

B. Cases

1. Oberster Gerichtshof (Austrian Supreme Court, OGH)⁵ 5 March 2019, 1 Ob 198/18a:⁶ Liability of Public Authorities for Incorrect Land Register Status?

a) Brief Summary of the Facts

- 4 When the new owner of a property was entered in the Austrian land register, a prohibition of encumbrance and sale benefitting his son was mistakenly not registered. Later, the owner took personal liability for a loan granted by the claimant. The claimant did not pursue a lien on the property at the time of the conclusion of the contract. After some time, when a lien and a prohibition of encumbrance and sale benefitting the claimant was to be registered, the land registry noticed the errors and corrected the land register status by incorporating a prohibition of encumbrance and sale benefitting the son of the owner with priority. Reasoning that if the prohibition benefitting the son had been duly registered the loan would not have been granted, the claimant sought damages based on the act on liability of public authorities (*Amtshaftungsgesetz*, AHG). Both, the Court of First Instance and the Court of Appeal dismissed the claim.

b) Judgment of the Court

- 5 The OGH focused on the protective purpose of the rule, emphasising that only such damage was to be compensated which the violated provision (at least among others) intended to prevent.⁷ Furthermore, the OGH stressed that while the land register provided information on the legal status of property, it did not provide information on assets and creditworthiness.⁸ According to the OGH, the

5 Cases are available at <<http://www.ris.bka.gv.at/jus>>.

6 Evidenzblatt (EvBl) 2019/103 = Juristische Blätter (JBl) 2019, 448 = Zivilrecht aktuell (Zak) 2019/249 = Österreichische Immobilien Zeitung (OIZ) 2019, 24 = Baurechtliche Blätter (bbl) 2019, 156 = Österreichisches Bankarchiv (ÖBA) 2019, 613 = Zeitschrift für Finanzmarktrecht (ZFR) 2019, 410 with cmt by *M Eliskases* = Wohnrechtliche Blätter (wobl) 2020/28.

7 RIS-Justiz RS0050038 (T21).

8 OGH Plenissimarbeschluss 13.1.1909, Revision (Rv) V, 2049/8 Judikatenbuch (JB) 188 = Glaser/Unger Neue Folge (GIUNF).

Austrian legislator did not intend a protection of an undefined group of persons. Rather, the OGH articulated the concept that only those individuals who hold rights recorded in the land register or who directly seek to obtain such rights and thus participate in land register proceedings are to be protected. The OGH denied a parallel to liability for incorrect information from public authorities. According to the OGH, while such information is intended to enable/facilitate economic dispositions, the land register above all serves as a basis for information for individuals participating in legal transactions recorded in the land register.

In addition, it was assessed whether the individual and the land registry ⁶ were bound by a special legal connection, or whether the performance of public authorities affected such a large and indefinite number of persons that they could be regarded as equivalent to the general public.⁹ In the OGH's view, a mere extract from the land register did not establish such a connection. The fact that a fee was to be paid for the extract from the land register did not alter that conclusion. The claimant's losses were considered to be a mere 'side effect' of the incorrect entry in the land register. Thus, the OGH denied liability and dismissed the claim.

c) Commentary

Under § 1 AHG, entities governed by public law are liable under the provisions ⁷ of civil law for damage which the individuals acting as their organs have inflicted 'on whomsoever'. The wording of § 1 ('whomsoever') does not imply liability on the entire public.¹⁰ Rather, the principles of the protective purpose of the rule apply.¹¹ This doctrine serves as a limitation of liability. Only such damage should be covered by liability which the respective provision intends to prevent.¹² The protective purpose can be divided into different aspects: on the one hand, the purpose related to the respective damage (objective scope); on the other hand, the purpose related to the respective type of causation (modal scope). In addition – as was relevant in the present case – it must be examined

⁹ RIS-Justiz RS0049993.

¹⁰ OGH 1 Ob 24/88 Sammlung Zivilrecht (SZ) 61/189.

¹¹ RIS-Justiz RS0050038.

¹² H Koziol, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/15 ff.

whether the violated rule was intended to protect the respective aggrieved party (personal scope).¹³

- 8 Considering the following examples of public liability claims, it seems difficult to determine the personal scope of the protective purpose of the rule: according to settled court practice, the purpose of official information is to protect the disposition of the person requesting the information. As the OGH reminded, such information is intended to facilitate economic dispositions.¹⁴ Consequently, even in cases of mere financial loss, liability can arise if the information given was incorrect, incomplete or omitted.^{15,16} According to these principles, an incorrect confirmation that land is designated as building land can entail liability, not only towards the owner of the property in question, but also towards a prospective developer.¹⁷ In 1 Ob 48/00s, the OGH extended the personal scope of such information directly to a lender, who granted a buyer a loan in reliance on such confirmation. The lender was entitled to compensation based on the AHG.¹⁸ If in the present case the bank had not used the land register as a basis for its decision but rather a building land confirmation, the (municipal) authorities would have been liable.
- 9 Quite the contrary with regard to the land register. Damage to third parties who do not participate in land register transactions does not give rise to liability. According to the OGH, if the damage of these parties were considered within the personal scope of the protective purpose of the rule, a boundless public liability would be established.

13 *Koziol* (fn 12) no 7/18.

14 RIS-Justiz RS0113363; RS0113365.

15 OGH 1 Ob 178/06t *Recht der Umwelt* (RdU) 2007/112.

16 OGH 1 Ob 79/19b *EvBl-LS* 2020/1; *W Kleewein*, Die rechtliche Stellung des Sachverständigen für Naturgefahren im Raumordnungs- und Bauverfahren der Gemeinden, *RdU* 2018/65; OGH 1 Ob 247/15b *Zeitschrift für Vergaberecht und Bauvertragsrecht* (ZVB) 2016/88 with cmt by *L-M Wagner*; OGH 1 Ob 14/10f *Zeitschrift für Wirtschaftsrecht* (ecolox) 2010/316 with cmt by *T Rabl*; OGH 1 Ob 154/08s *ecolox* 2009/329; *L Held*, Auskunftserteilung, Baubewilligung, Flächenwidmungsplan: Haftung der Gemeinde als Behörde, *Recht und Finanzen für Gemeinden* (RFG) 2008/26; OGH 1 Ob 225/07f *EvBl* 2009/44; *M Hecht*, Amtshaftung für rechtswidrig erteilte Genehmigungen gegenüber Bewilligungswerbern? *RdU* 2001, 123; OGH 22.2.2000 1 Ob 14/00s; OGH 1 Ob 48/00s *SZ* 73/90.

17 OGH 1 Ob 247/15b *ZVB* 2016/88.

18 OGH 1 Ob 48/00s *SZ* 73/90.

2. OGH 28 March 2019, 2 Ob 179/18i:¹⁹ Loss of Housekeeping Capacity

a) Brief Summary of the Facts

The claimant was injured in an accident and sought, inter alia, compensation 10 for loss of housekeeping capacity. For years, the claimant had taken care of her brother-in-law, who lived in the same household and who was severely mentally handicapped and suffering from alcoholism. The claimant managed the household predominantly on her own. The claimant also assisted her brother-in-law in personal hygiene and cleaning. The brother-in-law received an attendance allowance of about € 300 per month, which he gave to the claimant. While the Court of First Instance awarded the claimant the full amount of the costs of running the household, including the share attributable to the brother-in-law, the Court of Appeal reduced the compensation by this share.

b) Judgment of the Court

In the proceedings before the OGH, only that share was contested which was 11 attributable to the claimant's brother-in-law. In its reasoning, the OGH laid down the concept of compensation of loss of housekeeping capacity. The OGH referred to previous academic writing, according to which, it is irrelevant whether the person who runs the household fulfils an obligation under family law or is obliged to provide maintenance to members of the household.²⁰ The OGH concluded that, if spouses, by mutual agreement and on a permanent basis, have organised their household in such a way that a person not entitled to maintenance is also provided for, the share of the damage attributable to this person must also be compensated. Translated to the present case, the OGH took the view that the claimant's housekeeping activities had economic value insofar as the necessary services did not have to be provided by third parties. Moreover,

¹⁹ EvBl 2019/147 with cmt by *S Gruber* = Österreichische Richterzeitung (RZ) 2019, 114 with cmt by *A Spenling* = Zak 2019/367 = JBl 2019, 583.

²⁰ *E Karner/N Wallner-Friedl* in: *E Karner/K Oliphant* (eds), *Loss of Housekeeping Capacity – Austria* (2012) no 31; *C Huber*, *Fragen der Schadensberechnung* (2nd edn 1995) 501f; *C Huber*, *Neuere Entwicklungen beim Personenschaden in der höchstrichterlichen Rechtsprechung Deutschlands und Österreichs*, *Haftung und Versicherung (HAVE)* 2010, 253 (263 f); dissenting *R Reischauer* in: *P Rummel*, *ABGB* (3rd edn 2007) § 1325 no 39.

the members were living together upon a corresponding economic agreement²¹. It was therefore irrelevant to what extent the claimant would have been obliged to carry out housekeeping activities under family law. The decisive factor was the activities which, in the absence of the accident, she would have continued to undertake. Furthermore, the OGH pointed out that this was not third-party damage because it was exclusively the claimant who suffered the primary damage resulting from the loss of capacity to work. The OGH considered the compensation for this loss of earnings to be independent of any payment:²² consequently, it was also irrelevant whether the claimant received a payment from her brother-in-law for her work. The OGH rejected setting off the attendance allowance received by the brother-in-law against the compensation for damage, because the injured person was not the person who received the allowance.

c) Commentary

- 12 The judgment is based on § 1325 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB)²³: accordingly, a tortfeasor causing bodily injury is liable, inter alia²⁴, for the loss of (future) earnings. The term earning capacity refers to the ability to earn a living.²⁵ This also includes the capacity to manage the household (cleaning, cooking²⁶, parenting, nursing family members, gardening²⁷, shovelling snow, chopping wood and running errands,²⁸ organising family life and social relations²⁹).³⁰ It follows from these considerations, however, that the

21 *K-H Zoll*, *Entwicklungen im Personenschadensrecht*, r + s 2011, 133, 139 f.

22 OGH 20.11.1997 2 Ob 56/95; 2 Ob 208/75 SZ 48/119 = *Zeitschrift für Verkehrsrecht* (ZVR) 1976/320; 2 Ob 367/67 SZ 41/58 = ZVR 1969/87.

23 The provisions on strict liability also provide for compensation for loss of housekeeping capacity.

24 Compensation for treatment costs, pain and suffering and increased needs.

25 *Karner/Wallner-Friedl* (fn 20) no 1 ff; *H Koziol*, *Österreichisches Haftpflichtrecht II* (3rd edn 2018) 364; OGH RIS-Justiz RS0030606; RS0087381.

26 OGH 2 Ob 100/07f ZVR 2008/228 with cmt by *C Huber*.

27 OGH 7 Ob 14/07z ZVR 2011/145 with cmt by *C Huber*.

28 Cf *Karner/Wallner-Friedl* (fn 20) no 38 ff.

29 *Huber*, *Schadensberechnung* (fn 20) 468.

30 Cf *Karner/Wallner-Friedl* (fn 20) no 1; for a comparative perspective cf *E Karner/K Oliphant* in: *E Karner/K Oliphant* (eds), *Loss of Housekeeping Capacity – Comparative Perspective* (2012) 275 f; *E Karner*, *Der Ersatz des Haushaltsschadens im europäischen Vergleich*, *HAVE* 2012, 168; *E Karner*, *Fragen der objektiv-abstrakten Schadensberechnung*, in: *FS für Attila Fenyves* (2013) 203.

inability to pursue a hobby³¹ or a voluntary activity³² shall not be compensated. Claims for loss of earnings and loss of housekeeping capacity can be accumulated if the injured party is working but is also running the household. As the OGH also stated in the present case, it is irrelevant whether or not a remuneration was paid for the household activities.³³ In the event of permanent impairment, a pension is generally granted without time limit and is calculated on the basis of the gross income of a professional housekeeper.³⁴

If the injured party lives on her/his own or if housekeeping activities are carried out partly for the injured party's own benefit, loss of housekeeping capacity is not considered as loss of earning capacity. Nonetheless, the injured party is entitled to compensation due to increased needs (*vermehrte Bedürfnisse*).³⁵ If the injured party receives an attendance allowance (*Pflegegeld*), the claim against the tortfeasor is transferred pursuant to the *cessio legis* according to § 332 Austrian Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*, ASVG). Thus, the claim of the injured party against the tortfeasor is reduced corresponding to the sum of the attendance allowance.³⁶ Since in the present case not the injured party but the brother-in-law received an attendance allowance, the awarded sum was not reduced.

Damages for loss of housekeeping capacity are assessed in accordance with the particular circumstances of the case, such as the number of persons living in the household, etc, and the (notional) costs of a professional housekeeper.³⁷ Statistical tables regarding the average amount of housework are not referred to.³⁸ If a professional housekeeper is employed, the actual costs have to be compensated.³⁹ However, whether such a professional housekeeper is hired is irrelevant, since the tortfeasor shall not benefit from an increased effort the injured party or his/her relatives is/are willing to make.⁴⁰ Even if third parties

31 *Karner/Wallner-Friedl* (fn 20) no 41; *S Gruber* in her cmt EvBl 2019/147.

32 OLG Innsbruck 4 R 30/91 ZVR 1992/55.

33 Cf OGH 2 Ob 138, 139/83 ZVR 1985/46; 8 Ob 70/87 ZVR 1989/16; 2 Ob 345/00z Sammlung Ehe- und Familienrechtlicher Entscheidungen (EFSlg) 97.038 = EFSlg 97.039 = EFSlg 97.040 = EFSlg 97.041.

34 OGH 8 Ob 86/84 ZVR 1987/56; 2 Ob 345/00z EFSlg 97.038 = EFSlg 97.039 = EFSlg 97.040 = EFSlg 97.041; *Karner/Wallner-Friedl* (fn 20) no 21 ff.

35 *Karner/Wallner-Friedl* (fn 20) no 15 f.

36 *Karner/Wallner-Friedl* (fn 20) no 55.

37 *Karner/Wallner-Friedl* (fn 20) no 31 f.

38 *Karner/Wallner-Friedl* (fn 20) no 42; *C Huber* in his cmt ZVR 2011/145 (257).

39 *Karner/Wallner-Friedl* (fn 20) no 45.

40 *Karner/Wallner-Friedl* (fn 20) nos 4, 9 f, 43 ff; *Huber* in his cmt ZVR 2011/145 (257).

(increasingly) help out in the household, this circumstance does not reduce the claim for damages.⁴¹ If a third party pays these costs, the loss is shifted to that third party, which shall not benefit the tortfeasor. Convincingly, E Karner and N Wallner-Friedl argue that, in such cases of shifted loss, the right to claim damages should also be granted to the third party.⁴²

- 15 As noted by the OGH, most of the previous cases of loss of housekeeping capacity concerned wives and mothers running the household.⁴³ In most cases, therefore, persons who took care of the so-called family nucleus (*Kernfamilie*) were injured. However, a decision dating back to the 1960s already upheld a claim for compensation for an unmarried claimant's impairment of household management that was not subject to family law.⁴⁴ Furthermore, in the 1980s, in the case of a household that also included the mother-in-law and a self-sustaining son, compensation was awarded undiminished.⁴⁵ These cases, like the present, show that compensation can also be awarded if persons that are not legally obliged/entitled to maintenance are living in the household (eg unmarried co-habiting partners⁴⁶).⁴⁷ Rather, the concept of compensating for what has been made impossible by the injury applies. The injured party shall be put in the same position he/she was in before the injury (*restitutio in integrum* § 1323 ABGB⁴⁸). If the household includes a person to whom the injured party is not obliged to pay maintenance, the loss of capacity to care for this person can be compensated. The OGH draws the line of this broad⁴⁹ understanding where cohabitation is only random and casual. Thus, the OGH establishes as a prerequisite a consensual and sustainable organisation of the household.

41 OGH 8 Ob 125/73 ZVR 1974/162; 2 Ob 109/78 ZVR 1979/226; 2 Ob 345/00z EFSlg 97.038 = EFSlg 97.039 = EFSlg 97.040 = EFSlg 97.041.

42 Karner/Wallner-Friedl (fn 20) no 6.

43 OGH 28.6.2007 2 Ob 221/06y; RIS-Justiz RS0030922.

44 OGH 3 Ob 403/60 JBl 1961, 419 = ZVR 1961/315; Karner/Wallner-Friedl (fn 20) no 18f.

45 OGH 8 Ob 86/85 ZVR 1987/56.

46 Karner/Wallner-Friedl (fn 20) no 19.

47 Huber, Schadensberechnung (fn 20) 501f, 503ff.

48 Karner/Wallner-Friedl (fn 20) nos 3, 41.

49 A Spenling in his cmt RZ 2019, 114, 115.

3. OGH 26 April 2019, 3 Ob 23/19g:⁵⁰ Liability of a Mother for Preventing Contact between the Father and his Daughter

a) Brief Summary of the Facts

The claimant was the father of an underage daughter. The defendant was the 16 mother who was separated from the claimant. Based on statements made by the daughter, the mother suspected the claimant of sexual abuse, with the result that she disapproved of unaccompanied contact between the claimant and his daughter. After years of custody proceedings involving several experts' opinions, which could not present clear evidence of sexual abuse, the defendant moved to New Zealand together with the child, but later returned to Austria. Because the defendant kept her address in New Zealand from the claimant, the claimant brought proceedings (including proceedings according to The Hague Convention on the Civil Aspects of International Child Abduction) against her in order to locate her address. During the defendant's time spent in New Zealand, the father visited the child twice: once with a counsellor and once with his (new) wife. The claimant sought compensation of these travel expenses, as well as translation and legal fees and the costs of counselling and visit monitoring, as well as costs for legal representation. His claim was based on the allegation of abuse of rights by the mother with regard to the custody and contact right proceedings and a violation of § 159 ABGB. While the Court of First Instance partially upheld the claim, the Court of Appeal dismissed it.

b) Judgment of the Court

The OGH's reasoning is divided into two claims for compensation: costs in- 17 curred up to the defendant's departure for New Zealand and costs incurred from that time on.

Regarding the claim for damages prior to the departure for New Zealand, 18 the OGH stated that the defendant was justified in being (and having to be) alarmed by the child's statements. Nor could it be held against the defendant that the findings of the experts had not yet convinced her that the claimant had

⁵⁰ *E Ondreasova*, Schadenersatz bei Kontaktrechtsvereitelung, Zak 2019/751= Zak 2019/424 = Interdisziplinäre Zeitschrift für Familienrecht (iFamZ) 2019/114 = Zeitschrift für Familien- und Erbrecht (EF-Z) 2019/145.

not in fact committed sexual abuse. On grounds of these considerations, the OGH denied the defendant's refusal to allow unaccompanied contact to be an abusive exercise of rights. The OGH also held that the mere fact that the parent entitled to custody defends him/herself in the proceedings against contact right claims of the other parent does not in itself lead to liability. In consequence, the OGH dismissed the claim for damages for the period prior to the departure for New Zealand.

19 Regarding the claim for damages as from the defendant's departure for New Zealand, the OGH found a violation of § 159 ABGB (principle of mutual respect among parents, cf no 21ff below) since the defendant had not emigrated for professional reasons, but instead in order to avoid custody proceedings. The OGH referred to established case law, according to which, a violation of this principle may give rise to compensation claims, in particular with regard to procedural costs.⁵¹ Also in the present case, according to the OGH, costs of a custody and/or contact lawsuit were covered by the protective purpose of § 159 ABGB. The claim for damages was therefore valid on the merits.

20 However, the Supreme Court differentiated on the subject of the costs incurred and ruled that the share of travel expenses relating to the claimant, lawyers' fees and the costs of the proceedings under The Hague Convention were to be compensated. Costs incurred by the claimant in other Austrian court proceedings, which he initiated only for the purpose of locating the defendant's current residence, were not regarded as eligible for compensation. With regard to these costs, the OGH dismissed the claim for exceeding the protective purpose of the rule.

c) Commentary

21 The decision allows for a more detailed examination of the principles of compensation in the event of a violation of contact rights. It is important to maintain the distinction between tort and family law and ensure that the former does not undermine the latter.⁵² At the same time, however, compensation claims can

⁵¹ RIS-Justiz RS0126872.

⁵² *E Karner*, Besuchsrechtsvereitelung und Schadenersatz – ein Paradigmenwechsel? Österreichische Juristen-Zeitung (ÖJZ) 2011/60 (572) with further ref; *E Ondreasova*, Das Verhältnis zwischen Familienrecht und dem übrigen Zivilrecht, insb dem Schadenersatzrecht, Zak 2016/313 (169); *J Höllwerth*, Schadenersatzansprüche im Familienrecht, EF-Z 2016/139; *G Kathrein*, Kein Schmerzensgeld für den bloßen Trennungsschmerz bei Unterbrechung des Kontakts

lead to a strengthening of obligations under family law.⁵³ Primarily, § 159 ABGB stipulates a duty to safeguard the welfare of the child. However, the parent not entitled to custody but contact is protected by § 159 ABGB.⁵⁴ As the OGH already stated in 4 Ob 8/11x, the relationship between parents and children is a legal relationship recognised by the legal system and protected by fundamental rights, which also cover the pursuit of personal contact.⁵⁵ Consequently, in the event of culpable violation of § 159 ABGB, compensation claims may be due.⁵⁶ Even compensation for pain and suffering can be claimed.⁵⁷ As the OGH correctly stressed in 4 Ob 8/11x, the protection of the parent-child relationship is precisely about the protection of immaterial values, so that a protection also against serious psychological impairments seems particularly conclusive.⁵⁸ However, in the present case, no compensation for pain and suffering was claimed.

Convincingly, in the present decision, the OGH did not regard the mere exhaustion of the procedural means (without the intention of delaying the proceedings) as a violation of § 159 ABGB.⁵⁹ However, it is questionable whether the mere non-disclosure of the child's new address also violates § 159 ABGB. Ondreasova correctly points out that there are cases in which not knowing the child's address does not automatically prevent contact (for example, if the contact takes place at school or with relatives, etc), and thus, this does not automatically result in a violation of § 159 ABGB.⁶⁰

zum Kind (cmt on 9 Ob 28/14d) ZVR 2015/59; *G Thoma-Twaroch*, Schadenersatzpflicht des ob-sorgeberechtigten Elternteils wegen Vereitelung von Besuchskontakten (cmt on 4 Ob 8/11x), iFamZ 2011/136.

53 *Karner*, ÖJZ 2011/60, 573; *Ondreasova*, Zak 2016/313, 169; *Höllwerth*, EF-Z 2016/139, 296.

54 *Ondreasova*, Zak 2019/751, 408 with further ref in fn 2; *Höllwerth*, EF-Z 2016/139, 296.

55 Cf *Karner*, ÖJZ 2011/60, 573; OGH 4 Ob 8/11x SZ 2011/48 = Zak 2011/312 = *R Reischauer*, Schmerzensgeld wegen Beeinträchtigung der Eltern-Kind-Beziehung, ehewidrigen Verhaltens und Sachbeschädigung, EF-Z 2011/83 = EF-Z 2011/85 = EvBl 2011/96 = iFamZ 2011/136 with cmt by *G Thoma-Twaroch* = Anwaltsblatt (AnwBl) 2011, 357 = RZ 2011/15 = EFSlg 130.465 = EFSlg 130.446 = EFSlg 130.490 = EFSlg 130.550 = EFSlg 130.627 = EFSlg 131.038 = EFSlg 131.039 = EFSlg 131.040 = EFSlg 131.187 = ZVR 2012/42 overview by *K-H Danzl* = *Höllwerth*, EF-Z 2016/139.

56 RIS-Justiz RS0126872.

57 RIS-Justiz RS0126872.

58 *Karner*, ÖJZ 2011/60, 573.

59 *Ondreasova*, Zak 2019/751, 409; *Ondreasova*, Zak 2016/313, 168,169f; 8 Ob 133/06a EF-Z 2007/33, 56 with cmt by *E Gitschthaler*.

60 *Ondreasova*, Zak 2019/751, 409.

- 23 If the parent with sole custody, who alone is entitled to decide on the child's residence, decides to move with the child, this alone does not constitute a violation of § 159 ABGB. In principle, the person entitled to contact has no right to claim reimbursement of travel costs. Possible extraordinary additional costs can be considered by maintenance law but not by means of tort law.⁶¹
- 24 In the present case, the mother's motive was to prevent the father from having contact with the child and to avoid legal proceedings. With this intention she violated § 159 ABGB. As regards causation, the OGH correctly found that moving to New Zealand was not causal for the costs incurred before that date. These costs were not caused by any unlawful conduct of the mother. Only additional costs incurred by moving (eg costs of translations) were caused by the unlawful conduct of the mother. However, the attorney's fees would have been incurred even if the mother had continued to live in Austria.⁶²
- 25 In the present case as well, the protective purpose of § 159 ABGB serves as a limitation of liability. The primary protective purpose is to protect the contact and relationship between a child and its parents. Therefore, costs which are incurred in order to maintain the parent-child relationship and which would not have been necessary without the violation of § 159 ABGB are in any case eligible for compensation.⁶³ Since the matter concerns the parent-child relationship, the travel expenses of the plaintiff's wife and his social counsellor were not reimbursable. Solely the travel costs of the father were necessary for his legal action and were covered by the protective purpose of the rule. This applies to the travel expenses incurred by the father, as he had to travel to New Zealand for the hearings. It is questionable, however, whether travel costs which were only incurred for visits should also be compensated since, in the case of a lawful relocation, these would only be taken into account within the framework of maintenance law.⁶⁴ Costs incurred by the father for other Austrian court proceedings, which he filed only for the purpose of locating the mother's place of residence, were correctly considered not to be eligible for compensation; such costs are not covered by the protective purpose of § 159 ABGB.⁶⁵

⁶¹ *Ondreasova*, Zak 2019/751, 409, 411 with further ref; *Ondreasova*, Zak 2016/313, 168; *Kathrein*, ZVR 2015/59, 130; *Reischauer*, EF-Z 2011/45, 136; *Karner*, ÖJZ 2011/60, 572.

⁶² *Ondreasova*, Zak 2019/751, 410.

⁶³ *Ondreasova*, Zak 2019/751, 410; *Ondreasova*, Zak 2016/313, 169; *Karner*, ÖJZ 2011/60, 572.

⁶⁴ *Ondreasova*, Zak 2019/751, 410.

⁶⁵ *Ondreasova*, *ibid.*

4. OGH 27 June 2019, 6 Ob 6/19d:⁶⁶ Police on YouTube

a) Brief Summary of the Facts

The claimant was a police officer who, along with other police officers, accompanied an attachment by bailiff. The defendant – the wife and employee of the entrepreneur subject to the attachment – filmed the conduct of the authorities. When the officer in charge noticed this, he informed the defendant that she was entitled to film but not publish the video recording. On the same day, the video was posted on youtube.com. On this video recording, the claimant was seen unmasked and was addressed by name. It could not be proven whether the defendant had put the video online or had participated in doing so. When the claimant’s counsel requested the defendant to delete the video and to cease publication/remove it, the defendant’s response contained, inter alia, the statement that ‘violations of the law are being posted online, allowing anyone to see how the law is being violated’. Later the video was removed from youtube.com. The claimant sought an injunction prohibiting the defendant from taking and publishing photographs, videos or similar images showing him. The Court of First Instance dismissed the claim; the Court of Appeal upheld the claim. 26

b) Judgment of the Court

The OGH’s ruling is divided into two aspects: on the one hand, the recording of the video, on the other hand, its publication on youtube.com. 27

Balancing the conflicting interests, the OGH concluded that there were no sufficient reasons to prohibit the defendant from filming. The OGH held that the information given by the officer in charge should not be regarded as (legal) consent. This statement had no binding effect on the claimant. According to the OGH, since the claimant was on duty as a police officer, his personal freedom was restricted regardless. The OGH held that being filmed did not constitute an interference with the claimant’s interests, protected by Austrian law. The OGH 28

⁶⁶ Zak 2019/456 = Journal für Strafrecht-Sammlung (JSt-Slg) 2019/52 with cmt by *A Stuefer* = EvBl-LS 2019/157 = Zeitschrift für IT-Recht, Rechtsinformation und Datenschutz (jusIT) 2019/83 with cmt by *C Thiele* = AnwBl 2019/244 = Medien und Recht (MR) 2019, 317 with cmt by *H Wittmann* = Österreichisches Recht der Wirtschaft (RdW) 2019/447 = JBl 2020, 59 = ecorex 2020/29 with cmt by *D Hofmarcher* = AnwBl 2020/74 = Richterzeitung Entscheidungsübersicht (RZ-EÜ) 2020/85.

found that the aim of the recording was the documentation for evidentiary purposes, and that the defendant did not intentionally film the claimant or even do so motivated by sensationalism. Rather, filming the intervening police officers was unavoidable, according to the OGH. Furthermore, the OGH considered that, in the case of an operation subject to coercive force, State authorities would have to accept that these operations are recorded, especially as filming would have a preventive effect against potential unlawful assaults.

- 29 In contrast, the OGH regarded the publishing of the video as inadmissible: it could not be ruled out that the publishing was intended to degrade the authorities, thus also the claimant. Moreover, the claimant was addressed by name, with the consequence that his anonymity was compromised without any objective reason.⁶⁷ The OGH underlined that the defendant had not presented any reasons which would have led to the balancing of interests being decided in favour of publication.⁶⁸ Referring to previous case law,⁶⁹ the OGH emphasised that also an indirect interferer could be bound to an injunction. The OGH reasoned that, by filming, the defendant had also caused the risk of publication, and held that, according to the duty of someone who created a dangerous situation to take measures to avert the danger (*Ingerenzprinzip*), the defendant was obliged to prevent the publishing of the video (eg ensure safekeeping of the telephone with which the video was recorded or handing over the video solely to trustworthy persons). In the defendant's response, she clearly stated that she considered herself entitled to publish the video. Consequently, the OGH assumed that there was a risk of re-offending and granted the injunction regarding the publishing of the video.

c) Commentary

- 30 The present decision serves as a significant clarification of Austrian case law on the protection of personality rights in connection with video or photographic recordings and the publication thereof. The right to the protection of a person's image is a personality right in the meaning of § 16 ABGB,⁷⁰ which provides for

⁶⁷ RIS-Justiz RS0089997; RIS-Justiz RS0008998.

⁶⁸ RIS-Justiz RS0077785.

⁶⁹ RIS-Justiz RS0103058 (T16, T17, T18); RS0103058 (T19, T20); RS0103058 (T21, T22).

⁷⁰ RIS-Justiz RS0123001; addressing the dimension of data protection: *H Wittmann*, Filmen einer Amtshandlung (Cobra-Einsatz) – Posten des Videos auf YouTube, Medien und Recht (MR) 2019, 317.

defensive claims and claims for compensation.⁷¹ However, such claims shall not lead to an intolerable restriction of the interests of others and the general public.⁷² For this reason, a comprehensive balancing of goods and interests must always be ensured. The decisive factor is whether the person pictured can be identified. Furthermore, the motive being pursued must be taken into account.⁷³ In addition, the OGH considered whether the recording was intentional or coincidental.

Previous case law qualified a secret recording of persons in their private sphere, continuous unauthorised surveillance and stalking as well as systematic, covert, identifying video surveillance as an unlawful violation of privacy.⁷⁴ Even watching a neighbour (without technical equipment) can constitute an unlawful violation if done with unusual intensity and objectively gives the neighbour the feeling of being under constant surveillance.⁷⁵ Also a recording of spoken words can – regardless of a potential subsequent publication – constitute a violation.⁷⁶ Furthermore, taking photographs of a person in places open to the public, even without the intention of publication, is unlawful if the motive is not subject to protection (eg in 6 Ob 256/12h⁷⁷ the motive for taking photographs was mere amusement).⁷⁸

71 RIS-Justiz RS0008994.

72 RIS-Justiz RS0008990.

73 OGH 6 Ob 256/12h EvBl 2013/104 with cmt by *E Karner* = Newsletter Menschenrechte (NL) 2013,142 = *P Zöchbauer*, Verbot von Bildaufnahmen? Gedanken aus Anlass der OGH-E 6 Ob 256/12h, MR 2013, 59 = JBl 2013, 309 = *G Donath*, Recht am eigenen Bild – Wende in der höchstgerichtlichen Judikatur, Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int) 2013, 534 = AnwBl 2013, 332 = Sachverständige (SV) 2013, 96 = *ecolex* 2013/222 with cmt by *D Hofmarcher* = Zeitschrift für Informationsrecht (ZIR) 2013, 205 with cmt by *T Höhne* = ZIR-Slg 2013/91 = *bbl* 2013, 167 = *P Fischer*, Soziale Medien und private Homepages – Über das Einstellen von Bildern fremder Personen, AnwBl 2013, 476 = *A Noll*, Aufnahmen verboten? Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht (ÖBl) 2013/47 = ÖBl 2013/56 with cmt by *M Büchele* = SZ 2013/25 = MietSgl 65.003 = *K Schmidhuber*, Die Kollision der Drohne mit dem Schutz des höchstpersönlichen Lebensbereichs, ÖJZ 2017/31 = *K Stiebellehner*, Strafrechtliche Aspekte des Drohnenflugs, ZVR-Verkehrsrechtstag 2018, ZVR 2018/242.

74 RIS-Justiz RS0107155; RIS-Justiz RS0120422.

75 OGH 7 Ob 248/09k wobl 2010, 175 with cmt by *A Illedits* = Zak 2010/301 = EvBl-LS 2010/83 = JBl 2010, 374 = Neues Miet- und Wohnrecht (immolex) 2010, 319 = *ecolex* 2010/227 = RZ 2011/4 = MietSgl 62.902 = SZ 2010/4.

76 OGH 9 ObA 215/92 SZ 65/134 = EvBl 1993/111; 6 Ob 190/01m SZ 74/168.

77 OGH 6 Ob 256/12h (fn 73).

78 Outlining the methodical approach in great detail: *Karner*, EvBl 2013/104.

- 32 Even if the present decision takes into account the fact that the police officer was not able to live out his personality during work, one cannot conclude that all persons in the exercise of their profession may be filmed. Also, in 6 Ob 256/12h, the plaintiff was acting in the exercise of his profession (attorney), but the motive pursued was not worthy of protection. In the present case, it was possible to refer to the preservation of evidence.

5. OGH 28 August 2019, 7 Ob 103/19a:⁷⁹ Tinned Meat

a) Brief Summary of the Facts

- 33 The 12-year-old claimant discovered a piece of metal measuring approx 1 cm by 1 cm in a tinned can containing meat produced by the defendant. Although she was not physically injured by the piece that was already in her mouth, she developed an obsessive-compulsive disorder. Since this incident, she examines and purees all meals before eating. It was found that discovering the piece of metal was the cause of her disease to an extent of 10% to 15%. On the basis of the Product Liability Act (PHG), the plaintiff sought compensation. While the Court of First Instance dismissed the claim for lack of adequacy, the Court of Appeal confirmed adequacy, with reference to settled case law, according to which the tortfeasor was also liable for the consequences of a predisposed neurosis.

b) Judgment of the Court

- 34 With regard to the question of whether an injury within the meaning of § 1325 ABGB was given, the OGH reasoned that any impairment of physical or mental health and integrity was considered sufficient. Consequently, visible external injuries were not necessary; mere pain could be considered a bodily injury, even if the body did not suffer any adverse effects, according to the OGH.⁸⁰

⁷⁹ Zeitschrift für Energie- und Technikrecht (ZTR) 2019, 169 = Zeitschrift für Verbraucherrecht (VbR) 2019/137 with cmt by *P Leupold/B Gelbmann* = Zak 2019/691 = Zeitschrift für Gesundheitsrecht (ZfG) 2019, 133 = *ecolex* 2020/8.

⁸⁰ RIS-Justiz RS0030792.

Setting out the principles of causation in accordance with the theory of 35 equivalence,⁸¹ the OGH clarified the ratio of the *conditio sine qua non* formula, according to which it is to be examined whether the damage would not have occurred without the conduct/incident in question.⁸² Referring to settled case law,⁸³ the OGH confirmed that this factual causation is a question of findings of fact. With regard to the present case, it was found that finding the metal piece caused the claimant's illness to an extent between 10% and 15%.

Contrary to this factual causation, the assessment of adequacy is an act of 36 legal judgement,⁸⁴ the OGH reminded. The OGH regarded the fact that an event such as the present one could (at least partly) trigger a pathological mental obsessive-compulsive disorder as not being outside of any foreseeable experience. Therefore, the damage was to be considered adequate.

The OGH recalled that the tortfeasor had to bear the risk that the injured 37 party might suffer a contributory causal predisposition.⁸⁵ The OGH referred to previous case law: diseases which were triggered by an accident only because the injured person already had a predisposition to the disease are classified by the OGH as the full consequences of the accident for the purpose of adequacy, unless the predisposition would have caused the same disease in the foreseeable future even without the accident.⁸⁶ For this to apply, however, it must be established that the same result would have occurred at a certain point in time even without the accident, the OGH ruled. The OGH reminded that, for this, the burden of proof lies with the tortfeasor.⁸⁷ Since the defendant in the proceedings at first instance contested not only adequacy but also factual causation, the OGH referred the proceedings to the Court of First Instance.

c) Commentary

The present decision gives rise to describing the concept of superseding causa- 38 tion.⁸⁸ At the heart of the question is whether a tortfeasor can escape liability by

81 RIS-Justiz RS0109228.

82 OGH 18.10.2007 2 Ob 78/07w.

83 RIS-Justiz RS0022582.

84 RIS-Justiz RS0022582 (T2, T15).

85 RIS-Justiz RS0022746 (T9).

86 RIS-Justiz RS0022746 (T7).

87 RIS-Justiz RS0022684 (T17).

88 *Koziol* (fn 12) no 5/113ff; *Koziol*, *Österreichisches Haftpflichtrecht I* (3rd edn 1997) no 3/58ff; *F Bydlinski*, *Vergleichsverhandlung und Verjährung; Anlageschäden und überholende Kausali-*

showing that a subsequent event would have caused the same damage that he/she caused in reality. The answer to this question is controversial. While case law and part of the academic writing only hold the person who in reality caused the damage liable⁸⁹, a more consistent distinction is advisable.⁹⁰ In the case of an objective-abstract assessment of the damage, only the first (in reality) damaging party is liable, since the point in time at which the damage occurred is the only factor to be taken into account and future developments are not considered. On the other hand, if the damage is assessed subjectively and concretely, joint and several liability is applied if the later damaging party also acted unlawfully and with fault. However, joint and several liability can also be considered in the case of an objective-abstract assessment of the damage if and to the extent that the market value of the object was already reduced at the time of the actual damage by the later imminent risk of damage.⁹¹

- 39 Cases in which the injured party had a predisposition to the respective damage are considered as cases of superseding causation, since the further development of the disposition represents the later, superseded event.⁹² Consequently, can a tortfeasor object that the later development of the injured parties' disposition would have caused the same damage (in the present case the obsessive-compulsive disorder)? Full liability of the tortfeasor cannot be reconciled with the concept of the *conditio sine qua non*. Indeed, the damage would have occurred even without the first action, namely as a result of the predisposition. Also in this context, it is emphasised that the conduct of the tortfeasor affects a legal interest that has already been 'impaired' by the predisposition.⁹³ Therefore, it is reasoned that the tortfeasor only has to compensate for the damage caused by an earlier occurrence of the damage.⁹⁴

tät, JBl 1967, 130, 135 f; *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 32f; *P Apathy*, Zur Haftung bei überholender Kausalität, FS Koziol (2010) 515 f; *Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (5th edn 2017) § 302 no 9.

89 RIS-Justiz RS0022746; Rummel/*Reischauer* (fn 20) § 1302 no 14.

90 *Bydlinski*, Schadensverursachung (fn 88) 25f, 32f, 65f; *Koziol* (fn 12) no 5/113 ff; *Koziol* (fn 25) no 3/67 ff; *Apathy* (fn 88) 520 f.

91 *Koziol* (fn 12) no 5/119; *Koziol*, Haftpflichtrecht I (fn 88) no 3/71.

92 *Bydlinski* (fn 88); *id*, JBl 1967, 136; *Koziol*, Haftpflichtrecht I (fn 88) no 3/60; *Apathy* (fn 88) 516.

93 *Bydlinski* (fn 88); *id*, JBl 1967, 137; *Koziol*, Haftpflichtrecht I (fn 88) no 3/71.

94 *Bydlinski*, Schadensverursachung (fn 88) 99 f; *Apathy* (fn 88) 523 f; OGH 8 Ob 116/77 ZVR 1978/165; 10 Ob 2350/96t SZ 69/199; 4 Ob 23/98f JBl 1999, 246 with cmt by *C Bumberger*; *Karner* in KBB (5th edn 2017) § 1302 no 10.

Furthermore, the present decision provides a good opportunity to display 40 how Austrian law deals with unusual consequences of a tort. Austrian legal doctrine differentiates several concepts which limit the scope of liability. One of these concepts is the theory of adequacy. Contrary to factual causation, the assessment of adequacy is an act of evaluative assessment considering the circumstances in the specific individual case:⁹⁵ liability for atypical damage, which could only have occurred due to a coincidental, objectively unforeseeable combination of circumstances, is denied.⁹⁶ Larenz expressed the idea of excluding liability for remote damage since the tortfeasor could not control the results of his/her conduct.⁹⁷ F Bydlinski put this concept in the context of the notion of deterrence, arguing that when damage could not objectively have been foreseen, imposing liability for such remote damage could not have any motivating influence on the conduct of tortfeasors.⁹⁸ Bearing this in mind, some scholars advocate that the assessment of adequacy cannot be applied in cases of liability irrespective of misconduct.⁹⁹ Nevertheless, limitation of liability is appropriate in cases of liability based on dangerousness. Liability cannot be justified if one could not have foreseen that such damage could arise from the particular source of danger.¹⁰⁰ Thus, also in the present case, adequacy had to be assessed.

6. OGH 28 August 2019, 7 Ob 185/18h:¹⁰¹ Alleged Paternity

a) Brief Summary of the Facts

The claimant was the (in the meantime) divorced husband of the defendant. 41 Before getting married, he had acknowledged paternity to his alleged child, because the defendant told him he was the father, without mentioning that she

95 RIS-Justiz RS0081105; RIS-Justiz RS0022582 (T2, T15); cf *Koziol* (fn 12) no 7/7 f and no 7/12ff with further ref: in accordance with Wilburg's view, who advocates a gradation rather than rigidly depending on adequacy granting or fully denying compensation, the limits of adequacy depend on the protective purpose of the rule, gravity of wrongfulness and degree of fault.

96 RIS-Justiz RS0112489 (T1); *Koziol* (fn 12) no 7/7.

97 *Koziol* (fn 12) no 7/7; *K Larenz*, Schuldrecht I (14th edn 1987) § 27 III b; *Bydlinski*, Schadensverursachung (fn 88) 60.

98 *Koziol* (fn 12) no 7/7; *Bydlinski*, Schadensverursachung (fn 88) 60.

99 *Koziol* (fn 12) no 7/8 with further ref.

100 *Koziol* (fn 12) no 7/8 with further ref; *Koziol*, Haftpflichtrecht I (fn 88) no 8/4.

101 Zak 2019/599 = AnwBl 2019/302 = *R Reischauer*, Scheinvater werden ist nicht schwer, vom Schaden loszukommen dagegen sehr, EF-Z 2020/3.

had been intimate with her former boyfriend with whom the defendant had been sharing an apartment at the time of conception. 14 years after the child's birth, it was revealed that the child was not the claimant's child. Aside from a claim for unjust enrichment, the claimant sought compensation on the ground that the defendant had lied to him and intentionally withheld the fact that another man was possibly the father. The defendant objected that the claimant had known about her living situation at the time of conception and had never asked whether he was the biological father or not. While the Court of First Instance upheld the claim, the Court of Appeal dismissed it.

b) Judgment of the Court

- 42 With regard to the question of whether a claim for unjust enrichment was justified, the OGH underlined that parents are not considered as joint and several debtors of child maintenance,¹⁰² furthermore, that the mother was not obliged to provide the father's share on a subsidiary basis. Rather, the mother providing for the son in her household was already fulfilling her obligation. Therefore, the OGH concluded that the payments made by the claimant did not enrich the mother, so that the claim for unjust enrichment was denied.
- 43 In the course of the claim for damages against the mother, the OGH assessed § 1295 para 2 ABGB (intentional immoral infliction of damage, *absichtlich sittenwidrige Schädigung*). Previous case law granted such a claim if the mother had caused an acknowledgement of paternity by intentionally false statements.¹⁰³ Merely (even if grossly) negligent conduct was not sufficient for a claim based on § 1295 para 2 ABGB,¹⁰⁴ the OGH maintained. Furthermore, if the mother identifies a man with whom she was intimate within not more than 300 and not less than 180 days before birth,¹⁰⁵ she is not obliged to disclose that she was intimate with another man if the alleged father did not ask about it.¹⁰⁶ With reference to earlier case law,¹⁰⁷ however, according to the OGH, this view could

102 RIS-Justiz RS0047415 (T6).

103 OGH 8 Ob 125/14m Zak 2015/627 = iFamZ 2015/216 = ZVR 2016/44 overview by *K-H Danzl* = EFSIlg 146.302; OGH 13.4.1988 1 Ob 536/88; RIS-Justiz RS0048325.

104 OGH 8 Ob 125/14m (fn 103).

105 A man with whom the mother was intimate within not more than 300 and not less than 180 days before birth is presumed to be the father according to § 148 para 2 ABGB.

106 OGH 8 Ob 125/14m (fn 103); OGH 20.9.1994 4 Ob 1600/94; OGH 13.4.1988 1 Ob 536/88; RIS-Justiz RS0048514.

107 OGH 26.2.1998 6 Ob 48/98x.

not be maintained if the mother did not assume paternity in good faith but against her knowledge identified the wrong man as the father. In such cases the falsely identified father did not have to ask whether the mother had been intimate with other men or not in order to be able to claim damages under § 1295 para 2 ABGB. To establish whether the mother knew that the claimant's paternity was impossible and intentionally falsely identified him as the father, the case was remitted for further proceedings.

c) Commentary

In the context of Austrian court practice, the present decision can be seen as 44 another notable step expanding the liability of a mother if she causes a man to acknowledge paternity through her conduct, eg through deliberately false statements. From her, he can claim maintenance payments and legal costs, not on the basis of unjust enrichment, but on the basis of tort law.¹⁰⁸

The requirements for such a compensation claim are hotly disputed in academic writing.¹⁰⁹ The interests of the parties involved must be weighed up with 45 great care and responsibility. Does a personality right protect a man towards all people (thus also towards the mother) against the designation as the father of a child not conceived by him?¹¹⁰ Or does the mother's interest in not having to disclose that she was intimate with more than one man prevail? Are there valid reasons against a 'duty of self-incrimination'¹¹¹ of the mother?

A criticised¹¹² distinction is made between betrayed husbands and unmar- 46 ried men: a distinction is made as to whether the child was conceived through adultery, so that the unlawfulness of the married mother results from § 90 ABGB (personal legal consequences of marriage; eg marital fidelity) and negligence is

108 RIS-Justiz RS0048325.

109 *Reischauer*, EF-Z 2020/3 with further ref; *W Zankl*, Bereicherung und Schadenersatz im Familienrecht, EF-Z 2019, 113; *L Kolbitsch* in her cmt EvBl 2019/120; *T Maier*, Die Mutter zwischen Schweigerecht und Auskunftspflicht über den Vater, EF-Z 2017, 7; *E Gitschthaler*, Scheinvaterregress – Bereicherung oder Schadenersatz? EF-Z 2009/94.

110 *Reischauer*, EF-Z 2020/3; *Rummel/Reischauer* (fn 20) § 1295 no 60 with further ref; dissenting: *Ris-Justiz* RS0008942.

111 *Kolbitsch* in her cmt EvBl 2019/120.

112 *Kolbitsch*, *ibid*; *W Zankl*, Bereicherung und Schadenersatz im Familienrecht, EF-Z 2019/61.

sufficient¹¹³, or whether the mother was unmarried at the time of conception, so that § 1295 para 2 ABGB applies.¹¹⁴ Thus, § 1295 para 2 ABGB applies to betrayed unmarried men: if the mother identified a man as the father, for whom the legal presumption of paternity¹¹⁵ applies, according to previous court practice, the mother was not obliged to disclose her infidelity if the man had not asked about it. This case law takes into account the sphere of the mother, who should not have to reveal upon her own initiative that she was intimate with more than one man. The earlier decisions concerned cases in which the mother thought the man identified as the father in fact was the father. For instance, in 1 Ob 536/88¹¹⁶ at the time of her infidelity, the mother believed she was already pregnant with the designated man's child. Also, in 4 Ob 1600/94¹¹⁷ the mother considered the alleged father to be the probable father or, according to the findings in 8 Ob 125/14m¹¹⁸, consistently assumed that the alleged father was indeed the father.

47 In contrast to this, in cases in which the mother has not considered paternity in good faith but has identified the man against her better knowledge as the father, the necessity of an explicit question can no longer be demanded.

7. OGH 29 August 2019, 1 Ob 105/19a:¹¹⁹ 'Fictitious' Repair Costs

a) Brief Summary of the Facts

48 The claimant was a company which laid flooring in the business premises of the defendant, a farmer. The work was performed defectively. For this reason, the parties went to trial in the Court of First Instance (hereafter: preliminary proceedings). In these preliminary proceedings, the farmer was awarded the costs

113 OGH 4 Ob 82/18i Zak 2019/43 = Jus-Extra OGH-Z 6476 = JBl 2019, 242 = ZVR 2019/44 overview by *K-H Danzl = Reischauer*, Zum Schadenersatz des Scheinvaters bei Ehebruch seiner Gattin, EF-Z 2019/59 = EvBl 2019/120 with cmt by *Kolbitsch* = FamRZ 2019, 1521.

114 *Kolbitsch* in her cmt EvBl 2019/120.

115 § 148 para 2 ABGB.

116 OGH 1 Ob 536/88 SZ 61/89 = JBl 1988, 577.

117 OGH 20.9.1994 4 Ob 1600/94.

118 OGH 8 Ob 125/14m (fn 103).

119 OIZ 2019, 25 = Zak 2019/575 = EvBl-LS 2019/168 with cmt by *M Weixelbraun-Mohr* = bau aktuell 2019/12 = JBl 2019, 787 = ZVB 2019/115 with cmt by *T Chiwitt-Oberhammer* = RZ 2019/22 with cmt by *A Spening* = Zeitschrift für Recht des Bauwesens (ZRB) 2019, 141 = ZVR 2020/63 with cmt by *C Huber* = ecolex 2020/122.

of repairing the defects. In the present case, the claimant sought reimbursement of the amount paid on the grounds that the defendant had not yet repaired the defects, nor did he intend to do so. Both, the Court of First Instance and the Court of Appeal dismissed the claim.

b) Judgment of the Court

The OGH referred to settled case law, according to which fictitious repair costs 49 are not to be awarded in full if they exceed the objective loss in value. Such compensation would lead to an enrichment that would contradict the concept of Austrian tort law.¹²⁰ The claimant shall only be awarded repair costs that exceed the loss in value if he could prove that he intends to carry/have carried out the repair.¹²¹ Failing this, compensation is limited to the loss in value,¹²² the OGH continued.

Furthermore, the OGH expressed the view that when capital was awarded 50 for a repair that has not yet been carried out, it generally had to be considered earmarked. According to the OGH, an explicit description as an ‘advance payment’ was not necessary. If such an earmarked advance payment was not or only partially used for repairs, the tortfeasor could claim reimbursement on the basis of unjust enrichment (§ 1435 ABGB)¹²³ if the advance payment exceeded the objective loss in value, the OGH reminded. For the purpose of establishing the facts of the case on this, the proceedings were referred to the Court of First Instance.

c) Commentary

While settled case law awards compensation of repair costs that exceed the ob- 51 jective loss in value only if the aggrieved party proves that he/she will actually

120 OGH 4 Ob 42/15b Zak 2015/469 = JBl 2015, 594 = Jus-Extra OGH-Z 5852 = ecolex 2015/328 = bbl 2015, 231 = ZRB 2016, 83 = SZ 2015/46 = R *Reischauer*, Zur Tilgungsfolge bei Aufrechnung (§§ 1415 und 1416 ABGB), ÖJZ 2019/100; RIS-Justiz RS0022844; RS0030285 (T14, T18, T19, T20).

121 OGH 2 Ob 135/10g Zak 2011/325 = bbl 2011, 239 = ZRB 2012, 51 with cmt by *H Wenusch* = bau aktuell 2011/12 = SZ 2011/45.

122 OGH 4 Ob 42/15b (fn 120); RIS-Justiz RS0115059.

123 RIS-Justiz RS0021411.

repair the damage¹²⁴, the term ‘fictitious’ repair costs still creates misunderstandings.¹²⁵ Now there is clarity.¹²⁶ If repairs are not carried out, the tortfeasor can claim reimbursement of the difference between the repair costs awarded and the objective loss in value.

52 The core aspect of the decision is that the OGH clarifies that an explicit description ‘as an earmarked advance payment’ is not required.¹²⁷ For this reason, it is advisable for attorneys to inform the aggrieved party of a potential claim for reimbursement in the event of an omitted repair. Furthermore, an agreement could be concluded on how reimbursement should be made if the aggrieved party does not repair/have repaired the damage after all.¹²⁸

53 In the present case, there was no need to determine the period of time within which the aggrieved party would have to carry out the repair or reasons which would justify a delay. A generalising statement on this question does not seem feasible, evaluation on a case-by-case basis is required.¹²⁹ In the present case, the defendant clearly signalled that he would not carry out any renovation work.

54 The following aspects mentioned by Huber¹³⁰ remain uncertain: while the OGH, as in general for claims pursuant to § 1435 ABGB, applies a 30-year limitation period, Huber, in analogous application of § 1486 ABGB, considers a three-year limitation period to be more appropriate.¹³¹ In addition, can aggrieved parties retain the full amount of the advance payment if they themselves have the damage repaired professionally but at a lower cost? Can the tortfeasor request that the amount – until used for repair – is transferred to a trust account? Does the claim for reimbursement include interest,¹³² and if so, beginning at what point in time? Interest pursuant to § 1333 para 2 ABGB requires default in payment. For the time up to a default in payment, the interest claim could be based on § 1435 in conjunction with § 1000 ABGB. § 1000 ABGB is generally to be un-

124 RIS-Justiz RS0022844.

125 *A Spenling* in his cmt RZ 2019/22.

126 *C Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 139.

127 *T Chiwitt-Oberhammer* in her cmt ZVB 2019/115; *Spenling* in his cmt RZ 2019/22; *Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 139 pointing out that it would be appropriate if courts would still do so.

128 *T Chiwitt-Oberhammer* in her cmt ZVB 2019/115.

129 *Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 140.

130 *Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 139 f.

131 *Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 140.

132 *Huber* in his cmt on 1 Ob 105/19a, ZVR 2020/63, 139.

derstood as a lump sum payment for the right to spend loaned money,¹³³ and applies not only to loan agreements but also to claims based on unjust enrichment.¹³⁴ If one applies § 1000 ABGB to § 1435 ABGB, this claim arises at the earliest from the point in time at which the failure to carry out repairs is established.

8. OGH 24 September 2019, 6 Ob 103/19v:¹³⁵ Do Infants Grieve?

a) Brief Summary of the Facts

The claimant was the almost two-year-old sister of a baby who died shortly after 55 birth as a result of grossly negligent conduct of the doctors in the hospital operated by the defendant. Both claimant's parents were (inter alia) awarded bereavement damages. The lower courts dismissed the claim of the infant considering the young age and the fact that the sibling died only a few hours after birth.

b) Judgment of the Court

The OGH rejected the revision. By way of introduction, the OGH outlined the 56 established case law, according to which, compensation for bereavement over the loss of close relatives in the absence of disease status is awarded in cases of gross negligence or intent.¹³⁶ Also in the present case, the OGH emphasised that furthermore an intensive emotional relationship, as typically exists between the nuclear family members (*Kernfamilie*), was decisive.¹³⁷ Such a relationship typically also exists between siblings who live in the same household.¹³⁸ Without

133 OGH 4 Ob 149/06z SZ 2006/168.

134 Applying § 1000 on § 1041 ABGB: OGH 4 Ob 149/06z SZ 2006/168.

135 ZVR 2020/88 with cmt by *B Steininger* = Zak 2020/86.

136 RIS-Justiz RS0115189.

137 OGH 2 Ob 141/04f ZVR 2004/86 = Jus-Extra OGH-Z 3829 = JBl 2004, 792 = *ecolex* 2005, 39 = ZVR 2005, 84 with cmt by *K-H Danzl*; 2 Ob 90/05g ZVR 2005/73 with cmt by *E Karner*; 10 Ob 81/08x *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV-LS)* 2008/71 with cmt by *H Ofner* = *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2009/37 with cmt by *A Spickhoff*.

138 OGH 2 Ob 90/05g (fn 137); 2 Ob 55/08i Zak 2008/579 = *ecolex* 2008/336 = ZVR 2009/38 overview by *K-H Danzl*; 10 Ob 81/08x (fn 137).

living in the same household, however, close family ties alone were not sufficient, the OGH stated. Rather, the claimant would have to prove the existence of an intensive emotional relationship.¹³⁹ The OGH took the view that the claim did not demonstrate the required intensive emotional relationship with the sister but described the emotional relationship with the mother. The OGH supported the lower courts' reasoning and held that the claimant did not yet have any understanding of birth and death in its finality. Consequently, the OGH stated that the child was not affected by bereavement and denied an experience of grief.

c) Commentary

- 57 The fact that the OGH rejected the revision prevented a more in-depth discussion of the compensation for bereavement of claimants of a young age.¹⁴⁰ Can courts award compensation in cases in which the capacity to grieve is in question? This aspect arises regarding relatives who are in a coma¹⁴¹, relatives suffering from dementia, relatives who – as in the present case – are considered to be too young to understand life and death.¹⁴² Certainly, with regard to infants, it is not convincing to deny the capacity to grieve as a general rule. Rather, it must be argued that infants grieve differently, but certainly do so.¹⁴³ Nevertheless, the OGH denied the experience of grief and, without further substantiation, denied compensation for bereavement.
- 58 Even if one agrees with the OGH's view that an infant does not grieve at all, one should consider that the grieving reaction will occur later. But is such a prognosis regarding a later experience of grief permissible? A first parallel could be drawn with the court practice regarding the loss of earnings, which is awarded even if the injured party did not earn money at the time of the injury or did not intend to earn money in the future.¹⁴⁴ Children are granted an abstract pension, even if they cannot prove that they have suffered any actual loss of earnings because they are not yet in employment.¹⁴⁵ The question arises why chil-

139 OGH 2 Ob 90/05g (fn 137); 10 Ob 81/08x (fn 137).

140 *B Steinger* in her cmt ZVR 2020/88, 183.

141 Cf *E Karner*, Schmerzengeldbemessung, vermindertes Schmerzempfinden und Schmerztherapie, ZVR 2010/130, 285.

142 *S Nitsch*, Schock- und Trauerschadenersatzansprüche nach österreichischem und deutschem Recht, ZfRV 2019, 20 with further ref.

143 *Steinger* in her cmt ZVR 2020/88, 183.

144 RIS-Justiz RS0030484.

145 OGH 1 Ob 113/66 EvBl 1966/354 = AnwBl 1967, 9 with cmt by *Herz*.

dren who – according to the OGH – are not yet grieving are treated differently than children who are not yet working.

In addition, a parallel could be drawn with compensation for pain and suffering. Settled court practice awards compensation for pain and suffering even if the injured party does not experience any pain. Courts have pointed out that the injured party does not need to be able to perceive his/her own fate or its consequences in order to claim damages.¹⁴⁶ Certainly, the child's (alleged) incapacity to comprehend death did not result from the doctor's conduct. However, the OGH has awarded compensation for pain and suffering to claimants who, prior to the damaging event, were already unable to feel pain.¹⁴⁷ If one denies the capacity to grieve, could these considerations cautiously be applied to the present case? It would have been fruitful if the OGH had commented on these aspects.

If the OGH had recognised a capacity for grieving or had drawn the above conclusions, aside from an assessment of the degree of fault¹⁴⁸, an evaluation of the emotional relationship between the siblings would have followed. According to settled court practice,¹⁴⁹ the relationship between the claimant and the deceased must have been of particular intensity. In the light of recent court practice¹⁵⁰ awarding parents bereavement damages in the event of death of the child during birth or in the event of a stillbirth, it is surprising that in the present case reference was made to how long the child survived after birth. The only decisive factor is whether an intensive emotional relationship already existed. It seems reasonable that also infants are bound in an intensive emotional

146 RIS-Justiz RS0031233; *Karner*, ZVR 2010/130; *C Huber*, Antithesen zum Schmerzensgeld ohne Schmerzen – Bemerkungen zur objektiv-abstrakten und subjektiv-konkreten Berechnungsmethode, ZVR 2000, 218.

147 OGH 3 Ob 116/05p ZVR 2006/202 with cmt by *E Karner* = Jus-Extra OGH-Z 4178 = Zak 2006/644 = *ecolex* 2007/4 with cmt by *G Wilhelm* = *D Hinghofer-Szalkay/M Prisching*, Schmerz-unempfindlichkeit bereits vor Schadenszufügung durch den Schädiger: pro und contra Schmerzensgeld ohne körperliche Schmerzen, Zak 2007/258 = ZVR 2007/50 overview by *K-H Danzl* = *Karner* (fn 141) ZVR 2010/130.

148 RIS-Justiz RS0115189: The tortfeasor's conduct must have been at least grossly negligent which was not contested in the present case.

149 RIS-Justiz RS0115189.

150 OLG Graz 3 R 127/13s, *S Konrad/S Nitsch*, Trauerschaden des Vaters bei Tod des Kindes während des Geburtsvorgangs, ÖJZ 2014, 477f; OGH 1 Ob 114/16w, RdM 2017/63 with cmt by *E Karner*; *K-H Danzl*, Aktuelle Fortentwicklungen beim Schmerzensgeld, ZVR 2016, 457ff; *S Konrad/S Nitsch*, Schmerzensgeld bei Totgeburt, Juristische Ausbildung und Praxisvorbereitung (JAP) 2016/2017, 168ff; *E Karner* in: FS *K-H Danzl*, Zur Ersatzfähigkeit von Schock- und Trauerschäden (2017) 87, 101ff; *Nitsch*, ZfRV 2019, 20.

relationship not only to their pregnant mother, but also to an unborn sibling.¹⁵¹ Neither the claimant's young age, nor the fact that the death of her sister occurred shortly after birth, nor the concern that liability would be extended excessively, can justify the denial of a claim for damages.¹⁵²

9. Personal Injury

- 61 Apart from the decisions reported above, there was no significant court practice as regards personal injuries in 2019.

C. Literature

1. *H Koziol (ed), Die Haftung von Eisenbahnverkehrs- und Infrastrukturunternehmen im Rechtsvergleich (2019)*

- 62 The book edited by Helmut Koziol outlines the liability of railway operators in Germany, France, Italy, Austria, Switzerland and Hungary. The focus is on the separation between railway and infrastructure enterprises as imposed by the European Union. Questions resulting from this separation and possible approaches to their solution are presented.

2. Other

- 63 **Competition Law:** *C Brenn*, Erfolgsort beim Kartellschaden ist der beeinträchtigte Markt, *ÖJZ* 2019, 890; *C Kriechbaumer*, Konzernhaftung im Bereich des Kartellschadenersatzrechts, *ecolex* 2019, 607; *A Reidlinger*, Apropos Konzernhaftung, *ecolex* 2019, 610; *T Oswald/A Kropik*, Kartellschäden: Theorie und Methoden zur Schadensberechnung, *bauaktuell* 2019, 66
- 64 **Data Protection, IT and Technology:** *S Augenhöfer*, Datenschutz neu: Individuelle und kollektive Rechtsdurchsetzung, *VbR* 2019, 8; *E Karner*, Current Ru-

¹⁵¹ *Steininger* in her cmt *ZVR* 2020/88, 184.

¹⁵² *Steininger* in her cmt *ZVR* 2020/88, 184.

les, Challenges and the Need for Innovative Concepts, in: S Lohsse/R Schulze/D Staudenmayer (eds), *Liability for Robotics and in the Internet of Things* (2019) 117–124; *BA Koch*, Product Liability for Autonomous Vehicles, *Wiadoomości Ubezpieczeniowe* 4/2019, 1–12; *BA Koch*, Haftungsfragen im digitalen Zeitalter, in: Österreichischer Juristentag (ed), *Zivilrecht – Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter* (2019) 166–187; *BA Koch*, Product Liability 2.0 – Mere Update or New Version? in: S Lohsse/R Schulze/D Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* (2019) 99–116; *M Spitzer*, Schadenersatz für Datenschutzverletzungen, *ÖJZ* 2019, 629; *M Walter*, Filesharing-Haftung des Inhabers einer IP-Adresse, *MR-Int* 2019, 19; *C Wirthensohn*, LG Feldkirch: Immaterieller Schadenersatz für die rechtswidrige Verarbeitung besonderer Kategorien von Daten gem Art 9 DS-GVO, *jusIT* 2019, 247; *W Zankl*, Urheberrecht: Kein Haftungsprivileg für „aktive“ Host-Provider? *ecolex* 2019, 18

Environment: *E Karner*, Klimasünder schadenersatzrechtlich zur Verantwortung ziehen? APA Science Dossier vom 28.3.2019; *G Kathrein*, Keine Haftung des Waldeigentümers für Schäden am Nachbargrundstück, *ZVR* 2019, 376; *S Nitsch*, Umwelthaftung: Gegenüberstellung, Rechtsvergleich und Reformversuch (2019); *E Wagner*, OGH konkretisiert Waldrandhaftung, *RdU* 2019, 83

Family Law: *C Nigsch*, Schadenersatzanspruch der Eltern wegen verzögerten Studienbeginns ihrer Tochter, *JAP* 2018/2019, 239; *E Ondreasova*, Schadenersatz bei Kontaktrechtsvereitelung, *Zak* 2019/751; *R Reischauer*, Zum Schadenersatzanspruch des Scheinvaters bei Ehebruch seiner Gattin, *EF-Z* 2019, 103; *S Gruber*, Der Haushaltsführerschaden: Ersatz auch für nicht Unterhaltsberechtigte, *EvBl* 2019, 1041; *W Zankl*, Bereicherung und Schadenersatz im Familienrecht, *EF-Z* 2019, 110

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Rechtsschutzversicherung und Versicherungsvertriebsrecht (2019) 31; *F Scholz-Berger*, Schad- und Klagloshaltung (2019); *M Unzeitig*, Regress und Schadenersatz zwischen General- und Subunternehmer, *bauaktuell* 2019, 114; *SL Wild/M Weichbold*, Ersatzfähigkeit ideeller Schäden infolge der Verwechslung von Kindern nach der Geburt, *iFamZ* 2018, 272

- 68 Investors:** *N Brandstätter*, Wie verjähren (nun) Schadenersatzansprüche bei fehlerhafter Anlageberatung, *ecolex* 2019, 928; *P Fidler*, Ermittlung der Schadenshöhe bei pflichtwidriger Veranlagung von Investmentfonds, *Zeitschrift für Finanzmarktrecht (ZFR)* 2019, 191; *A Figl*, Haftung des Notars für Anlegerschäden, *EvBl* 2019, 729; *S Kriwanek/B Tuma*, Fonds – Schadenshöhe des einzelnen Anteilsinhabers, *RdW* 2019, 168; *P Leupold/B Gelbmann*, Produkthaftung: Kausalität und Adäquanz bei Anlageschäden, *VbR* 2019, 220; *S Kriwanek/B Tuma*, Anlegerschaden – Schadensminderung durch vorzeitige Konvertierung, *RdW* 2019, 165; *R Wolfbauer*, Mitverschuldenseinwand beim Anlegerschaden: Keine Trennungsthese, *ZFR* 2019, 632
- 69 Medical Liability:** *K Leitner/M Kropf*, Ersatz des Verdienstentgangs bei einem Behandlungsfehler gebührt auch dann, wenn anzunehmen ist, dass der Verletzte ansonsten Erwerb gesucht und gefunden hätte, *ZfG* 2019, 10; *M Neumayer*, Angehörigenpflege nach Geburtsschaden, *Österreichische Zeitschrift für Pfliegerrecht (ÖZPR)* 2019, 63; *S Pree*, Schadensberechnung und Vorteilsanrechnung von Sozial(versicherungs-)leistungen bei „wrongful birth“, *Journal für Arbeitsrecht und Sozialrecht (JAS)* 2019, 194; *R Wagner-Kreimer*, Aufklärung im Rahmen ästhetischer Operationen, *Österreichische Zeitschrift für das ärztliche Gutachten (DAG)* 2019, 31; *J Zahrl*, Aufeinanderfolgende Fehlbehandlung in zwei Spitälern, *DAG* 2019, 94; *J Zahrl*, Kausalitätsbeweis bei ärztlichen Behandlungsfehlern, *DAG* 2019, 141; *J Zahrl*, Ärztliche Aufklärung, *DAG* 2019, 142
- 70 Personal Injury:** *A Gerhartl*, Immaterieller Schadenersatz bei Mobbing? *Zak* 2019, 87; *C Huber*, (Keine) Verunstaltungsentschädigung wegen Unfruchtbarkeit, *ZVR* 2019/174; *C Huber*, Keine Einbeziehung der Verunstaltungsentschädigung in die Unterhaltsbemessungsgrundlage, *ZVR* 2019/195; *E Karner*, Trauerschmerzensgeld (Ersatz des ideellen Gefühlsschadens ohne Krankheitswert) gebührt nur bei grober Fahrlässigkeit, *EvBl* 2019, 23; *P Leupold/B Gelbmann*, Solidarhaftung bei Abfeuern von Raketen, *VbR* 2019, 24; *S Nitsch*, Schock- und Trauerschadenersatzansprüche nach österreichischem und deutschem Recht, *ZfRV* 2019, 20; *M Spitzer* (ed), *Human Rights Violations in Global Supply Chains*, *Journal of European Tort Law (JETL)* 2019/10/2; *M Spitzer*, *Human Rights, Global Supply Chains, and the Role of Tort*, *JETL* 2019, 95–107

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- 75 **Transportation, Traffic and Infrastructure:** *S Arazli*, Schäden in Parkhäusern und Garagen, Sachverständige 2019, 78; *C Brem*, ÖBB haftet auch für den Zu- und Abgangsbereiches außerhalb des Bahnhofes, EvBl- LS 2019, 190; *M Hasberger/M Busta*, Schäden an Infrastruktureinrichtungen am Beispiel von unterirdischen Einbauten, bau aktuell 2019, 140; *C Huber*, Keine Haftung bei unabwendbarem Ereignis („Faltstraßengerät“), ZVR 2019/194; *C Huber*, Haftungsprivilegierung bei Heißluftballonunfall, ZVR 2019, 253; *C Huber*, (Kein) Mitverschulden bei fehlender Beleuchtung eines handbetriebenen Rollstuhls, ZVR 2019/6; *G Kathrein*, Haftung des Reiseveranstalters für Unfall in einem wegen Flugannullierung gebuchten Hotel, ZVR 2019, 248; *BA Koch*, Mitverantwortung durch unterlassenen Selbstschutz am Beispiel von Schutzkleidung, ZVR 2019, 475–483; *M Lindmayr*, Rechtswidriger Verkauf von „Parkpickerln“ – kein Schadenersatzanspruch, ARD 2019, 6660; *A Netzer*, Die Haftung von Eisenbahnverkehrs- und Infrastrukturunternehmen im Rechtsvergleich, ZVR 2019, 180