019, 1809, 1812 no 31.

158 BGH 4 April 2019 – III ZR 35/18, NJW 2019, 1809, 1812 f no 32.

159 See the case notes of *T Hebeler*, Juristische Ausbildung (JA) 2019, 638; *T Krüger*/*L Saberzadeh*, Erste-Hilfe als Nebenpflicht für Sportlehrer, Zeitschrift für das Recht der Non Profit Organisationen (npoR) 2019, 167; *H-D Lippert*, Medizinrecht (MedR) 2019, 799; *S Omlor*, Schuldrecht BT: Erste-Hilfe-Maßnahmen bei Zusammenbruch im Sportunterricht, JuS 2019, 715; *M Pangerl*/*C Hartmann*, Bayerische Verwaltungsblätter (BayVBl) 2019, 748.

160 Cf BGH 23 November 2017 – III ZR 60/16, BeckRS 2017, 135004 = NJW 2018, 301; *Wurmnest*/*Gömann* (fn 29) no 50.

certainty,[161] the *Bundesgerichtshof* in its present decision also excluded other officials from its (analogous) scope, provided that emergency assistance is amongst their secondary obligations. However, since teachers have no specific core duty to serve the protection of life and health, in the case of an accident pupils cannot rely on a reversal of the burden of proof. This balanced result seems convincing, as teachers are indeed not mainly, but also not just coincidentally responsible for the life and limb of their students.[162]

49 In addition to school teachers, the BGH's reasoning will also apply to educators in public day-care centres and kindergartens,[163] as well as probably to trainers in private sports clubs.[164]

5. LG Berlin 9 September 2019, 27 AR 17/19:[165] Even Massive Insults of a Politician on Facebook May not Amount to Defamation

a) Brief Summary of the Facts

50 The applicant, a well-known politician of the German Green Party, requested information on the identity of 22 Facebook users from the social network. These users had posted various harsh insults under a post linking to a newspaper article of 2015, which had reported on the politician under the general heading 'Green politician in need of explanation'.[166] The expressions used included, but were not limited to, abusive language such as 'piece of shit', 'mentally ill', 'old green pig', 'sick woman', 'bitch', 'brain amputated', 'dirty cunt', 'old perverted bastard', 'hollow nut' and 'hazardous waste'. Referencing to a statement of the politician during a debate in the Regional Parliament of Berlin in 1986, the relevant paragraph of the article read: 'While a Green member of parliament talks about domestic violence, a Conservative member of parliament asks the ques-

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161 Cf BGH 14 June 2018 – III RZ 54/17, NJW 2018, 2723, 2727 no 48 ff.

162 *Hebeler*, JA 2019, 638, 640.

163 *Omlor*, JuS 2019, 715, 716.

164 *Krüger/Saberzadeh*, npoR 2019, 167. For volunteers, however, § 31b BGB will generally limit liability to intent and gross negligence.

165 BeckRS 2019, 21753 = MMR 2019, 754, accessible at <https://openjur.de/u/2180445.html>.

166 *R Alexander/CC Malzahn*, Grünen-Politikerin Künast gerät in Erklärungsnot, 24 May 2015, <https://www.welt.de/politik/deutschland/article141406874/Gruenen-Politikerin-Kuenast-geraet-in-Erklaerungsnot.html>.

tion how the speaker views the decision of the Greens in North Rhine-Westphalia that criminal sanctions for sexual acts against children should be lifted. Although not being the speaker, the politician according to the minutes shouted into that debate: "Comma, if no violence is involved!" Doesn't that sound as if sex with children without violence is okay?'[167] Against this background the article discussed the affinity of members of the Green Party in the 1980s to legalise consensual sexual relations between adults and children. The post in issue further deduced from the quote that according to the politician, 'if no violence is involved, sex with children is quite ok'.

Before the LG Berlin, the member of the Greens argued that she was entitled to be informed about the identity of the authors of the insults, since the statements in question were libellous in the sense of §§ 185 ff of the German Criminal Code (*Strafgesetzbuch*, StGB) and therefore triggered further civil claims. Indeed, § 14(3) German Telemedia Act (*Telemediengesetz*, TMG) allows (not: obliges) social networks to provide information about user data if it is necessary to enforce civil claims based on an infringement of personality rights through illegal content. However, Facebook argued that there were good reasons to not grant access to information in the present case, as the concrete insults would still be covered by the right to freedom of expression (art 5(1) sent 1 GG). **51**

b) Judgment of the Court

Ruling in favour of the social network, the LG Berlin held that in all 22 cases no defamation had been committed, so that the applicant had no right to information about any of the Facebook users' identities. According to the Court, although the statements were in part indeed 'very polemical and exaggerated as well as sexist',[168] they were still covered by the constitutional right to freedom of expression (art 5(1) sent 1 GG) because of their factual basis. A statement could in the eyes of the judges not be classified as libellous as long as it was made in the context of a factual dispute and not merely to defame the applicant.[169] Since the statements were all made in reaction to the Facebook post of a third party, which had merely reproduced the politician's viewpoint as it would be understood by the general public, the LG Berlin held that the necessary factual con- **52**

167 For the complete wording, see above fn 166.

168 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 755 no 15.

169 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 755 no 16.

text had been present.[170] The politician herself had in the eyes of the Court expressed her opinion on an issue that strongly affected the public and thus provoked a certain degree of resistance. In addition, in comparison to ordinary citizens politicians would have to accept more criticism in any case.[171] As far as sexualised comments were concerned, the sexual character of the debate at stake and its considerable potential for public outrage justified that the applicant as a politician had to put up with particularly excessive criticism.[172]

c) Commentary[173]

53 The Court's decision has quite predominantly been heavily criticised,[174] as the judges not only classified obvious sexist and faecal insults as justified, but also statements that are usually considered as so-called 'formal libel' in German law. As one example among several, the expression 'dirty cunt' can hardly be classified as legitimate criticism that a politician has to put up with, even if voiced in the context of a debate on the limits of sexuality in relation to children. The fact that the Court did nevertheless not shy away from justifying these insults could be explained by its referral to the liberal stance of the *Bundesverfassungsgericht* on the constitutional limits of freedom of expression (art 5(1) sent 1 GG).[175] According to its settled case law, 'defamation cannot be assumed if the statement is made in the context of a factual debate'.[176] Hence, the 'classification of a statement as defamatory [...] regularly requires that occasion and context of the statement are taken into account'.[177] However, although the Federal Constitutional Court has in these decisions narrowly defined the scope of clear-cut defamations, the faecal and sexual quality of the comments at stake could still

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170 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 755 no 14.

171 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 755 no 15.

172 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 756 no 33.

173 See the case note of *S Ihwas*, 'Politiker müssen sich auch sehr weit überzogene Kritik' gefallen lassen, Fachdienst Strafrecht (FD-StrafR) 2019, 421509.

174 Cf *J Henrich*, Verbalattacken gegen Renate Künast, MMR-Aktuell 2019, 421798.

175 LG Berlin 9 September 2019 – 27 AR 17/19, MMR 2019, 754, 755 no 12.

176 BVerfG 19 February 2019 – 1 BvR 1954/17, BeckRS 2019, 4023 no 11 with further refs ('Von einer Schmähung kann nicht ausgegangen werden, wenn die Äußerung in dem Kontext einer Sachauseinandersetzung steht.').

177 BVerfG 14 June 2019 – 1 BvR 2433/17, NJW 2019, 2600 no 18 with further refs ('Die Qualifikation einer ehrenrührigen Aussage als Schmähkritik [...] erforder[t] regelmäßig die Berücksichtigung von Anlass und Kontext der Äußerung').

very well justify their classification as defamatory.[178] This is already illustrated by the wording of the *Bundesverfassungsgericht*'s reasoning, requiring context and occasion to be 'taken into account', but not necessarily as the decisive factors. Moreover, even if the expressions would not justify a classification as clear-cut defamations, German law allows for a balancing of the right to freedom of expression with the conflicting personality rights on a case-by-case basis.[179] Had the personality rights of the applicant been given the necessary weight in this balancing exercise, the LG *Berlin* would at the very least at this stage have come to the conclusion that severe insults without particular connection to the debate are not covered by the right to freedom of expression.[180] For, with regard to the strongest expressions quoted above, the protection of freedom of expression must stand back.[181]

Unfortunately, the case at hand is exemplary for growing 'hate speech' **54** against politicians, volunteers and private persons alike, made possible and facilitated by the anonymity of the so-called 'social' networks.[182] Although distinctions certainly have to be made according to the content of the expression and the degree to which the persons express themselves in public, excesses such as the one at hand must be decisively opposed, as they equally threaten democracy and social cohesion. In this regard, a recent ruling of the CJEU on a similar constellation requiring platform operators to search for and delete offensive postings on a worldwide basis[183] could turn out to be a step in the right direction, compelling the LG *Berlin* to reconsider its recent case law.[184]

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178 *S Ihwas*, FD-StrafR 2019, 421509.

179 See, amongst others, BVerfG 23 August 2005 – 1 BvR 1917/04, NJW 2005, 3274.

180 *S Ihwas*, FD-StrafR 2019, 421509.

181 In line with this take, the LG Berlin has on complaint of the plaintiff and in view of the strong criticism received recently revised its judgment to classify 6 of the 22 strongest insults as not covered by the freedom of expression after all, LG Berlin 21 January 2020 – 27 AR 17/19, becklink 2015242. However, since it upheld its decision with regard to the 16 other instances of abusive language, the judgment will nevertheless be appealed by the claimant, see below fn 185.

182 Recently, two cases of hate speech against local mayors hit the headlines of German newspapers, with one resigning from his duties and the other applying for a firearms license as a consequence, see *R Burger*, Solidarität, aber nicht wegen des Waffenscheins, FAZ-Einspruch, 12 January 2020, <https://www.faz.net/einspruch/justiz/der-buergermeister-von-kamp-lintfort-will-sich-bewaffnen-16577641.html>.

183 CJEU 3 October 2019, C-18/18, *Glawischnig-Piesczek v Facebook Ireland*, ECLI:EU:C:2019:821.

184 *S Ihwas*, FD-StrafR 2019, 421509.

55 The question who should under such circumstances still want to engage in political work does however not only arise with regard to court decisions such as the one of the LG *Berlin*, but also call upon the legislature to provide for more effective (civil law) instruments to curb hate speech. In this respect, it appears to be a cause for serious concern that even if the Higher Regional Court upon appeal of the applicant[185] annulled the decision of the LG *Berlin*, the affected politician would not immediately be able to enforce her claims against the offenders, since Facebook would only be *allowed* to submit the relevant data. In case of refusal, a second lawsuit would be needed to ultimately force the social network to hand out the relevant information.[186]

6. Personal Injury

56 This year again brought numerous cases concerning various aspects of personal injury. However, only a limited selection of special interest for practitioners can be presented.

57 First, the BGH extended its settled case law on so-called 'damage caused by shock' (*Schockschäden*)[187] to shocks caused by medical malpractice.[188] People suffering from a pathological impairment due to the critical state of health of a close relative caused by a medical error of the physician may thus be entitled to compensation. The decision was handed down in circumstances where the plaintiff's husband had experienced complications following a faulty colonoscopy, as a result of which he was in acute danger of death for several weeks. Because she had suffered from medical depression and anxiety, his wife sued in her own right for non-pecuniary compensation. Differing from the Higher Regional Court,[189] the BGH did not see a reason why different rules should apply in cases of medical malpractice than in (other) tort cases. In line with its case law on *Schockschäden*, the Court however reiterated that in these cases non-

185 *Editorial*, MMR-Aktuell 2019, 421364. The notice of appeal is accessible at <https://hateaid.org/wp-content/uploads/2019/10/Beschwerde_5520.19_01.10.2019_HateAid-ohne-personenbezogene-Daten.pdf>.

186 Cf *Editorial beck-aktuell*, 19 September 2019, becklink 2014161.

187 Cf BGH 10 February 2015 – VI ZR 8/14, NJW 2015, 2246, 2247 no 9; BGH 27 January 2015 – VI ZR 548/12, NJW 2015, 1451 no 6. On the recent law on compensation of secondary victims for pain and suffering (Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld, 21 July 2017, BGBl I 2421) see *Wurmnest/Gömann* (fn 29) no 1 ff.

188 BGH 21 May 2019 – VI ZR 299/17, NJW 2019, 2387 = MDR 2019, 696.

189 OLG Köln 12 June 2017 – 5 U 144/16, BeckRS 2017, 145862.

pecuniary damages may only be granted if the mental state of health 'goes beyond the health impairments to which the affected are generally exposed in the event of death or serious injury of a close relative'.[190]

58 Second, the Federal Court of Justice had to decide on the duties of a nursing home operator towards his mentally handicapped residents. The severely impaired claimant had intended to take a bath and been granted the authorisation to do so by one of the caregivers. However, by contrast to previous instances, the resident this time did not manage to handle the outpouring hot water and suffered severe scalds on her feet and legs. Contrary to the Higher Regional Court,[191] the BGH affirmed an infringement of the nursing home operator's duties.[192] Holding that it was a principal duty of the operator to protect the residents against any risk which they cannot control, the BGH called upon the home operator to respect human dignity and the right to self-determination of its residents. While technical standards could provide valuable guidance, the Court held that the necessary balancing exercise could not lead to a general outcome valid for all residents, but needed to be performed for each individual resident, taking into account the specificities of his/her individual case.[193]

59 Third, the *Bundesgerichtshof* decided that breaches of form and procedure of the medical duties to inform living organ donors under § 19(1) no 1 of the Transplantation Act (*Transplantationsgesetz*, TPG) do not per se lead to the invalidity of their consent to the organ removal.[194] However, it is imperative that the donor was fully informed about the health consequences of the surgery. To prove that this has not been the case, donors can rely on an indicative effect of the infringement of the informational duties. Similarly, the classic tort law objections of legitimate alternative conduct or hypothetical consent are not admissible in this context. Otherwise the illegal removal of organs would not be sanctioned at all and the specific informational duties of § 19(1) no 1 TPG would be undermined.[195]

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190 BGH 21 May 2019 – VI ZR 299/17, NJW 2019, 2387, 2388 no 7 with further refs ('über die gesundheitlichen Beeinträchtigungen hinausgehen, denen Betroffene beim Tod oder einer schweren Verletzung eines nahen Angehörigen in der Regel ausgesetzt sind').

191 OLG Bremen 13 April 2018 – 2 U 106/17, BeckRS 2018, 47068.

192 BGH 22 August 2019 – III ZR 113/18, NJW 2019, 3516 = FamRZ 2019, 1817.

193 BGH 22 August 2019 – III ZR 113/18, NJW 2019, 3516, 3517 no 14.

194 BGH 29 January 2019 – VI ZR 495/16, NJW 2019, 1076 = JZ 2019, 517; VI ZR 318/17, BeckRS 2019, 1867 = MDR 2019, 418.

195 For more details see *G Mäsch*, Schuldrecht BT: Aufklärungsanforderungen bei freiwilligen Organspenden, JuS 2019, 812; *A Spickhoff*, JZ 2019, 522.

60 Fourth, the BGH held that the principles of the obligation to grit are to be applied in the same way to private as to public parking spaces, so that the specific duties to clear and grit depend on the circumstances of each individual case.[196] In the case at hand, the Court did not assume an infringement of those duties though no gritting was carried out between parked vehicles on a large supermarket car park with a constant change of vehicles, as mechanical spreading was not possible and hence not reasonable there. Moreover, since the car park was not only used by the supermarket's customers but also by residents at night, the operator was neither obliged to grit the car park before the opening of the supermarket.[197]

61 An important development has taken place at the level of the *Oberlandesgerichte*. In 2018, the OLG *Frankfurt* aM had decided to adopt a new approach to the calculation of non-pecuniary damages for pain and suffering.[198] To render the concrete amount of damages granted for pain and suffering more predictable for plaintiffs and thereby reduce their litigation risk, the OLG *Frankfurt* aM had for the first time calculated the non-pecuniary damages incurred on a daily basis ('*taggenaue Bemessung des Schmerzensgeldes*'), which allowed for more weight to be accorded to the concrete duration of the impairment.[199] It essentially based its approach on an assessment of the duration of the suffering. For each day of suffering, a certain percentage of the average monthly gross salary would be awarded as compensation. The percentage itself would vary according to the injury suffered. Previously, this method had apparently only been advocated by few scholars.[200] The judgment of the OLG *Frankfurt* aM however raised the question whether a fundamental shift of the calculation of non-pecuniary damages had to be expected within the judiciary.[201] With the exception of the LG

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196 BGH 2 July 2019 – VI ZR 184/18, NJW-RR 2019, 1304 = MDR 2019, 1192, accessible at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=98764&pos=0&anz=1>.

197 For more details see NJW-Spezial 2019, 586; *K Forster*, Facility Management: Winterdienst – keine uneingeschränkte Räum- und Streupflicht eines Lebensmittelmarkts, Immobilienverwaltung & Recht (IMR) 2019, 472.

198 OLG Frankfurt 18 October 2018 – 22 U 97/16, BeckRS 2018, 27125 = NJW 2019, 442.

199 For more details see *Kleinschmidt* (fn 2) no 61.

200 *H-P Schwintowski*/*C Schah-Sedi*/*M Schah-Sedi*, Handbuch Schmerzensgeld (2013) 13 ff; *H-P Schwintowski*, Der Anspruch auf taggenaue Berechnung des Schmerzensgeldes, VuR 2011, 117 both with further refs.

201 In favour of such a shift *R Zarges*, zfs 2019, 90 f; although critical also *S Bensalah*/*J Hassel*, Kritische Aspekte zur taggenauen Schmerzensgeldbemessung, NJW 2019, 403; against it *HO Höher*, VersR 2019, 1168; *J Luckey*, Schmerzensgeldbemessung – ist Billigkeit berechenbar?,

Frankfurt which has indeed followed 'its' Court of Appeal,[202] no such general shift has taken place, as the other *Oberlandesgerichte* confronted with the need to calculate non-pecuniary damages rejected the OLG *Frankfurt* aM's approach and stuck to the traditional principles developed by the BGH.[203]

62 Traditionally, the judiciary assesses the 'fair compensation in money' due for non-pecuniary damages (§ 253(2) BGB) more or less freehandedly, taking into account all the specific circumstances of the concrete case and relevant case law generated by similar fact patterns. Allowing for a broad margin of judicial discretion on the appropriateness of an amount, this approach is said to generally lead to lower compensation and less predictability.[204] Courts may, under the traditional approach, simply consider a sum 'appropriate but also sufficient' without this conclusion being objectively verifiable or transparent.[205] However, as the method, figures and percentages employed by the OLG *Frankfurt* aM lack a definite (empirical) basis and thus can and must be questioned themselves,[206] its approach might not yet represent the final and ideal way to move away from the current practice either.

63 Lastly, the reader's attention is drawn to the following cases of personal injury: the OLG *Karlsruhe* also had to decide on the attribution of compensation for pain and suffering, in a case in which three young adults had attached a col-

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JR 2019, 311; in favour of a comprehensive analysis *J Lüttringhaus*/*S Korch*, Schmerzensgeldbemessung, VersR 2019, 973.

202 LG Frankfurt 17 July 2019 – 2-24 O 246/16, FD-StrVR 2019, 419295, accessible at <https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190035621>.

203 OLG München 25 October 2019 – 10 U 3171/18, BeckRS 2019, 25923, accessible at <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-25923?hl=true&AspxAutoDetectCookieSupport=1>; KG Berlin 9 September 2019 – 22 U 35/18, BeckRS 2019, 30230; OLG Celle 26 June 2019 – 14 U 154/18, NJW-RR 2019, 1306 = VersR 2019, 1157 (for more details see below no 64, accessible at <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=KORE220862019&st=null&showdoccase=1>; OLG Brandenburg 16 April 2019 – 3 U 8/18, DAR 2020, 25, accessible at <http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=KORE216132019&doc.part=L&doc.price=0.0#focuspoint>; OLG Düsseldorf 8 March 2019 – I-1 U 66/18; NJW 2019, 2700, accessible at <https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2019/1_U_66_18_Urteil_20190328.html>.

204 Cf *S Korch*, NJW 2019, 2700, 2705.

205 Exemplarily OLG Düsseldorf 8 March 2019 – I-1 U 66/18; NJW 2019, 2700, 2703 no 69 ('angemessen, aber auch ausreichend').

206 OLG Düsseldorf 8 March 2019 – I-1 U 66/18; NJW 2019, 2700, 2701 no 34 ff; *Kleinschmidt* (fn 2) no 61; *S Korch*, NJW 2019, 2700, 2705. For details see *S Korch*, Schmerzensgeldbemessung und Glücksforschung, JZ 2019, 419.

oured slackline of about 15 metres length and five centimetres width across a cycling and running path in a public park without any further safety measures.[207] The claimant, who drove on the curvy and slightly sloping path with her bike, did not see the slackline and fell without decelerating. In line with the *Landgericht Freiburg*,[208] the OLG *Karlsruhe* rejected an assumption of contributory negligence of the claimant and granted her full damages on the basis of § 823(2) BGB. However, differing from the LG, the OLG also increased the amount of damages for pain and suffering from € 10,000 to € 25,000, as it specifically considered the limited extent of future professional activities the claimant could pursue due to the accident.[209]

64 In a case mainly revolving around the calculation of pecuniary loss after a severe traffic accident leaving the claimant with a complete paraplegia, the OLG *Celle* laid down principles for the fictitious billing of nursing assistance provided by relatives.[210] First, within the margins of judicial discretion granted by the case law of the BGH,[211] the costs of a professional caretaker could only serve as guidance, since relatives would as a general rule not provide professional assistance. However, a monetary value had to be attached to their non-remunerated assistance nonetheless, which the OLG *Celle* deemed roughly comparable to the value of housework (approx € 8 per hour). From this sum, a further € 2 per hour was deducted for full-day assistance by relatives, since, out of the 16.5 hours of general availability, it assumed only a fraction would be devoted to active caretaking.[212]

65 The OLG *Saarbrücken* was in turn confronted with a set of circumstances in which a patient had fallen on an uneven path to a hospital at night despite her knowledge of the poorly kept pathway because she had focused her attention on her smartphone.[213] The Court held that in such a situation a causal infringement of the operator's duties to protect could not be proven by *prima facie* evi-

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207 OLG Karlsruhe 16 July 2019 – 14 U 60/16, BeckRS 2019, 15562 = MDR 2019, 987, accessible at <https://www.burhoff.de/asp_weitere_beschluesse/inhalte/5379.htm>.

208 LG Freiburg 23 March 2016 – 14 O 435/12, BeckRS 2016, 136579, accessible at <https://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=28543>.

209 For more details see NJW-Spezial 2019, 618.

210 OLG Celle 26 June 2019 – 14 U 154/18, NJW-RR 2019, 1306 = VersR 2019, 1157, accessible at <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=KORE220862019&st=null&showdoccase=1>.

211 Cf BGH 1 October 1985 – VI ZR 195/84, BeckRS 1985, 30372995.

212 For more details see *O Kääb*, FD-StrVR 2019, 418864; NJW-Spezial 2019, 490.

213 OLG Saarbrücken 18 September 2019 – 5 U 7/19, BeckRS 2019, 28880, accessible at <https://dejure.org/ext/05873f0b6e1bcd6ccb0104bb8fcfdc47>.

dence, since it could not be ruled out that the patient fell not because the uneven path was poorly lit, but because she was distracted and did not notice where she was stepping.

Finally, the LG *Köln* held that compensation for pain and suffering in the amount of € 500 was appropriate for visible but temporary facial burns incurred through an incorrectly performed cosmetic intense pulsed light (IPL) hair removal.[214] 66

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