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XI. Germany

A. Legislation

1. No Civil Liability Rules in the new Supply Chain Due Diligence Act

1 On the eve of European legislation on responsibilities in global supply chains, the German legislator enacted its domestic approach to this important and pressing topic in the Supply Chain Due Diligence Act of 16 July 2021.[1] This Act has rightly been called a 'milestone' in the protection of human rights in the supply chain,[2] after Germany had previously (and unsuccessfully) opted for a voluntary scheme. For the first time, the new Act establishes numerous detailed binding due diligence duties of sufficiently large[3] companies related to the protection of human rights and of the environment.[4] It will apply as of 1 January 2023.

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1 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Federal Law Gazette (Bundesgesetzblatt, BGBl) I 2021, 2959; see eg *E Ehmann*/*DF Berg*, Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick, Gesellschafts- und Wirtschaftsrecht (GWR) 2021, 287ff; *R Koch*, Das Lieferkettensorgfaltspflichtengesetz, Monatsschrift für deutsches Recht (MDR) 2022, 1ff; *WG Paefgen*, Haftung für die Verletzung von Pflichten nach dem neuen Lieferkettensorgfaltspflichtengesetz, Zeitschrift für Wirtschaftsrecht (ZIP) 2021, 2006ff; *G Rühl*/*C Knauer*, Zivilrechtlicher Menschenrechtsschutz? Das deutsche Lieferkettengesetz und die Hoffnung auf den europäischen Gesetzgeber, Juristenzeitung (JZ) 2022, 105ff; *A Schmidt-Räntsch*, Sorgfaltspflichten für Unternehmen – Von der Idee über den politischen Prozess bis zum Regelwerk, Zeitschrift für Umweltrecht (ZUR) 2021, 387ff; *E Wagner*/*M Rutloff*, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, Neue Juristische Wochenschrift (NJW) 2021, 2145ff; *G Wagner*, Das Lieferkettengesetz: Viele Pflichten, keine Haftung, in: Selbstbestimmung: Freiheit und Grenzen. Festschrift für Reinhard Singer zum 70. Geburtstag (2021) 693ff; for an analysis in English, see *G Rühl*, Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act, in: Gedächtnisschrift in honor of Jonathan Fitchen (forthcoming 2022) (available at SSRN: <https://ssrn.com/abstract=4024604>).

2 *G Wagner*, Haftung für Menschenrechtsverletzungen in der Lieferkette, ZIP 2021, 1095, 1095; *Rühl* (fn 1) 1.

3 The Act applies to companies domiciled in Germany with more than 3,000 domestic employees; as of 2024, this figure will be reduced to 1,000, see § 1(1) of the Act.

4 For a balanced overview over the scope and the limits of these duties, *Rühl* (fn 1) 2ff; *ead*/*Knauer*, JZ 2022, 105, 106f; *E Wagner*/*Rutloff*, NJW 2021, 2145, 2145ff; *G Wagner* (fn 1) 699ff.

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However, contrary to its original intention,[5] the legislator finally opted for an approach that entirely relies on public enforcement of these duties. The Federal Office for Economic Affairs and Export Control is entrusted with control and enforcement and therefore granted wide competences.[6] In contrast, § 3(3) of the Act expressly states that a violation of due diligence obligations arising from the Act cannot be the basis of civil liability, notwithstanding any civil liability arising irrespective of the Act. This provision was introduced in the course of the parliamentary procedure in order to clarify the legislator's position and to resolve doubts created by the silence of the first draft as to the proposal's relevance for private law.[7] **2**

Therefore, the Act does not create any new civil liability. In particular, the accompanying legislative materials elucidate that all duties arising from the Act are not intended to qualify as protective norms within the meaning of § 823(2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).[8] § 823(2) BGB creates a liability for the culpable violation of a statutory provision that is intended for the protection of others (so-called *Schutzgesetz*). Without the express clarification, one may well have been led to assume such a qualification – that could, in turn, have become the starting point of private enforcement.[9] As § 823(1) BGB is not mentioned in the legislative materials, it is debated whether a violation of the due diligence duties established by the Act may give rise to civil liability where the violation leads to the infringement of one of the protected interests enumerated in § 823(1) BGB.[10] However, taken at face value, § 3(3) of the Act appears to rule out this avenue as well.[11] **3**

5 Summarised in *Rühl* (fn 1) 4f; *ead*/*Knauer*, JZ 2022, 105, 107f (stating that the legislator eventually heeded to fierce opposition by businesses).

6 The Federal Office may act *ex officio* but also at the request of a private party, see § 14(1) of the Act.

7 *Rühl* (fn 1) 5; *ead*/*Knauer*, JZ 2022, 105, 108.

8 See the final report by the parliamentary Committee for Labour and Social Affairs, Printed Documents of the German Bundestag (Bundestagsdrucksache, BT-Drucks) 19/30505, 39; cf *G Wagner* (fn 1) 707.

9 See the analysis of the draft Act by *G Wagner*, ZIP 2021, 1095, 1101ff.; cf *Rühl* (fn 1) 5; *ead*/*Knauer*, JZ 2022, 105, 108.

10 *Koch*, MDR 2022, 1, 4; *Paefgen*, ZIP 2021, 2006, 2011f; *M-P Weller*/*L Nasse*, Unternehmensorganisation zum Schutz der Menschenrechte: Eine neue Verkehrspflicht in § 823 Abs. 1 BGB, in: Deutsches, europäisches und vergleichendes Wirtschaftsrecht. Festschrift für Werner F. Ebke zum 70. Geburtstag (2021) 1071ff.

11 In the same vein, *V Dohrmann*, Das deutsche Lieferkettensorgfaltspflichtengesetz als Vorbild für den europäischen Gesetzgeber? – Eine kritische Analyse, Corporate Compliance Zeitschrift (CCZ) 2021, 265, 271; *H Fleischer*, Zivilrechtliche Haftung im Halbschatten des Lieferkettensorgfaltspflichtengesetzes, Der Betrieb (DB) 2022, 920, 921; *Rühl* (fn 1) 6; *G Wagner* (fn 1) 708.

4 As to the provision's caveat to leave existing civil liability untouched, it should be borne in mind that, despite various proposals in legal writing,[12] German courts have so far been reluctant to accept any civil liability based on an infringement of due diligence duties in global supply chains. This reluctance is widely justified with a view to the 'entity principle' (*Rechtsträgerprinzip*), which generally limits delictual responsibility to one's own conduct and sphere.[13] Whether the provision may actually work as an invitation to legal practice to expand their work on the development of civil liability for human rights violations[14] remains to be seen. Some consider § 11 of the Act, which provides for legal standing of domestic trade unions and NGOs in civil procedure, as a potential hint in this direction.[15]

5 The lack of private enforcement remains controversial. While some authors do indeed regard public enforcement as more suitable,[16] others submit that private claimants would not only be more flexible, or 'agile', than a large public body but also motivated by incentives to maximise their profits.[17] It is therefore not without obvious disappointment if one author concludes that the Act 'does not have much – if not to say: nothing – to offer in terms of private law' and expresses her hope for a rematch on the European level.[18]

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12 See the refs in *Rühl* (fn 1) 6 and in *E Wagner/Rutloff*, NJW 2021, 2145, 2150 fn 38f.

13 *Fleischer*, DB 2022, 920, 921f; *G Rühl*, Unternehmensverantwortung und (Internationales) Privatrecht, in: A Reinisch et al (eds), Unternehmensverantwortung und Internationales Recht (2020) 89, 106ff; *G Wagner*, Tort Law and Human Rights, in: M Saage-Maß et al (eds), Transnational Legal Activism in Global Value Chains (2021) 209, 224ff.

14 Cf the hope expressed by *E Ehmann*, Das Lieferkettensorgfaltspflichtengesetz (LkSG) kommt! Zeitschrift für Vertriebsrecht (ZVertriebsR) 2021, 205, 206; *Rühl* (fn 1) 7; *ead/Knauer*, JZ 2022, 105, 109; *G Wagner* (fn 1) 708f; more sceptical *G Spindler*, Verantwortlichkeit und Haftung in Lieferantenketten – das Lieferkettensorgfaltspflichtengesetz aus nationaler und europäischer Perspektive, Zeitschrift für das gesamte Handelsrecht (ZHR) 186 (2022) 67, 95ff; for a detailed discussion, see *Fleischer*, DB 2022, 920, 921ff.

15 *Paefgen*, ZIP 2021, 2006, 2006; *G Wagner* (fn 1) 705; *E Wagner/Rutloff*, NJW 2021, 2145, 2150; *Rühl* (fn 1) 7; *ead/Knauer*, JZ 2022, 105, 109; for a different reading *H Fleischer*, DB 2022, 920, 925.

16 *PS Stöbener de Mora/P Noll*, Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2021, 1285, 1285ff; *G Wagner* (fn 13) 227ff; *id*, ZIP 2021, 1095, 1105.

17 Deploring the legislator's decision *Rühl* (fn 1) 4; *ead/Knauer*, JZ 2022, 105, 107ff; *E-M Kieninger*, Miniatur: Lieferkettengesetz – dem deutschen Papiertiger fehlen die Zähne, Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW) 2021, 252, 254.

18 *Rühl* (fn 1) 11f.

2. Taking Automated Driving to the Next Level

In the 'Act on autonomous driving'[19], the German legislator has enacted pioneering rules to create a legal framework for level 4 autonomous driving. The Act, which entered into force on 28 July 2021, amends and modifies the Road Traffic Act (*Straßenverkehrsgesetz*, StVG) and contains an accompanying modification of the Compulsory Insurance Act (*Pflichtversicherungsgesetz*, PflVG). 6

This further legislative take on automated driving follows the amendment of the Road Traffic Act in 2017, which had already allowed the use of a vehicle with highly or fully automated driving functions (SAE-level 3).[20] These amendments had left the existing strict liability of the keeper of the vehicle untouched (and only increased the maximum amounts recoverable under this strict liability). Concerning the driver's liability for presumed fault, in contrast, this earlier amendment clarifies that a person who activates and uses such automated driving functions remains the 'driver' of the vehicle even if this person does not manually steer the vehicle (§ 1a(4) StVG). However, the amendment had caused significant uncertainty as to the standard of care required from this driver because § 1b StVG allowed him to 'turn away' from traffic and from steering the vehicle as long as the driver stays 'attentive enough to perceive' the necessity to retake control of the steering at any given time. 7

While this previous legislation on *automated* driving still presupposed the presence of a human being in the vehicle who could resume control of the vehicle, the newly introduced §§ 1d–1l StVG deal with motor vehicles with *autonomous* driving functions operated within a pre-defined area ('festgelegter Betriebsbereich') without the need for such physical presence or even permanent intervention.[21] The new § 1e(1) StVG allows the operation of such vehicles only if they possess certain technical equipment, including among others the autonomous compliance with traffic rules or the avoidance of accidents,[22] and only within areas that are pre-defined by the competent authority. In particular, the vehicle has to 8

19 Gesetz vom 12.7.2021 zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes – Gesetz zum autonomen Fahren, BGBl I 2021, 3108; see *E Ternig*, Das Gesetz zum autonomen Fahren, Zeitschrift für Schadensrecht (ZfS) 2021, 604 ff.

20 For details, see *W Wurmnest*/*M Gömann*, Germany, in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 207, no 7 ff; *M Steege*, Gesetzentwurf zum autonomen Fahren (Level 4), Straßenverkehrsrecht (SVR) 2021, 128, 130 criticises that the legislator's terminology does not entirely coincide with the accepted levels of automation.

21 Cf the definition in § 1d(1) StVG.

22 Summarised in § 1e(2) StVG; for details, see *Ternig*, ZfS 2021, 604, 606 f; *Steege*, SVR 2021, 128, 131 f; noteworthy aspects of this regulation concern in particular the question how the vehicle has to deal with dilemma situations, cf § 1e(2) nos 2 and 5 StVG and the criticism by *P Schrader*, Wohin

be able to put itself into a 'state of minimal risk'[23] upon certain events, or to be put in such state upon deactivation from outside.[24] Potential future vehicles operated under this scheme might be autonomous 'people movers' ('robotaxis') or 'goods movers'.[25] The legislator hopes to increase traffic safety and efficiency and to help the environment with new concepts of mobility.[26]

9 In addition to the existing categories of keeper and driver, the Act creates the new category of 'technical supervisor' ('technische Aufsicht'). According to § 1d (3) StVG, the technical supervisor is the natural person who can deactivate the vehicle at any given time (thus putting the vehicle in a state of minimal risk) and who can allow certain driving manoeuvres.[27]

10 From the perspective of tort law,[28] it should be noted that the keeper's strict liability (§ 7(1) StVG) also extends to a motor vehicle with autonomous driving functions.[29] While generally this strict liability does not apply to vehicles that cannot go faster than 20 km/h, a modification of § 8 no 1 StVG excludes this exception as long as such vehicles are in autonomous operation.[30] Like the amendment of 2017 for automated vehicles, a modification of § 12(1) StVG doubles the maximum amounts recoverable if the damage was caused by the operation of an autonomous driving function.[31] The legislative materials emphasise that an exclusion of liability of the keeper by § 17(3) StVG where the accident involves more than one motor vehicle and was caused by an 'unavoidable event' is less likely in the case of autonomous driving functions because the exclusion will not

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steuert das autonome Fahrzeug – vorübergehend? Zeitschrift für Rechtspolitik (ZRP) 2021, 109, 110.

23 The state of minimal risk ('risikominimaler Zustand') is defined by § 1d(4) StVG as a state in which the vehicle brings itself to a standstill at a location where this is as safe as possible and switches on its hazard lights.

24 See § 1e(2) nos 3, 5, 7 and 8 StVG; in particular, the vehicle has to put itself in such a state where it could only continue its way by violating traffic rules, where it would put other persons in danger, where it reaches its (technical or geographical) limits or in the case of a malfunction.

25 BT-Drucks 19/27439, 17.

26 BT-Drucks 19/27439, 15.

27 The duties of the technical supervisor are specified in § 1f(2) StVG.

28 Cf the seminal article by *G Wagner*, Verantwortlichkeit im Zeichen digitaler Techniken, Versicherungsrecht (VersR) 2020, 717 ff.

29 For a detailed justification of this solution, see *G Wagner*, VersR 2020, 717, 731 f.

30 As the keeper will often be the only liable subject (see below no 11 on the technical supervisor), this exclusion avoids the victim being left without compensation.

31 *Steege*, SVR 2021, 128, 136 expects that the concurring (§ 16 StVG) delictual liability of the keeper under § 823(1) BGB for an organisational fault (ie in supervising the technical supervisor) will remain relevant because no cap applies to this liability.

apply if the event is due to a defect in the vehicle's condition or a malfunction of its equipment.[32]

Although one could say that the technical supervisor in a way replaces functions of the traditional driver,[33] this person fulfils a different role. Strictly speaking, the vehicle is driver-less while it operates autonomously.[34] Hence, the question of liability of the technical supervisor arises. In the legislative process, it was debated whether the technical supervisor nevertheless ought to be included in § 18 StVG, which establishes the driver's liability for presumed fault. In the end, this proposal was rejected so that the general rules on fault-based liability (§§ 823ff BGB) apply to the technical supervisor.[35] Most importantly, this solution implies that the claimant has to prove fault of the technical supervisor. The government justified this solution as it saw a considerable difference between the tasks of a traditional driver and the tasks of the technical supervisor.[36] The government did not fear any detriment for victims of traffic accidents whose protection it regarded as sufficiently safeguarded by the strict liability regime for keepers and the compulsory insurance that the keeper has to take out.[37] This solution continues an existing trend of allocating liability to the keeper (rather than to the driver).[38] **11**

The amended § 1 sent 2 PflVG requires the keeper of a vehicle with autonomous driving functions to take out insurance also for the technical supervisor. This amendment serves as an additional protection of potential victims. However, there may be another reason for this extension of insurance coverage: the inclusion of the technical supervisor in the risk covered by the insurance prevents the insurer from taking recourse against the technical supervisor.[39] **12**

The Act stipulates certain duties for the producer of vehicles with autonomous driving functions (§ 1f(3) StVG) but it does not establish any new rules on the liability of the producer who develops and markets the autonomous functions.[40] This has been criticised for shifting risks created by the producer to the **13**

32 BT-Drucks 19/28178, 24; cf *G Wagner*, VersR 2020, 717, 732.

33 *P Schrader*, Neujustierung der Gefährdungs- und Verschuldenshaftung bei der Fahrzeugautomatisierung, Deutsches Autorecht (DAR) 2022, 9, 12.

34 BT-Drucks 19/27439, 31.

35 See also BT-Drucks 19/27439, 34.

36 See, however, in favour of a presumtion of fault, at least in a first phase, *M Wagner*, Gesetz zum autonomen Fahren – Streitpunkte im Gesetzgebungsverfahren, SVR 2021, 287, 289.

37 BT-Drucks 19/28178, 24f.

38 *Schrader*, DAR 2022, 9, 10.

39 *Schrader*, ZRP 2021, 109, 111.

40 It seems to be inherent in the idea of autonomous functions that even the programmer cannot predict the 'conduct' of the system in every particular instance, see *G Wagner*, VersR 2020, 717, 720. This entails a specific 'autonomy risk', see ibid, 724.

keeper and, ultimately, to the community of insured keepers.[41] Indeed, where the autonomous decisions taken by the vehicle exclude the keeper and the user, the producer of the autonomous systems enters centre stage as the person in control.[42] It therefore needs to be examined to what extent the existing rules on product liability are fit for this technology.[43] Furthermore, it should be borne in mind that where liability of the producer exists, the keeper's liability insurer will be able to take recourse against the producer.[44]

3. Exemption of Certain Delictual Claims from Prescription

14 From a doctrinal perspective – as well as from a policy perspective – it is a significant development that the so-called 'Act for Establishing Substantive Justice' (*Gesetz zur Herstellung materieller Gerechtigkeit*)[45] exempts certain delictual claims from prescription. As of 30 December 2021, the Act modifies § 194(2) BGB to the effect that private law claims arising from a crime for which no statute of limitations exists are not subject to prescription in private law, either. This refers to the crime of murder[46] and to crimes under the Code on International Criminal Law (*Völkerstrafgesetzbuch*, VStGB)[47]; the prosecution of all other crimes is time-barred at some point. The revised § 194(2) no 1 BGB applies to all claims that were not yet prescribed on 30 December 2021. It encompasses personal injury claims brought by the victim (in the case of attempted murder) or by the victim's heir(s) (for damage suffered by the victim in the case of completed murder) as well as claims for compensation of secondary victims (bereavement damages

41 *Schrader*, DAR 2022, 9, 10f; *id*, ZRP 2021, 109, 111.

42 *G Wagner*, VersR 2020, 717, 718, 725; see also ibid, 728 (producer is required to observe its product after it has been put into circulation).

43 Cf the analysis by *G Wagner*, VersR 2020, 717, 725ff, 733ff with further refs.

44 According to § 86 Insurance Contract Act (Versicherungsvertragsgesetz, VVG); see *G Wagner*, VersR 2020, 717, 732 with further refs on the controversy concerning this recourse.

45 Gesetz vom 21.12.2021 zur Änderung der Strafprozessordnung – Erweiterung der Wiederaufnahmemöglichkeiten zuungunsten des Verurteilten gemäß § 362 StPO und zur Änderung der zivilrechtlichen Verjährung (Gesetz zur Herstellung materieller Gerechtigkeit), BGBl I 2021, 5252; for a (critical) analysis, see *A Piekenbrock*, Die Unverjährbarkeit von Ansprüchen aus unverjährbaren Straftaten, JZ 2022, 124ff.

46 See § 78(2) of the Criminal Code (Strafgesetzbuch, StGB), exempting charges of murder (§ 211 StGB) from prescription.

47 See § 5 VStGB; to be sure, § 194(2) only applies if the claim is governed by German law, see art 15(h) Rome II Regulation, unless one would consider it to belong to domestic public policy under art 26 Rome II.

under § 844(3) BGB and claims for nervous shock). In contrast, the provision does not extend to damage to property brought about in connection with the murder (eg, murder by arson).[48]

15 The Act entered into force after a remarkable legislative procedure.[49] Its main thrust had originally been an amendment of § 362 of the Code of Criminal Procedure (*Strafprozessordnung*, StPO) where the Act establishes a new ground for reopening criminal prosecution proceedings after the accused had been acquitted in a first trial. Restricted to charges of murder, genocide, crimes against humanity, or war crimes against a person, a criminal procedure may be reopened to the disadvantage of the accused if new facts or evidence constitute a strong reason ('dringende Gründe') for a conviction of an accused who had previously been acquitted. The proponents of this amendment had cases in mind where an accused had been acquitted and new evidence, such as evidence provided by a DNA analysis that had not been an available technique at the time of the first trial, proves that the accused had in fact committed the murder. The proposed amendment was highly controversial because of its interference with the constitutional principle of 'ne bis in idem' enshrined in art 103(3) Basic Law (*Grundgesetz*). For this reason, the then Minister of Justice declined to sponsor the legislative draft. The draft was adopted after hurried parliamentary deliberations only shortly before the federal elections of September 2021. The Federal President, who is responsible for signing statutes into law, expressed his doubts as to the constitutionality of the amendment but signed the Act nonetheless because established constitutional practice would require more than doubts for him to decline his signature.[50] The amendment of § 194(2) BGB was only inserted into the draft statute by the Justice Committee of the *Bundestag* in the course of the parliamentary procedure and received far less public attention than the modification of the StPO. It was, however, severely criticised by the second chamber, the *Bundesrat*, who urged the federal government to re-examine the matter and adopted the statute nevertheless.

16 Before the amendment, claims affected by the new provision were subject to a 30-year period of prescription (§ 197(1) no 1 BGB), which applies to all claims for damages arising from an intentional violation of life, body, liberty, or sexual self-determination. According to § 200 BGB, the period begins to run from the moment

48 On the scope of the provision, see *Piekenbrock*, JZ 2022, 124, 126f.

49 See the detailed description by *Piekenbrock*, JZ 2022, 124, 124f with refs to the relevant legislative materials.

50 These doubts are explained in a press release of 22 December 2021, available at <https://www.bundespraesident.de/SharedDocs/Pressemitteilungen/DE/2021/12/211222-Gesetzesausfertigung-StPO-362.html>.

when the claim 'comes into being', which is generally read as the moment when the claim becomes enforceable.[51] The objective character of prescription that commences regardless of the claimant's knowledge of the claim is therefore compensated by the length of the prescription period. This special regime for intentional delicts was introduced in 2013 because the general, subjective three-year period (§§ 195, 199 BGB) had been regarded as insufficient in cases of sexual abuse.[52] The considerable extension of the prescription period was intended to enable victims of an intentional infringement of the interests mentioned to wait for the conclusion of criminal proceedings in the same matter before they bring their claim for damages to a civil court.[53] It corresponds to the long-stop established in § 199(2) BGB for any damages claim for personal injury.

17 Within the German system of prescription of delictual claims, the new provision is remarkable (and debatable) in two respects. First, the provision breaks with the general principle that all claims prescribe at some point. Among other objectives, prescription is to provide for legal certainty and to prevent the enforcement of 'stale' claims.[54] Under the new provision, it will be possible to bring claims against the tortfeasor's heirs or even their heirs years after the tortfeasor's death, while the accused's death sets a natural limit to any criminal prosecution.[55] As a result, it may happen that a civil court is required to deal with criminal charges arising out of events that occurred decades ago where a criminal trial would no longer be possible. This runs counter to the objectives of prescription. The BGB acknowledges claims that do not prescribe only in a very few instances.[56] All these instances have in common that they relate to a re-orientation of the present situation (eg, a rectification of the land register or a dissolution of a community of joint heirs), while the damages claims addressed by the new provision relate to events in the past.[57]

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51 *H Grothe* in: Münchener Kommentar zum BGB (MünchKomm-BGB), vol 1 (9th edn 2021) § 200 no 2; for details on the commencement of prescription concerning damages claims, see *R Zimmermann/J Kleinschmidt*, Prescription: General Framework and Special Problems Concerning Damages Claims, in: H Koziol/BC Steininger (eds), European Tort Law 2007 (2008) 26, no 11ff.

52 See MünchKomm-BGB/*Grothe* (fn 51) § 197 no 6f; *F Wagner-von Papp/J Fedtke*, Germany, in: K Oliphant/BC Steininger (eds), European Tort Law 2011 (2012) 242, no 8ff.

53 BT-Drucks 17/6261, 20.

54 For details, *Zimmermann/Kleinschmidt* (fn 51) no 5; *R Zimmermann*, '... ut sit finis litium': Grundlinien eines modernen Verjährungsrechts auf rechtsvergleichender Grundlage, JZ 2000, 853ff, both with further refs.

55 Cf the criticism by the Bundesrat in Printed Documents of the German Bundesrat (Bundesratsdrucksache, BR-Drucks) 662/21(B), 2; in the same vein, *Piekenbrock*, JZ 2022, 124, 127.

56 See §§ 194(2) no 2, 758, 898, 902, 924, 2042(2) BGB.

57 *Piekenbrock*, JZ 2022, 124, 127.

Secondly, in contrast to a number of other European legal systems, German law had so far abstained from tying its prescription periods for damages claims to criminal law.[58] In an admittedly very limited area of the law where the reasons for protecting the intentional tortfeasor may be low, this decision by the drafters of the original BGB[59] has now been overturned. This may be another reason for calling the new provision contrary to the system of prescription in private law. However, the connection which the Act establishes between criminal proceedings on the one hand and a claim for damages on the other has led one commentator to propose that an accused be denied the defence of prescription when the claim for damages is brought in an adhesive procedure before a criminal court and the claim relates to an intentional delict within the scope of § 197(1) no 1 BGB (see above, no 16).[60] Other authors advocate a coordination of prescription under private law and under criminal law in cases of murder to cater for evidence won from novel forensic methods and to restore the unity of the legal order.[61] It will be up to the German legislator to evaluate these positions when it hopefully reconsiders the new provision. **18**

4. Introduction of an Individual Claim for Damages in the Act against Unfair Business Practices

In transposition of art 11a of Directive 2005/29/EC concerning unfair commercial practices as amended by art 3 no 5 of Directive (EU) 2019/2161 regarding the better enforcement and modernisation of Union consumer protection rules,[62] the Ger- **19**

58 See eg § 1489 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB); art 60(2) of the Swiss Law of Obligations (Obligationenrecht, OR); art 2947(3) of the Italian Civil Code (Codice civile); art 10(1) of the French Code of Criminal Procedure (Code de procédure pénale); see, generally, *J Kleinschmidt*, Verjährung vorsätzlich begangener torts, Zeitschrift für Europäisches Privatrecht (ZEuP) 2009, 827, 842ff; and the comparative overview in *Piekenbrock*, JZ 2022, 124, 131; for the historical antecedents, see *id*, Befristung, Verjährung, Verschweigung und Verwirkung: Eine rechtsvergleichende Grundlagenstudie zu Rechtsänderungen durch Zeitablauf (2006) 137f.

59 See *B Mugdan* (ed), Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, vol 2 (1899) 414.

60 *Piekenbrock*, JZ 2022, 124, 127ff.

61 *R Koch*/*S Behr*, Zivilrechtliche Verjährung trotz strafrechtlicher Unverjährbarkeit? JZ 2018, 702, 706ff.

62 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] Official Journal (OJ) L 328/7.

man legislator has introduced a new § 9(2) into the Act against Unfair Business Practices (*Gesetz gegen den unlauteren Wettbewerb*, UWG).[63] Under the new provision, the consumer will be able to claim damages from another person who, by means of an unfair business practice prohibited by EU law,[64] intentionally or negligently induces a business decision which the consumer would otherwise not have taken. The provision entered into force on 28 May 2022.

20 As a transposition measure, the new basis of claim is not unique to German law but rather part of the Europe-wide 'New Deal for Consumers'. Nevertheless, it deserves to be mentioned in this report at least briefly because German unfair business practices law had previously catered for consumer interests on a collective level only. Thus, affording an individual claim to consumers presents a novelty in German law.[65] The introduction of the claim is often seen in the context of the diesel emissions scandal that showed the limits of the existing mechanisms designed for the protection of individual consumers.[66] In principle, the new claim does not bar existing claims on other grounds, nor is it barred by them.[67]

5. Modification of the Recourse by Social Security against Family Members of the Victim

21 Enacted already in 2020,[68] a significant modification of the recourse mechanism for social security against tortfeasors contained in § 116 of the Tenth Book of the Social Security Code (*Zehntes Buch Sozialgesetzbuch*, SGB X) applies as of 1 January 2021. Generally, § 116(1) SGB X provides for a subrogation of a damages claim to bodies of social security if these had paid benefits to the victim intended

63 Gesetz vom 10.8.2021 zur Stärkung des Verbraucherschutzes im Wettbewerbs- und Gewerberecht, BGBl I 2021, 3504; see *C Heinze*/*A Engel*, Der neue Schadensersatzanspruch für Verbraucher bei UWG-Verstößen, NJW 2021, 2609ff.

64 See *Heinze*/*Engel*, NJW 2021, 2609, 2610.

65 On this context, see *C Heinze*/*A Engel*, Durchbruch oder Dammbruch? – Der individuelle Schadensersatzanspruch bei Lauterkeitsverstößen, in: Deutsches, europäisches und vergleichendes Wirtschaftsrecht. Festschrift für Werner F. Ebke zum 70. Geburtstag (2021) 345ff with further refs.

66 *Heinze*/*Engel*, NJW 2021, 2609, 2614; the scandal is also referred to in the Commission proposal for the underlying Directive, see COM(2018) 185 final, 13.

67 For details on the relationship with other (contractual and extra-contractual) remedies, see *Heinze*/*Engel*, NJW 2021, 2609, 2612f.

68 Art 8 no 9 Siebtes Gesetz zur Änderung des Vierten Buches Sozialgesetzbuch und anderer Gesetze of 12 June 2020, BGBl I 2020, 1248; see *M Burmann*/*J Jahnke*, Die Neufassung des Angehörigenprivilegs des § 116 VI SGB X zum 1.1.2021, Neue Zeitschrift für Verkehrsrecht (NZV) 2020, 621ff.

to compensate the same damage (for instance, compensation for loss of earnings). Before its revision, paragraph (6) of the provision had prevented such subrogation in the case of a non-intentional infliction of damage by family members sharing the same household with the victim. The thrust of this exclusion is twofold.[69] First, preventing litigation about intra-familial infliction of damage aims to protect family peace that could be upset by the assertion of delictual claims from outside the family. Secondly, payments to be made by a family member upon a recourse claim by social security will often be to the detriment of the victim indirectly. The provision goes back to 1983 and was inspired by a much older similar exclusion that is today contained in § 86(3) VVG and curtails recourse actions by insurers against family members (and their liability insurers).

22 While the above-mentioned rationale was still regarded as sound in principle, its implementation in § 116(6) SGB X had given rise to doubts. The exclusion of claims against family members is therefore modified in three ways:

23 (i) In order to cater for the diversity of ways of living together,[70] the privilege that had previously been afforded to family members of the tortfeasor is extended to all persons living in the same household. This modification confirms an extension to cohabitants that had already been accepted in case law by way of analogy.[71] A comparable extension in the Insurance Contract Act enacted in 2008 paved the way for this case law and serves as a model for the modification.

24 (ii) Preventing a subrogation could lead to an unwanted consequence. While the victim received benefits from social security, it retained its claim for damages against the tortfeasor. Thus, the victim could freely decide to enforce the claim against the tortfeasor (or, in traffic accidents, rather: the tortfeasor's insurer). A double compensation could ensue.[72] The modification is intended to avoid this potential windfall (which is realised at the expense of household peace).[73] Henceforth, a subrogation takes place – so that the victim who has received social security benefits is no longer entitled to claim. The social security system is, however, barred from asserting the claim against the member of the same household at the time when the harmful event occurred. Again, this modification imitates an earlier revision of the Insurance Contract Act.

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69 Cf eg BGH 5 February 2013 – VI ZR 274/12, VersR 2013, 520; BGH 28 June 2011 – VI ZR 194/10, NJW 2011, 3715.

70 BT-Drucks 19/17586, 117.

71 BGH 5 February 2013 – VI ZR 274/12, VersR 2013, 520.

72 BGH 17 October 2017 – VI ZR 423/16, NJW 2018, 1242.

73 BT-Drucks 19/17586, 116f; *Burmann*/*Jahnke*, NZV 2020, 621, 622 who submit that the same rule ought to be applied to harmful events that occurred before 1 January 2021 by way of constitutional interpretation.

25 (iii) A new exception permits the enforcement of a claim directed against a household member to the extent liability is covered by compulsory liability insurance for vehicles. In this case, the direct action that exists towards compulsory insurers avoids any interference with household life.[74] By providing for this exception, the legislator intended to allocate the damage to the community of policyholders instead of the community of solidarity represented by social security.[75] However, while the other two modifications fostered a harmonisation of recourse mechanisms among different types of benefit providers (social security, private health insurance, ...), the introduction of the new exception disturbs the uniformity and may lead to undesirable discrepancies.[76]

B. Cases

1. BGH 19 January 2021, VI ZR 194/18:[77] Supervision Duties towards Children at a Horse Show

a) Brief Summary of the Facts

26 The claimants, the owner of a horse and her liability insurer, claimed indemnification from the organiser of a horse show and a declaration that the organiser must bear all the costs resulting from the injury caused by the horse to a child. The horse show, which included a number of riding tournaments, was organised by the defendant on his grounds and could be attended by spectators without any access restrictions. The defendant made various meadows available in which the tournament participants could park their horse trailers. One of these meadows bordered on a path, which was used by participants and visitors during the

74 However, it is not excluded to bring an action against the tortfeasor as well, *Burmann*/*Jahnke*, NZV 2020, 621, 623 (pointing to procedural advantages of suing both the tortfeasor and his insurer).

75 BT-Drucks 19/17586, 117.

76 See the detailed criticism by *Burmann*/*Jahnke*, NZV 2020, 621, 623ff.

77 NJW 2021, 1090 = VersR 2021, 460. A very similar case was decided on the very same day, see BGH 19 January 2021 – VI ZR 210/18, SVR 2021, 313 with case note by *F Pardey* = VersR, 2021, 452 = Beck-Rechtsprechung (BeckRS) 2021, 1443; see *M Wellenhofer*, Schuldrecht und Familienrecht: Haftung der Eltern gegenüber dem Kind, Juristische Schulung (JuS) 2021, 556; *H Ludyga*, Kein Anspruch des Kindes bei Aufsichtspflichtverletzung der Eltern, Neue Zeitschrift für Familienrecht (NZFam) 2021, 328; *M Hausleiter*/*B Schramm*, Aufsichtspflichtverletzung – Haftungsumfang der Eltern, Neue Juristische Wochenschrift Spezial (NJW-Spezial), 2021, 164; *P Schultess*, Verkehrssicherungspflichten vs. elterliche Aufsichtspflicht, VersR 2021, 1011, 1012.

tournament. In the meadow alongside the path, various agricultural machines were exhibited. Participants of the tournament had parked horse transporters and trailers behind these machines. It was here, in a space allocated to her by the defendant, that the horse owner, who was accompanying a tournament participant, had parked her vehicle and horse trailer.

After the tournament, the horse was brought back into the horse trailer, tied up and secured from behind with a holding bar. The ramp at the rear of the horse trailer and hatches at the side of the front were open because of the high air temperature. The owner left the trailer unattended and there were also no horse show personnel supervising the area around the trailers. **27**

A child of about three years, who was attending the show with his parents, entered the trailer unnoticed and was hit on the head by the horse's hoof and seriously injured. The horse owner's insurer indemnified the child. The case decided by the *Bundesgerichtshof* (BGH) concerned the allocation of liability between the horse owner and the horse show organiser, with the organiser arguing that he was not responsible for the tragic accident as the child's parents should have supervised the child more carefully. **28**

The *Landgericht* (LG) *Freiburg* dismissed the action.[78] The *Oberlandesgericht* (OLG) *Karlsruhe*, however, held that the defendant was obliged to reimburse the insurer one-third of all payments made to the child and to indemnify the horse owner in case she was subject to a claim by the child to the extent of one-third of the value of such claim.[79] **29**

b) Judgment of the Court

The defendant's appeal to the BGH was successful. The BGH upheld the *Landgericht's* decision to dismiss the action on the basis that the defendant was not jointly and severally liable with the horse owner pursuant to §§ 840, 426 BGB, as the organiser was not liable to compensate the injured child on the grounds of §§ 823(1), 31 BGB. **30**

The *Bundesgerichtshof* argued that the horse show organiser did not have to take any precautions to prevent the toddler from getting into the horse trailer parked nearby the tournament area. **31**

Generally speaking, a person who creates a source of danger is obliged to take the necessary and reasonable precautions to prevent harm to others as far as **32**

78 LG Freiburg 14 October 2016 – 1 O 209/15.

79 OLG Karlsruhe 20 April 2018 – 14 U 173/16, BeckRS 2018, 55140.

possible. The legally required safety requirements include those measures that a prudent and reasonable person, exercising caution within reasonable limits, would consider necessary and sufficient to protect others from harm. A person allowing a dangerous situation to unfold in his or her area of responsibility is also liable for road safety.[80] It was therefore obvious that the defendant was responsible for taking precautions against those visitors on the road or on the adjacent meadows coming to harm.

33 However, the BGH highlighted that not every abstract danger can be prevented. Therefore, it was necessary to take only those precautions which are reasonable in light of the danger. The standard of care required is satisfied if the necessary degree of safety is achieved. Therefore, it is sufficient to apply those safety precautions that a reasonable, prudent, careful and conscientious member of the relevant community would consider sufficient. If harm does exceptionally occur in such cases where a risk was only to be feared under particularly peculiar and remote circumstances, the injured party must bear the loss itself.[81]

34 Considering the setting of a horse show, the BGH was convinced that a small child under four should have been supervised by his parents in such a way that he was not left out of sight and could be taken by the hand immediately if necessary.[82] Therefore, the defendant was entitled to rely on the fact that small children would be supervised and would be stopped from entering the show participant's parked horse trailers. The case was distinguished from cases in which landowners had had to take additional safety measures because it was obvious that a certain danger zone offered a particular incentive for children to play there.[83]

35 It is also settled case law that every landowner must protect children from the consequences of their inexperience and imprudence if he or she knows or should know that they are using his land to play and if there is a risk that they may come in close contact with dangerous objects.[84] Against this background, during the proceedings it was especially disputed whether the defendant should have taken further precautions to prevent children from entering the parked horse trailers. In particular, the plaintiffs argued that the defendant should have secured the parking area, for example by dispatching personnel to supervise the area. The plaintiffs argued that such measures were appropriate as small children can escape from the supervision of their parents. However, the BGH found that such measures would only be necessary if the horse show organiser had known that children were

80 See BGH 2 October 2012 – VI ZR 311/11, NJW 2013, 48 para 15.
81 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 9.
82 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 17.
83 See BGH 14 March 1995 – VI ZR 34/94, NJW 1995, 2631.
84 See BGH 4 May 1999 – VI ZR 379/98, NJW 1999, 2364.

actually present in the parking area without authorisation and not under the supervision of their parents. In that case, additional supervision could have been appropriate. However, if the operator was not aware of this, he should not have had to expect underage children to be unauthorised and unsupervised in the area with parked horse trailers because of the close supervision obligation of the authorised adults. The BGH did not find any evidence that the defendant knew or should have known that unsupervised children played near the horse trailers.[85]

36 Further, the BGH recalled that additional supervision by the defendant would have left the parents' original duty of supervision unaffected. The person responsible for ensuring safety may rely to a degree on the fact that those responsible for a child will exercise a minimum of careful supervision. The trust in the performance of the duty of supervision by those responsible for it has an effect on his or her duty to safeguard. If dangers to children are neutralised to a degree by the required supervision of a third party, the safety expectations of the property owner, who may rely on such supervision, are accordingly reduced.[86]

37 The extent of the required supervision of minors is determined by their age and character, whereby the limit on the necessary and reasonable measures is determined by what reasonable parents should do in the specific situation in order to prevent harm. Young children up to the age of four need constant supervision so that they do not expose themselves to dangers in their environment which they cannot yet recognise and control due to their inexperience and imprudence. These dangers can arise from circumstances that are completely harmless for everyone else.[87]

38 In circumstances in which the supervision of small children is carried out incompletely, this represents a failure of supervision on the part of the parents or other persons entrusted with such supervision. The mere possibility of such a failure does not impose on the landowner responsible for road safety the duty to counteract the dangers arising from such supervisory failures. There is only cause to do so if there are concrete indications of a special risk, a risk which the BGH could not identify in the case at hand.[88]

39 In addition, the BGH ruled that a diligent horse show organiser did not have to take additional measures to prevent older children, who must not constantly be 'kept at bay' but who might nonetheless still not have a sufficient awareness of danger, from entering the area where the horse trailers were parked without proper supervision. As the danger arising from the open horse trailers was

85 See BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 17.
86 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 12.
87 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 14.
88 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 17.

obvious not only to the defendant but also to the visitors of the horse show, the parents of these children should have kept them away from that area. Even the possibility that an older child might suddenly 'escape' from supervision did not make the horse show owner responsible for the accident.[89]

c) Commentary

40 The decision complements the existing case law on parental duties of care and the duty of care of a third person controlling specific risks for children. The scope of supervision duties is essentially based on the age, character and nature of the child. The BGH made clear that children up to four years of age may not be given free space and require constant supervision. Furthermore, it is assumed that the more dangerous the actual situation, the higher the duty of supervision. In particular, the BGH clarified that if no special circumstances exist, persons responsible for road safety may rely on parents to fulfil their supervision duties sufficiently. To assess the scope of the parental duty of care and the defendant's duty to ensure safety for the show's visitors, the BGH applied the criterion of general duties of care (*allgemeine Verkehrssicherungspflichten*) to balance the obligation of the parents to supervise children and the obligation of the landowner to take measures to ensure road safety.[90] This criterion represents a suitable way to allocate liability in light of the dangerousness of a situation.

41 The generalised statement that children under the age of four always require constant supervision disregards the individuality and diversity of children. The assumption is nonetheless justified from the point of road safety and a fair distribution of liability. In this context, the point of view that greater danger is also accompanied by an increased duty of supervision deserves particular support. Therefore, parents must pay particular attention to their duty of care when attending a horse show. This is, amongst other things, due to the fact that horses are extraordinarily large and strong animals compared to children. Also, children are regularly inexperienced in dealing with them and can therefore easily put themselves in danger. This is especially the case if the horses are exposed to great stress at a horse show, which makes their behaviour all the more unpredictable and dangerous. Therefore, the overall rationally justified decision in differentiating parental supervision duties deserves approval.

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89 BGH 19 January 2021 – VI ZR 194/18, NJW 2021, 1090 para 23 f.

90 *P Schultess*, VersR 2021, 1011, 1012; *F Pardey*, Verkehrssicherungspflichten eines Reitvereins, Aufsichtspflichten der Eltern, Gesamtschuldnerausgleich; Feststellungsbegehren, SVR 2021, 314, 315 f.

2. BGH 23 February 2021, VI ZR 21/20:[91] Interplay of Contractual and Tortious Liability of a Plumber

a) Brief Summary of the Facts

A building insurer asserted a derived claim against a plumber for loss suffered by a building owner. In 1995, the plumber installed water taps in a newly built gymnasium. In 2009, leaks were found at seven taps in the building. The leaks were caused by the defendant's improper installation of the tap extensions. This had caused water to leak from the pipes, which had spread behind the wall sealing and into the floor construction and which caused moisture penetration. Despite the moisture penetration, the sports hall was usable at all times in its entirety for its intended purpose. **42**

All tap extensions were replaced by the building owner. The insurer claimed compensation for the damage resulting from the defective installation which caused water penetration in parts of the building including the walls and floors with approximately € 200,000 assessed for repair/renovation measures. **43**

b) Judgment of the Court

As the liability of the plumber could be based on the contract concluded with the building owner as well as on tort (under German law, the two systems of liability do not exclude each other), the BGH reiterated that the rules of tort liability are not superseded by the rules of contractual liability. Rather, both systems follow their own rules, which should safeguard different interests.[92] Whereas tort liability protects the *Integritätsinteresse*, ie remedy harm to property or other legal interests, such as life or bodily integrity, liability for improper performance of a contract ensures that the contractual partner receives compensation which is equivalent to the intended use of the acquired good or service (*Äquivalenzinteresse*). If the asserted damage corresponds with improper performance, there is no room for an additional claim under tort law. In such a scenario, the acquired goods or services were defective from the start and thus the defect is the only loss which can be remedied under contract law. There is no room for an additional tort claim as the **44**

91 NJW 2021, 1883 with case note *O Koos* = VersR 2021, 510, see also the comments by *M Finkelmeier*, VersR 2021, 647 and *T Hänsel*, Deliktische Haftung vs. Werkvertragsrechtliche Mangelhaftung, NJW-Spezial 2021, 237; *T Rapp*, Kumulation werkvertraglicher und deliktischer Ansprüche, Lindenmaier-Möhring Kommentierte BGH-Rechtsprechung (LMK) 2021, 810654.

92 BGH 23 February 2021 – VI ZR 21/20, NJW 2021, 1883 para 10.

person who acquired the defective goods or services never had unimpaired property and thus the rules of tort law do not apply. Only if the damage goes beyond the defect, for example by damaging other pieces of property, may an additional tort claim arise.[93]

45 In the case decided by the *Bundesgerichtshof*, the separation of contract and tort claims is not as simple as it looks at first sight because the plumber rendered a defective service, meaning that the owner of the building never had properly installed water taps. According to the BGH, the determination of whether the interest in integrity or only the interest in performance is impaired depends on whether, from an economic point of view, the defect affects the entire object for which damages are sought, for example if the object as a whole could not be used for its intended purpose. If this is the case, the injured party can assert only contractual claims. If the original defect however damages further parts of the product that were not defective before the work was carried out, there is a claim in tort. The BGH clarified that these principles initially developed in product liability cases also apply to the liability of a contractor rendering services.[94]

46 Whereas the lower courts did not see room for a tort claim, the *Bundesgerichtshof* argued that it was possible to replace the tap extensions without destroying other components of the building and that the gymnasium could be used even after the defective service was rendered.[95] In addition, the Court rejected the argument that compensation under tort law could not be made in respect of other parts of the building damaged by water because the pipe extensions had (also) served to protect these parts of the building (which could be damaged by the defective installations of the water taps). The BGH pointed out that such an interpretation would render the dividing line between contract and tort cases meaningless (as there would never be room for tort claims alongside a contractual claim) given that every service on a building would prevent other parts of the building from being damaged as the functioning of every building relies on the proper interaction of its individual components.[96]

47 As the building owner's tort claim against the plumber was also not time-barred, the BGH annulled the judgment of the lower court and remanded the case back to the *Oberlandesgericht Rostock*.

93 BGH 23 February 2021 – VI ZR 21/20, NJW 2021, 1883 para 11.
94 BGH 23 February 2021 – VI ZR 21/20, NJW 2021, 1883 para 16.
95 BGH 23 February 2021 – VI ZR 21/20, NJW 2021, 1883 para 17.
96 BGH 23 February 2021 – VI ZR 21/20, NJW 2021, 1883 para 18.

c) Commentary

The BGH affirmed its view on the relationship between contract law and tort law. **48**
In case of *Stoffgleichheit* (material equality) between the defect and the damage caused, the BGH highlighted that the loss can only be remedied by contract law and that there is no additional tort claim. Things are different if the damage goes beyond the improper provision of a service as the additional loss can also be claimed under tort law.

The BGH's clarification that, in the case of buildings, the criterion of broad **49**
contractual protection cannot necessarily be extended across the board to every case of non-compliance deserves approval. Otherwise the protective purpose of tort law would be eroded and absorbed by contract law. In sum, the judgment is good news for building owners, as contractual claims against plumbers are time-barred after five years if the plumber's work is work on a building (§ 634a(1) no 2 BGB). The limitation period starts with the acceptance of the work by the contractual partner (§ 634a(2) BGB) so, in the case at hand, the claim was time-barred when the damage was discovered. The limitation period for tort claims is generally three years but this period only starts at the end of the year in which the claim arose and in which the victim knew or could have known of the circumstances giving rise to the claim (§ 199(1) BGB). The limitation period thus starts only when the water damage was detected or could have been detected by a prudent party, which gives the building owner the chance to determine the cause of the damage and suspend the limitation period by negotiating with the tortfeasor (§ 203 BGB) or by instituting legal proceedings (§ 204 BGB).

3. BGH 18 May 2021, VI ZR 452/19:[97] Dieselgate Liability Extends to Purchasers of Second Hand Cars

a) Brief Summary of the Facts

2021 saw another BGH judgment in the Dieselgate saga.[98] The plaintiff sued VW, **50**
the manufacturer of the car, for compensation for damage caused by an improper 'defeat device' which had inhibited the effective measurement of emissions. The

97 Neue Juristische Wochenschrift Rechtsprechungs-Report (NJW-RR) 2021, 1111 = BeckRS 2021, 17826; comment by *G Vollkommer*, Entscheidungsanmerkungen zum Wirtschafts- und Bankrecht (WuB) 2021, 447.

98 On preceding judgments in 2020 see *J Kleinschmidt*, Germany, in: E Karner/BC Steininger (eds), European Tort Law 2020 (2021) 206, no 34ff.

claimant had bought a second-hand VW vehicle equipped with a diesel engine of the type EA189, Euro 5 emission standard, at a purchase price of € 26,900 from a car dealership which was a subsidiary of the defendant. The vehicle was equipped with a control device by the defendant, which, in 2015, had been classified as an illegal defeat device by the German *Kraftfahrtbundesamt* (Federal Motor Transport Authority). The defendant recalled all affected vehicles in order to install modified software. The claimant's vehicle was subsequently adjusted. Arguing that the software update did not make good the damage caused, the buyer demanded damages in the amount of approximately € 20,000 (purchase price plus finance costs minus benefits for use) and offered to return the vehicle to the seller. Amongst other arguments, the plaintiff argued that the car producer had intentionally inflicted damage 'against good morals' upon the buyers of cars with the defeat device so that his claim could be based on § 826 BGB.

b) Judgment of the Court

51 The BGH clarified that, contrary to the assumption of the lower court, the *Oberlandesgericht Koblenz*, a claim according to § 826 BGB does not fail because the plaintiff bought the vehicle manufactured by the defendant as a second-hand car. The OLG *Koblenz* had argued that the defendant could only be held liable for breach of § 826 BGB for putting new cars with the defeat device on the market and not when a second-hand car was resold as only in the first scenario had the defendant received an economic benefit. The *Bundesgerichtshof* pointed to a recent landmark judgment,[99] in which the court had held that the conduct of the defendant must also be seen as an intentionally inflicted loss 'against good morals' vis-à-vis the buyers of second-hand cars given that the car producer damaged all uninformed buyers of vehicles fitted with a defeat device.[100]

52 Furthermore, the BGH affirmed that if someone is induced by unlawful means to conclude a contract that he or she would otherwise not have concluded, this person may suffer pecuniary loss even if the performance is worth the purchase price, provided that the performance is not fully usable for the buyer's purpose. In such a scenario, the injured party must be able to free him- or herself from the contract which, from the buyer's perspective, is an unwanted obligation (*ungewollte Verpflichtung*). In addition, such an unwanted contract must be regarded as the damage to be compensated pursuant to § 826 BGB. This damage did not

99 BGH 25 May 2020 – VI ZR 252/19, NJW 2020, 1962.

100 BGH 18 May 2021 – VI ZR 452/19, NJW 2021, 1111 para 10.

cease to exist because the value or condition of the contract's object subsequently changed. In particular, the installation of a software update did not retroactively turn the unwanted contract into a wanted one even though the defeat device was removed.[101]

c) Commentary

This decision approves the BGH's judgments handed down on the diesel emission case in 2020. The court's clarification that purchasers of second-hand cars are just as worthy of protection as purchasers of new cars deserves approval, given that the conduct 'against good morals', ie the marketing of the car with a defeat device, caused losses to all buyers of such cars. 53

It can be predicted that the diesel emission scandal will continue to keep courts busy in 2022 as the case law handed down so far does not cover all types of engines, devices and car manufacturers. In August 2021, even a temporary 'auxiliary Senate' was established to deal with appeals in tort cases based on the allegation of improper defeat devices in cars with diesel engines. In a recent judgment, the BGH dismissed an action brought against Mercedes Benz where the device incorporated into the car (a so-called thermal window) controlled the exhaust gas recirculation system based on the outside temperature. The Court left open the question whether this was an improper defeat device because in any event the defendant's conduct in equipping the diesel engine with this particular device could not be qualified as 'against bonos mores'.[102] 54

4. BGH 29 June 2021, VI ZR 52/18:[103] Violation of Personality Rights via an Internet Blog

a) Brief Summary of the Facts

The plaintiff is an investor and the defendant operated the blog 'www.aktienversenker.de'. A considerable part of numerous blog posts dealt with the plaintiff and his allegedly incorrect decisions and embarrassing conduct. Amongst other things, the defendant referred to the plaintiff as a 'stock market loser' (*Börsen-* 55

101 BGH 18 May 2021 – VI ZR 452/19, NJW 2021, 1111 para 13.
102 BGH 16 September 2021 – VII ZR 190/20, NJW 2021, 3721.
103 NJW 2021, 3130.

versager) and a 'corporate raider' (*Firmenräuber*). In addition, the plaintiff alleged that the defendant had offered several times to stop the blog in exchange for payments so that the various negative blog posts were essentially used as a means of criminal blackmail (*Erpressung*) against him. The plaintiff claimed for injunctive relief against the defendant and monetary compensation for the infringement of personality rights.

56 The LG *Berlin* sided largely with the claimant[104] but, upon appeal, the *Kammergericht Berlin* (KG Berlin) dismissed the action.[105] The appeal to the BGH was successful.

b) Judgment of the Court

57 The litigation concerned the question of whether the defendant had violated the plaintiff's *allgemeines Persönlichkeitsrecht*, which the BGH answered in the affirmative. As the lower court had stated that the defendant had repeatedly demanded the payment of sums up to € 400,000 from the plaintiff to stop the 'campaign' against the investor, the BGH held that the blog was used as a means for (attempted) blackmail so that the plaintiff could demand that the defendant cease the activities directed against him in the blog based on §§ 823(1), 1004 BGB.

58 The defendant had violated the plaintiff's *allgemeines Persönlichkeitsrecht*, more precisely the plaintiff's honour, by using defamatory expressions in the blog.[106] The use of such expressions was also unlawful. Whether a person's *allgemeines Persönlichkeitsrecht* has been violated cannot be defined in absolute terms. Rather it must be determined by weighing the conflicting interests protected by the fundamental rights enshrined in the German Constitution as well as the affected fundamental rights and guarantees of the European Convention on Human Rights (ECHR). The infringement of the *general personality right* is only unlawful if the interest of the person concerned in protection outweighs the interests of the other party which are worthy of protection. Against this background, the BGH clarified, in line with the case law of the German *Bundesverfassungsgericht* and the European Court of Human Rights, that the blog's legality should be measured against the protection of the plaintiff's honour guaranteed by art 2(1), 1(1) GG and art 8 ECHR and the defendant's freedom of expression as per art 5(1) GG and art 10 ECHR. In balancing the plaintiff's interest in the protection of his honour with the defen-

104 LG Berlin 8 September 2015 – 27 O 58/15.

105 KG Berlin 21 December 2017 – 10 U 155/15, BeckRS 2017, 164363.

106 BGH 29 June 2021 – VI ZR 52/18, NJW 2021, 3130 para 22.

dant's right to freedom of expression, the BGH sided with the plaintiff as the blog served – as far as the lower court had dealt with the issue – as a means of coercion for attempted blackmail to the detriment of the plaintiff.[107]

c) Commentary

The BGH affirmed its case law on violations of the *allgemeines Persönlichkeitsrecht* and once again applied the general principles developed in the offline world to online blogs. The decision makes it clear that the interests of blog operators that use abusive language as a bullying strategy against individuals will usually not prevail. It had not yet been proved that the blog had indeed been used as a means of a criminal activity (attempted blackmailing), however, the BGH held that even if the lower court found that the blog had not been used as part of a criminal strategy, that did not mean that it was lawful. Rather the German Supreme Court has made it clear that blogs which have no real information function apart from bullying individuals are not operated lawfully. **59**

5. BGH 29 November 2021, VI ZR 258/18:[108] Heritability of Damages Claim for Infringements of Personality Rights Presupposes a Final Judgment

This judgment brings an end to the claims for damages of the former German chancellor Helmut Kohl against two 'ghost-writers' and the publisher of his biography (for details see the German Report in the European Tort Law Yearbook 2017). The *Landgericht Köln* had awarded the former Chancellor a record amount of compensation for violation of his personality rights.[109] After the appeal was lodged by the defendants, the former Chancellor died. Kohl's heir, his wife, argued that she was entitled to pursue the claim but the *Oberlandesgericht Köln* dismissed the action given that claims for monetary compensation for violation of personality rights cannot be inherited unless a final judgment has been obtained.[110] The dismissal was endorsed by the *Bundesgerichtshof*. The BGH held that a judgment which is not final and only provisionally enforceable does not put the heir into a position to claim compensation for violations inflicted upon the deceased person. **60**

107 BGH 29 June 2021 – VI ZR 52/18, NJW 2021, 3130 para 24.
108 NJW 2022, 868 with critical case note *B Gsell*.
109 LG Köln 27 April 2017 – 14 O 323/15, BeckRS 2017, 125934.
110 OLG Köln 29 Mai 2018 – 15 U 64/17, BeckRS 2018, 17910.

This interpretation of the law is plainly wrong as it favours the tortfeasor for no good reason and was already criticised in the German Report in the 2017 Yearbook.

6. OLG Dresden 19 July 2021, 4 W 475/21:[111] Explosion of Battery during Starting Process is Use of a Motor Vehicle

a) Brief Summary of the Facts

61 The claimant claimed damages from the defendant liability insurer of a truck. The plaintiff had inspected a truck offered for sale. The vehicle was no longer registered for road use and was parked on private property. As it could not be started, it was connected to another truck battery via a jumper cable. When the claimant tried to start the vehicle this way, the truck's battery exploded and injured him severely. The claimant claimed, inter alia, compensation for loss of earnings, travel expenses and a declaration of compensation for future damages from the truck's liability insurer. The defendant refused to indemnify the claimant, as the starting procedure had been a particularly dangerous situation. The claimant should not have tried to start the car with a jumper cable but should have brought the truck to a garage for repair.

62 As the plaintiff did not have sufficient funds for a lawsuit, he applied for legal aid (*Prozesskostenhilfe*). Within the proceeding for the grant of such financial support, the prospects of success of the claim are assessed on the basis of the facts presented and the evidence offered only by way of a summary examination. The LG *Leipzig* refused to grant legal aid.[112] The appeal to the OLG *Dresden* was successful as the court held that the intended legal action of the plaintiff had sufficient prospects of success within the meaning of § 114 Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

b) Judgment of the Court

63 On the basis of the plaintiff's submissions, the *Oberlandesgericht Dresden* assumed a presumably successful claim according to § 823(1) BGB, § 7 StVG, § 115 VVG.

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111 NJW-RR 2021, 1333; Recht und Schaden (r+s) 2021, 572 with case note by *K Maier*; Fachdienst Straßenverkehrsrecht (FD-StrVR) 2021, 441671 with case note by *O Kääb*.

112 LG Leipzig 27 May 2021 – 7 O 611/21, BeckRS 2021, 21844.

Pursuant to § 115(1) no 1 VVG, a third party can assert his or her claim directly against the car's liability insurer as such insurance is mandatory in Germany. An insurer has, however, only to step in if the damage to a person or to property occurred during the 'use' of the vehicle (*durch den Gebrauch*) as only this risk must be insured according to § 1 PflVG. The concept of 'use' enshrined in § 1 PflVG goes beyond the concept determining liability under § 7 StVG, which limits liability to damage caused operating (*bei dem Betrieb*) the car. As the OLG confirmed, the insurance under § 1 PflVG must cover damage caused by every action that is directly connected with the purpose of using the vehicle or its equipment.[113] Regarding the use of the vehicle, the special risk of motor vehicles is decisive. All dangers typically associated with its use are covered.[114] **64**

Applying these general principles, the OLG found that it was likely that the insurer had to indemnify the claimant. The damage occurred when the battery of the insured vehicle exploded during the starting process. The battery was not simply used as a source of energy but the claimant wanted to start the car to test whether it could still be driven. Therefore, the explosion was a danger emanating from the vehicle, or more precisely from the car's obviously defective and explosive battery, which justifies treating the starting process as 'use' of the vehicle.[115] **65**

c) Commentary

This court order supplements the existing case law on interpreting risks emanating directly from vehicles on the grounds of § 1 PflVG. The court clarified that the explosion of the battery of an insured vehicle during the starting process can be linked to the use of the insured vehicle, even if the vehicle is not registered anymore and is parked on private property and the starting process is supported by another vehicle. **66**

7. Personal Injury

As was the case in previous years, in 2021 there was a significant number of noteworthy decisions on personal injury of which only a very small selection can be referred to in this report. **67**

113 OLG Dresden 19 July 2021 – 4 W 475/21, NJW-RR 2021, 1333 para 4.
114 OLG Dresden 19 July 2021 – 4 W 475/21, NJW-RR 2021, 1333 para 4.
115 OLG Dresden 19 July 2021 – 4 W 475/21, NJW-RR 2021, 1333 para 4.

68 The *Oberlandesgericht München*[116] decided in August 2021 on the new provision on compensation for secondary victims (*Hinterbliebenengeld*) enshrined in § 844(3) BGB. Under German law, those secondary victims with a close personal relationship with a deceased primary victim can claim compensation for their grief, the *Hinterbliebenengeld*, from the tortfeasor.[117] Scholars disagree whether a nasciturus, ie a foetus that had not been born at the time of the death of the primary victim, can (after being born alive) claim compensation from the tortfeasor under § 844(3) BGB.[118] The OLG München answered this question in the negative. In its judgment, the court reiterated that the legal capacity of a human being begins on the completion of birth according to § 1 BGB.[119] Even though the BGH has admitted exceptions to this rule to ensure that a child that was harmed when in the womb and which was subsequently born with a disability can assert tort claims against the tortfeasor,[120] the OLG points out that this reasoning cannot be applied to claims under § 844(3) BGB. In the cases decided by the BGH, the child suffered its own physical damage that manifested after birth. In cases of secondary victims claiming *Hinterbliebenengeld*, there was only physical damage to the deceased primary victim whereas the *nasciturus* suffers merely non-recoverable non-material harm – apart from the loss of maintenance support which can be recovered from the tortfeasor under § 844(2) BGB.[121] Given that the claim under § 844(3) BGB is a special provision and that there are no indications that the legislature accidentally overlooked claims of unborn children when introducing the new rule, the OLG rejected an analogous application of the rule. In addition, the judges pointed out that there is no close personal relationship between the nasciturus and the deceased primary victim at the time of the latter's death.[122]

69 Another important decision on § 844(3) BGB was handed down by the *Schleswig-Holsteinisches Oberlandesgericht*. The OLG awarded an adult woman who lost her aged father (born in 1937) in a traffic accident € 10,000 as compensation.[123]

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116 OLG München 5 August 2021 – 24 U 5354/20, r+s 2021, 598 with case note by *C Burmann*; see also *O Kääb* FD-StrVR 2021, 441338.

117 For details see *W Wurmnest/M Gömann*, Germany, in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 207, no 1ff.

118 Arguing in favour of a compensation of the nasciturus *G Wagner*, NJW 2017, 2641, 2644; *C Huber*, JuS 2018, 744, 746; contra *M Burmann/J Jahnke*, NZV 2017, 401, 404; *G Spindler*, in: BeckOK BGB, 60th edn 1 November 2021, § 844 no 43 with further refs.

119 OLG München 5 August 2021 – 24 U 5354/20, r+s 2021, 598 para 21.

120 See BGH 5 February – VI ZR 198/83 NJW 1985, 1390.

121 OLG München 5 August 2021 – 24 U 5354/20, r+s 2021, 598 para 23.

122 OLG München 5 August 2021 – 24 U 5354/20, r+s 2021, 598 para 25.

123 OLG Schleswig 23 February 2021 – 7 U 149/20, r+s 2021, 656.

The court reasoned that this amount was justified because the father and daughter had a strong emotional relationship. Moreover, the court held that the amount of € 10,000 cannot be regarded as an upper limit for compensation but rather as a type of anchor for assessing the proper amount of compensation. As many of the details related to the application of the new law have not yet been clarified, the OLG allowed an appeal to the *Bundesgerichtshof* where the case is currently pending (VI ZR 73/21). The appeal decision will be of great interest, as the BGH will have to develop general guidelines to assess the amount of the *Hinterbliebenengeld*. If the reasoning of the OLG is upheld, it can be predicted that the amount of compensation awarded by the courts will be higher than anticipated by some scholars when § 844(3) BGB was adopted.

70 In a different case, the very same *Oberlandesgericht* awarded damages in the amount of € 800,000 to a 35-year-old cyclist for severe injuries resulting in permanent disability (complete paraplegia) caused by an accident after the BGH had remanded the case back to the court. The case concerned an accident involving a cyclist on a cross-country tour. When cycling on a dirt road, he crashed into a barbwire construction stretched across the road to block it for animals. In its initial judgment, the OLG had assessed the contributory negligence of the cyclist at 75 %.[124] Upon appeal, the BGH held that the cyclist did not violate the road traffic rules even though he could not stop the bike before crashing into the barbwire as the construction was very difficult to detect for a cyclist who was not aware of such a danger.[125] Also the fact that the cyclist might not have engaged the braking process properly did not reduce his claim, as he had no time to assess the situation adequately.[126] The BGH however pointed out that the use of 'click pedals' on a bumpy dirt road (which make it harder to get off the bike in a crash) might be regarded as a form of contributory negligence and remanded the case back to the OLG for further assessment. The OLG decided, after taking additional evidence, that the use of 'click pedals' by an experienced cross country cyclist on an uneven dirt road did not constitute contributory negligence.[127] The rather high amount of € 800,000 as compensation for pain and suffering was justified by the severity of the injuries and the fact that the accident, from one moment to the next, turned the relatively young cyclist from an active person into a person who will require around-the-clock care throughout his life.[128]

124 OLG Schleswig 10 August 2017 – 7 U 29/16, BeckRS 2017, BeckRS 160004.

125 BGH 3 April 2020 – III ZR 251/17, NJW 2020, 3106 para 37ff with case note by *O Kääb*, FD-StrVR 2020, 429976; see also *F Koehl* SVR 2020, 219; *S Omlor*, JuS 2020, 977.

126 BGH 3 April 2020 – III ZR 251/17, NJW 2020, 3106 para 44.

127 OLG Schleswig 23 February 2021 – 7 U 149/20, r+s 2021, 656 para 40ff.

128 OLG Schleswig 23 February 2021 – 7 U 149/20, r+s 2021, 656 para 58ff.

71 A record-breaking amount of damages for pain and suffering (€ 1 million) was awarded by the *Landgericht Limburg* to a small child that was severely injured (severe brain damage, epilepsy, hip dislocation) in a hospital by improper treatment of a nurse.[129]

8. Coronavirus Litigation

72 It is no surprise that the COVID-19 crisis has had an impact on the application of German tort law as more and more cases are brought in connection with the pandemic.

a) Disinfection Costs

73 One line of cases concerns disinfection costs for things (regularly cars) that were damaged by the tortfeasor and repaired by a third party. Often the repair companies charged a fee for disinfection of the car (prior to or after the repair took place).

74 Many courts held that the tortfeasor or their insurers did not have to pay for the disinfection after the damaged car was repaired as the disinfection and hygiene measures were too remote to be attributed to the tortfeasor. Amongst other courts, the District Court (*Amtsgericht*, AG) *Stuttgart* declined to find that such damage is adequately caused by the tort.[130] In particular, the court emphasised that these potential losses are a result of the peculiar and unusual circumstances of a pandemic caused by the COVID-19 virus, which statistically usually occur only once in a period of 100 to 1,000 years. Therefore, the court regarded the pandemic as an improbable circumstance ultimately not leading to disinfection costs being incurred on the occasion of the accident. The AG *Kassel* considered the question of additional disinfection and hygiene measures after the repair on the grounds of § 249 BGB.[131] The court highlighted in particular the need to reimburse necessary repair costs that appear from the point of view of a reasonable person in the situation of the injured party in order to remedy the damage and also dealt with the aspect of contributory negligence (§ 254 BGB). The court assumed that disinfection and hygiene measures after the repair of a car are not necessary costs

129 LG Limburg 28 June 2021 – 1 O 45/15, VersR 2022, 381 (not final).

130 AG Stuttgart 28 April 2021 – 46 C 1202/21, COVID-19 und alle Rechtsfragen zur Corona-Krise (COVuR) 2021, 359 with case note by *P Schultess*.

131 AG Kassel 26 March 2021 – 435 C 4071/20, NJW-RR 2021, 818 = SVR 2021, 352.

for protective measures. The disinfection and hygiene measures were not required in order to repair the damage caused by the car accident. In addition, they served neither the customer nor were they covered by the customer's repair order. The court held that the disinfection measures are not connected to the repair job and merely acknowledged their necessity for protecting the employees. In addition, some courts also rejected the recoverability of a COVID-19 'flat-rate' of around € 30 or € 60 for disinfection of contact surfaces in the interior of the car after the repair as disproportionate in relation to the usual effort of cleaning.[132]

75 It seems that the courts' hostility towards allowing claims for compensation for such disinfection costs is also encouraged by the observation that such disinfection costs are regularly not charged in other areas where there is direct contact between service providers and customers, for example in restaurants or with regard to repairs carried out by craftsmen in customers' homes. Rather, such fees are prominent in industries where an insurer steps in to cover the damage, such as is the case after car accidents.[133]

76 There are however also courts arguing that disinfection costs should be reimbursed. The AG *Heinsberg* held that in times of the COVID-19 pandemic, a hygienic cleaning after a vehicle has been repaired and touched by third parties is necessary for health reasons.[134] In addition, the LG *Stuttgart* assumed that the injured party may expect the disinfection of the essential contact surfaces after the repair of the vehicle.[135] This court held that, amongst other things, the steering wheel, gearshift and handgrip are essential surfaces and argued that the interest of the tort's victim in not exposing him-/herself to infection is particularly worthy of protection considering the severity of a potential COVID-19 infection. Further, the court estimated disinfection costs in the amount of approximately € 30 as proportionate for regular cases.

77 To conclude, some courts have granted damages for disinfection and hygiene measures to the injured party[136] but many did not.[137] As a result, the overall case

132 AG Bremen 22 April 2021 – 9 C 41/21, Neue Juristische Online-Zeitschrift (NJOZ) 2021, 1141; AG Kassel 26 March 2021 – 435 C 4071/20, NJW-RR 2021, 818 = SVR 2021, 352.

133 See *R Balke*, SVR 2021, 352, 353 f.

134 AG Heinsberg 4 September 2020 – 18 C 161/20, COVuR 2020, 699.

135 LG Stuttgart 21 July 2021 – 13 S 25/21, COVuR 2021, 605.

136 AG Heinsberg 4 September 2020 – 18 C 161/20, COVuR 2020, 699; AG München 27 November 2020 – 333 C 17092/20, DAR 2021, 38; LG Stuttgart 21 July 2021 – 13 S 25/21, COVuR 2021, 605; see also *A Staudinger/E Altun*, Unfälle in Corona-Zeiten und die Erstattung von Desinfektionskosten, NZV 2021, 169, 169 ff.

137 AG Bremen 22 April 2021 – 9 C 41/21, NJOZ 2021, 1141; AG Kassel 26 March 2021 – 435 C 4071/20, NJW-RR 2021, 818 = SVR 2021, 352; AG Saarbrücken 25 September 2020 – 120 C 279/20 (05), SVR 2021, 73; AG Stuttgart 28 April 2021 – 46 C 1202/21, COVuR 2021, 359; *F de Biasi*, NZV 2021, 113,

law on disinfection and hygiene costs after the repair is still inconsistent and controversial.

b) Compensation for Pain and Suffering

78 Further, one lower court granted damages in the amount of € 250 to a 'victim' who was deliberately coughed at by the tortfeasor, even though it remained unclear whether the victim was infected with the coronavirus at all.[138] In this case decided by the AG *Braunschweig*, the plaintiff worked for the city of Braunschweig and was in charge of enforcing the corona measures imposed by public bodies in public spaces. Under these rules, only a limited number of people were allowed to be present at a city market at the same time. As the defendant entered the market without the permission of the security personnel and apparently by bypassing a longer queue with people waiting for the permission to enter, the plaintiff approached the defendant and instructed him to leave the market and to queue properly. In the course of the following argument about this order, the defendant deliberately coughed – from a distance of around one metre – several times into the plaintiff's face as he disliked the order. As a consequence, the plaintiff went into a voluntary self-quarantine for 14 days and suffered from sleepless nights for at least a week due to the uncertainty about a possible COVID-19 infection and the resulting psychological stress. The plaintiff however did not take a COVID-19-test, so it remained unclear whether he had caught the virus at all.

79 The AG *Braunschweig* argued that coughing on someone constitutes an injury to health and bodily harm in the sense of § 823(1) BGB. This interpretation of the law is not very convincing. As the plaintiff did not show any physical reaction, an interference with bodily integrity cannot be assumed. And given that it was even unclear whether the defendant carried the coronavirus (let alone whether it was transmitted by the coughing), even an injury to health is questionable. The psychological stress suffered by the plaintiff is merely based on the danger that coughing may transmit the virus but this alone is not a violation of the plaintiff's health. The mere risk that one might have caught an illness should not suffice to amount to an injury to health.[139] To be able to grant compensation in 'coughing cases' in which

113ff; *Balke*, SVR 2021, 104, 105f; differentiating AG Wolfratshausen 15 December 2020 – 1 C 687/20, SVR 2021, 105.

138 AG Braunschweig 29 October 2020 – 112 C 1262/20, r+s 2021, 112 = COVuR 2021, 90 with case note by *E Schlereth* = Neue Justiz (NJ) 2021, 164 with case note by *B Piper*.

139 *H Eibenstein*, Anmerkung zu AG Braunschweig, r+s 2021, 112, 114. A different (and disputed) question is whether, in the case of an infection, a violation of bodily integrity and health can be

no infection can be proven, the court should have discussed a violation of the plaintiff's dignity as part of the *allgemeines Persönlichkeitsrecht*. Coughing at somebody has, in times of a pandemic, a similar effect as, for example, spitting at someone in normal times and can thus lead to a claim for money for pain and suffering even though it does not cause damage to health or bodily harm.[140] But even this reasoning might be flawed because coughing at somebody will often not have a similar effect as spitting, where it cannot be proven that at least some 'particles' came into contact with the victim.

Finally, the *Landgericht Köln* dismissed an action for pain and suffering **80** brought by the parents of a three-year-old child against the authority that ordered the child to go into quarantine after another child in the same kindergarten tested positive. The claim was rejected because the order was in accordance with the law.[141]

c) No Discrimination by Face Mask/Medical Certificate Control upon Entering a Shop

In Germany, a substantial number of people argue that COVID-19 is no more than **81** a type of flu and that the measures to contain the virus are grossly exaggerated. For these people, wearing a face mask is a significant burden. But there are also people who, for medical reasons, are exempt from wearing a face mask. During the pandemic, customers could only enter shops if wearing a face mask (mouth-nose-protection) or upon presentation of a medical certificate indicating that for medical reasons they are exempt from wearing a face mask.

A customer claimed that the mandatory presentation of a medical certificate **82** exempting him from the mask requirement when entering a shopping centre represented an impairment of participation in society as prohibited by § 19 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, AGG) and a violation of the *allgemeines Persönlichkeitsrecht*. This claim was for good reason straightforwardly rejected by the *Landgericht Kiel*. The court held that shop owners are authorised to make the admission conditional on the presentation of a medical certificate showing an exemption from the mask requirement.[142] The court clarified

assumed even if the victim shows no physical reaction. This is assumed by *O Brand*/*O Becker*, Deliktische Haftung bei einer Ansteckung mit SARS-CoV-2, NJW 2020, 2665 and rejected by *H Eibenstein*, r+s 2021, 112, 114.

140 *H Eibenstein*, r+s 2021, 112, 114.

141 LG Köln 26 October 2021 – 5 O 117/21, BeckRS 2021, 36053.

142 LG Kiel 24 June 2021 – 13 O 196/20, COVuR 2021, 603.

that the presentation of a medical certificate does not constitute an impairment of participation in society pursuant to § 19 AGG. In particular, the pandemic constituted an objective reason for different treatment on the grounds of § 20(1) AGG. Further, a violation of the *allgemeines Persönlichkeitsrecht* required a serious infringement of this right, which the court could not find in the case at hand.

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