

CHAPTER SEVEN DEFENCES

7.2. ASSUMPTION OF RISK

7.2.2. GERMAN LAW

Introductory Note

Acting at one's own risk (*Handeln auf eigene Gefahr*) used to be a *complete* defence, i.e. it excluded the defendant's liability entirely. For a long time, it was founded on the principle of implied consent, seen as a declaration of will which had to be valid under the rules on contractual or unilateral legal acts. In a key judgment of 14 March 1961¹ the BGH solemnly abandoned that position as being artificial and unrealistic. Since then consent is used as justification for a complete defence only when it is real, and therefore primarily in sports which involve the conscious infliction of bodily harm. In such situations *a priori* consent to an invasion of one's legal right of bodily integrity is given, or may be assumed to have been given, without indulging in artificial construction.

Apart from such situations of genuine consent, the principle of *Treu und Glauben* (good faith) laid down in § 242 BGB – which, among others, prohibits a plaintiff from contradicting his own prior actions (*venire contra factum proprium*) – now governs cases where the defendant argues that his or her liability should be *reduced* or, under particular circumstances, *excluded*. That principle also underlies the value judgment expressed in § 254 BGB concerning contributory negligence. However, in normal sport cases, where players may potentially injure each other, *Treu und Glauben* will normally lead to a *rejection* of the plaintiff's claim, at least when the rules of the game have been observed by the defendant, because in such situations players may be taken to have abandoned the possibility to bring a claim against one another. In such cases the reasoning underlying § 254 BGB will not apply.²

Furthermore, in cases of risk-based liability (*Gefährdungshaftung*) acting at one's own risk will operate as a (complete) defence since such liability regimes only protect persons who could not avoid the danger against which the specific liability regimes protects. It is held that a plaintiff accepting that danger no longer comes under the ambit of protection of the regime.³

¹ *Infra*, 7.G.19.

² See *infra*, 7.G.20.

³ *Infra*, 7.G.21. See further Lange at 638. Risk-liability regimes under German law are discussed *supra*, Chapter VI, see in particular 6.1.1.

BGH, 14 March 1961⁴

7.G.19.

EXPOSURE TO DANGER

Young driver

The principle of Treu und Glauben (§ 242 BGB) prohibits someone from acting inconsistently with one's prior conduct and thus makes it wrong for a plaintiff to invoke the liability of the defendant without taking into account that he himself consciously created a dangerous situation. In such a situation, § 254 BGB can be applied by analogy.

Facts: The plaintiff was involved in a motor accident when he was 16½ years old. On 21 February 1957 he drove to school with the first defendant, then nearly twenty years old and the only one with a valid driving licence. Two other boys, the second defendant and J, then nearly 17 and 17½ years old respectively, were also sitting in the car. On their way to lunch, the second defendant asked the first defendant to allow him to drive the car but the first defendant refused. On the way back, however, the second defendant renewed his request and the first defendant relented and allowed him to take the wheel for a while. Though the road was quite steep, the second defendant drove about 60 km/h, lost control of the car, and struck a tree. The second defendant suffered a cranial fracture, the first defendant a knock on the head, and J a bruise to the left eye. The plaintiff suffered brain damage and a severing of the left ocular nerve which reduced vision in his left eye to about 10 per cent.

Held: The court of first instance awarded the plaintiff's claim in part, but the court of appeal dismissed it in its entirety. The BGH quashed the judgment and the case was remanded.

Judgment: "I. The court of appeal held that there was no implied agreement which excluded the defendant's liability in tort. In any event, any such agreement by a minor like the plaintiff would be invalid without the consent of his legal representative. However the court held that the defendants were nevertheless entitled to be relieved from liability on the ground that the plaintiff had been acting at his own risk. The plaintiff was found to have sufficient insight to appreciate the clear risk involved in allowing the second defendant to take over the wheel...

II. We quite agree with the court of appeal that the defendants' liability was not effectively excluded by contract. However, its observations on the doctrine of acting at one's own risk (*Handeln auf eigene Gefahr*) require us to make a decision of principle.

At present lawyers speak of a person as acting at his own risk when, without any sufficient reason, he puts himself in a position of imminent danger although he is aware of the particular circumstances which create the danger in question. If this risk results in injury, the question arises whether the injured party can claim damages from another person who would otherwise be liable, whether under risk-based liability or under the rules of contract or tort law. At first the courts applied § 254 BGB in such cases unless they found an implicit contractual exclusion of liability, which they were very reluctant to do...

⁴ BGHZ 34, 355, NJW 1961, 655. English version by T. Weir in Markesinis at 649.

Not until its judgment of 19 June 1933 (RGZ 141, 262) did the RG... adopt the view that a person who rides in a vehicle with knowledge of special attendant dangers, thereby consents to any personal injury which may arise therefrom during the journey. If such consent was validly given and relevant, it neutralized the illegal quality of the defendant's conduct with the result that though he caused the harm, he was not liable for it. Such consent to an invasion of one's legal interest was seen as a declaration of will which needed to reach the addressee and, if made by a person with limited legal capacity, would because of its adverse effect be valid only if his statutory representative had agreed to it. The RG adhered to this view [reference omitted], and the Third Civil Chamber of the BGH adopted it [reference omitted]...

III. As long ago as 25 March 1958 (NJW 1958, 905), this Chamber expressed doubts about the way in which the RG [in the above judgment] treated person putting themselves consciously in a position of imminent danger. Scholars have also increasingly objected to treating a person who 'acts at his own risk' as giving a consent to a possible invasion of a legal interest which operates as a defence. They stress that it is artificial and unrealistic to view the situation in this way, that it is inappropriate to employ the concept of 'legal act' (*Rechtsgeschäft*), and that this construction tends to lead to unsatisfactory results [references omitted]. We agree with these criticisms and now depart from the doctrine of the Reichsgericht.

1. The situation involves carriage by an incompetent driver. Here it is clearly unrealistic to suppose that the passenger who is aware of the driver's incapacity is consenting to the personal injuries which may arise during the journey. That situation concerns normally a case of conscious negligence rather than of conditional intention... [and] it amounts to gross fiction to hold that such conduct by the passenger constitutes a consent to personal injury.

2. Furthermore, it is only within the rather narrow limits of §§ 134, 138 BGB and § 226a StGB that any such agreement could serve as a defence for the defendant. Should the injury prove fatal, the defendant's conduct clearly cannot be exculpated by any such agreement [reference omitted]...

3. Another unsatisfactory consequence of treating a person's consent to the invasion of a legal interest as constituting a declaration of will is the requirement that it needs to be received and must therefore 'reach' the addressee...

4. Nor is the doctrine any better when the victim is under age. Why should liability with regard to minors, who are themselves capable of being liable in tort, depend on whether their [legal] representative consents which is in practice extremely uncommon since normally the decisions involved are sudden and spontaneous?

5. In cases involving drunk-driving the view, which we now reject, meant that whether there was a complete defence or a more elastic apportionment under § 254 BGB depended on whether the passenger, himself often drunk, was conscious of the risk or whether he had committed a serious negligence for rendering himself incapable of appreciating the risk. This is a very subjective matter...

6. We note finally that the view of the Reichsgericht leads to a difference in the way the illegality of an actor's conduct is judged in private and in criminal law. In criminal law the victim's conscious self-exposure to harm is not accorded the same exculpatory force where personal injuries are negligently inflicted as it has been in private law...

IV. In the view of this Chamber, the problem under discussion gives rise to issues of illegality and exculpation only when the victim's conduct really, and without any artificial

DEFENCES

construction amounts to a consent to an envisaged invasion of his legal interest. This may happen in certain dangerous sports [reference omitted], but in the common case before the courts today the sole question is almost always whether, and if so to what extent, a person's liability in damages is affected by the fact that the victim had consciously exposed himself to the danger when it was imminent. If in such cases it seems ... offensive that the damage should be shifted from the victim to the other party, that is because in claiming compensation the victim is acting in a manner inconsistent with prior conduct of his own and for which he is answerable. To go against one's own act conflicts with the principle of *Treu und Glauben*, and *it is this which makes it wrong for the victim to invoke the liability of the defendant without taking account of the fact that he himself consciously created or helped to create the dangerous situation which enabled the defendant... to cause the harm.* [emphasis added] Once this is realized, we see that the correct way to deal with the problem is by means of the value judgment expressed in § 254 BGB. This rule provides that a defendant's liability may be reduced, or even extinguished, if conduct of the victim is especially his capricious exposure of himself to danger, contributes to the harm. It is essentially based on the concept of inconsistent behaviour rooted in § 242 BGB...

It is true that if the cases of self-exposure to danger are to be dealt with under § 254 BGB [that is in accordance with the principle of apportionment], we will be abandoning the familiar rigid principle that to act in the knowledge of specific existing danger is to act at one's *own* risk and thus to forfeit one's claim to damages. However, in our view it will do nothing but good if this principle is abandoned... [as] the courts have tended to set an almost impossibly stringent burden of proof with regard to the plaintiff's knowledge of the special source of danger...

As to the question of when liability should be *excluded* in a case where the victim has exposed himself to danger, and when there should simply be a *reduction* of the damages, we are of opinion that no precise rule can be laid down... Certainly, when a victim has clear knowledge of a specific danger and exposes himself to it without any good reason and is hurt, or indeed when he helps to create the dangerous situation, there will be good reason to relieve the defendant of all liability. However... [o]ther factors may be of great weight, for instance how the danger arose, how much the defendant was to blame for the existence and realisation of the risk, what the relationship between the parties was, and how obvious the danger was... § 254 BGB permits the trial judge to do justice in the particular circumstances of the individual case in a judicially responsible manner, and he will be assisted in making a just and proper exercise of his discretion in applying this provision if he pays attention to the principles evolved by the courts in relation thereto and to the principle of inconsistency in conduct...

V. It is well-established law that if the victim is a minor, his contributory fault under § 254 BGB is to be judged in accordance with the relevant principles of delictual law. If a 16½-year old like the plaintiff is personally at fault in consciously putting himself at risk, one must therefore look to his actual ability to recognize the dangerous nature of his conduct and to behave accordingly. To this extent we agree with the court of appeal. However... we cannot follow the court of appeal in holding that the defendants must be relieved of liability just because the plaintiff consciously endangered himself...

These observations are not intended to prejudge the final decision which, in view of the change in the law and the possibility of further evidence, must necessarily be left to the trial judge. We make them only in order to show that on the evidence so far adduced it would be

wrong that the defendants, who have apparently suffered only slight injuries, should be entirely released from liability to the plaintiff, who is maimed for life...

Notes

(1) The decision is a good example of a judgment where the BGH, not unlike the legislator repealing earlier (statute) law, says explicitly that, and to which extent, it reverses earlier case law (see, at the end of II). The Court announces that it wishes to make a decision of principle and then embarks on a thorough (and learned) analysis of the legal situation. The Court criticizes the earlier case law for having accepted that “acting at one’s own risk” is always a complete defence against a plaintiff bringing a tort action and for having founded that idea on the presumed plaintiff’s *consent*, viewed as a “legal act” (*Rechtsgeschäft*). Under III of the annotated judgment the BGH explains why it considers that view to be artificial and unrealistic, and how it leads to unsatisfactory results. Only in certain cases, e.g. in dangerous sports cases, can it be said that the victim’s conduct amounts to consent, given in advance, to an envisaged invasion of his legal interest of bodily integrity. However that is not correct in common cases, such as those involving carriage by an incompetent driver, and nor is it correct in cases involving drunk-driving (under III.1. and III.5 of the excerpt).

(2) Instead of applying the artificial construct of a legal act, and the principle of *Willenserklärung* (expression of will) inherent thereto, the BGH, in the annotated judgment, chose to found the defence of “the plaintiff acting at his own risk” on the principle of *Treu und Glauben* (good faith) laid down in § 242 BGB, as it is “wrong for a victim to invoke the liability of the defendant without taking account of the fact that he himself consciously created or helped to create the dangerous situation” (under IV). The correct way to deal with the problem is then, according to the Court, “by means of the value judgment expressed in § 254 BGB” as it is based “on the concept of inconsistent behaviour which is rooted in § 242 BGB”. As already stated,⁵ § 254 BGB stipulates that “if a fault of the injured party has contributed to the occurrence of the damage, the duty to compensate and the extent of the compensation to be made depend upon the circumstances...”. However, as we have seen,⁶ creation of danger or, as here, a victim exposing himself capriciously to danger (under IV of the excerpt), is also a factor which may be taken into account to alleviate liability under § 254 BGB. All this means that, in many instances, acting at one’s own risk will lead to apportionment of liability rather than operating as a complete defense for the defendant.

The Court then goes on to explain which elements have to be taken into account, within the framework of § 254 BGB, in the particular situation of a victim who is a minor and under the circumstances of the case, to reduce his claim for damages rather than to exclude it.

⁵ *Supra*, 7.1.2.

⁶ *Supra*, 7.G.7., Note (3) and 7.G.8., Notes (1) and (3).

*BGH, 5 November 1974***7.G.20.**

NO CLAIMS ADMITTED

Unlucky football player

In less dangerous sports, such as football, where all players may potentially injure one another, even when they comply with the rules of the game, the principle venire contra factum proprium (Selbstwiderspruchverbot) prohibits one player from bringing a claim for damages against another. In such a case the value judgment underlying § 254 BGB does not apply by analogy.

Facts: On 29 September 1968 a football match was played between the football teams of the plaintiff and of the defendant. Towards the end of the first half, the plaintiff had the ball. When he had already crossed into the opponents' half of the pitch, the defendant attacked him. As a result, the plaintiff suffered an open fracture of the right lower leg. As a consequence the plaintiff suffered from sepsis of the bone marrow (osteomyelitis) which led to his being hospitalised several times. He claimed material damages amounting to DEM 12,870, the payment of appropriate damages for pain and suffering and a declaration of liability for future damage. He claimed that the defendant had "floored" him deliberately, causing him to fall, with a kick when he was driving the ball along in front of him at a distance of three to four meters. The defendant claimed that he did not kick at the plaintiff but at the ball and he indeed hit it with his right foot. At the same moment the plaintiff also kicked at the ball to drive it along. However, the latter did not reach it but hit the defendant's foot and the fracture of the leg was caused at that moment.

Held: The court of first instance and the court of appeal dismissed the claim. The BGH upheld the decision of the lower courts.

Judgment: "...II. There is no doubt *per se* that a culpable infringement of a rule of the game, intended to protect the player in general, triggers liability for compensation if the infringement results in injury of the player [reference omitted]. However, this is fundamentally different where the injury of the football player is caused by another player – usually a member of the other side as is the case here – and the latter's style of play was covered by the rules according to which both teams participated in the match; in such case the possible occurrence of such injuries is accepted by each player... [W]here a person participates in a football match which takes place in accordance with specific rules that are binding upon every player, this participation, in legal terms, has to be interpreted to the effect that he accepts the rules of the game, i.e. he acknowledges the conditions for participation and, insofar as play did comply with the rules, he recognizes that he will not bring any claims for compensation of damage that might arise.

a) Football is a competitive game, i.e. a game held between two teams involving bodily contact, which requires the use of strength and dexterity and which often leads to unavoidable injuries as a result of the combative element of the mutual "battle for the ball"

⁷ NJW 1975, 109. Translation by I. Wendt and M. Jelbert.

specific to this form of sport. Every player takes the occurrence of such injuries into account and expects that the other players also accept the potential danger and, hence, will not bring any claims for damages that might arise. Any mental reservation on the part of one player that conflicts with these rules of the game would be irrelevant in law since the legal relations between the participants in a football match, in the context of tort law, must be judged in their objective typification, so that the individual attitude of the particular player is not relevant. If the injured person nevertheless claimed compensation, he would contradict his previous behaviour in a legally inadmissible way.

Already the BGH's decision of 14 March 1961, BGHZ 34, 355,⁸ was based on this point of view... However, that decision based the relevant legal problem on the normative judgment laid down by law in § 254 BGB... As that decision explicitly states, however, it is rooted in... § 242 BGB. It did not – as people often fail to realise – completely abandon the consideration of acting at one's own risk (*Handeln auf eigene Gefahr*), i.e. the tacit acceptance of injury arising from an identified danger. Certainly it can hardly be claimed that the participant in a football match would consent to his injuries. The legal concept of consent (*Einwilligung*) to the injury itself is appropriate, for instance, where a patient allows a [minor] operation to be carried out, i.e. where the doctor injures with intent in the legal sense [reference omitted], or where there is an invasion of privacy [reference omitted]. A football player, however, should not be injured if possible. To assume his consent would constitute an artificial assumption which, as the BGH held [in the decision quoted above], is to be taken into account only in the case of distinctly dangerous sports: ...dangerous motor racing, daredevil rock climbing, boxing and wrestling matches and the like... On the contrary, a football player rather hopes and also expects – not least because of the rules of the game binding upon every participant – that no injuries will arise...; nevertheless, he remains aware that the situation he helped to create can unintentionally lead to injuries. The basic idea of that BGH decision also applies here: namely that it would be perceived as improper (*anstößig*)... if the injured person tried to shift the damage he (consciously and tacitly) accepted to the other [party]. The tenet of that decision is also particularly apposite with regard to a football match: it would be contrary to one's earlier conduct (*venire contra factum proprium*) – which is inconsistent with good faith – to allow the injured person to claim damages from the defendant where [the injured person] could equally have been in the position of the defendant... and would then have defended himself just as well (and rightly so) against the claim to pay damages to the other party...

If this prohibition to act inconsistently with one's own prior conduct (*Verbot des Selbstwiderspruchs*) is to be taken seriously, it cannot be left to a weighing according to § 254 BGB. On the contrary, this legal concept must lead to a complete exemption from liability. Participation in a football match is fundamentally different from the risk which the passenger in a motor vehicle accepts with a driver not fit to drive, which was dealt with in BGH, 14 March 1961, BGHZ 34, 355 [quoted above]. During such a drive, the risk of having an accident is the same for all the participants, however, only the driver and not the passenger can commit the error that leads to the accident; the driver generally relies on the confidence of the passengers that no accident will occur. On the other hand, when fighting for the ball the risk of injury is 'reciprocal': every player is both a potential tortfeasor and a potential victim; what happened to the player alleged to be liable could as well have

⁸ *Supra*, 7.G.19.

DEFENCES

happened to the player invoking his sportsmate's liability. Also the degree of risk is a great deal higher in the case of football. Even if the players comply with the rules of the game, the risk of getting injured is inevitable given the nature of the sport; this does not apply in the same manner to the passenger of a motor vehicle. This risk jointly accepted by the players under the same conditions forces one to conclude that, in the case of injuries which occur despite the fact that the rules of the game have been complied with, players must be exempted entirely from any liability that might arise. It would be too much to expect any player to bear the risk of paying damages (medical expenses, hospital costs, convalescence costs, loss of earnings, damages for pain and suffering, life annuity and so forth) for injuries which have been caused in the normal course of the match...

b) Contrary to the claim of the appellant, the injured person has to accept this exemption from liability even if the injuries sustained... are serious, or even if more serious damage develops as a result of unforeseeable complications...

c) The risks which [the players] specifically have to bear are to be determined in the first place by the rules of the game..."

Note:

The annotated judgment constitutes an addition to the earlier judgment of 14 March 1961,⁹ to which it refers explicitly. In the latter judgment the BGH declined to accept, for the most common cases of self-exposure to danger, that "consent [by the victim] to an envisaged invasion of his legal interest" can be regarded as a correct legal basis for the defendant to exclude his or her liability in tort. Apart from cases (as e.g. in boxing) where "consent to an envisaged invasion of one's right" (in that case one's right to bodily integrity) can be truly regarded as consent (seen as consent to a legal act), such consent will normally appear as fiction and be tantamount to artificial construction. In such typical situations of self-exposure to risk, the legal basis for the defence of acting at one's own risk is to be found, according to that 1961 judgment, in the concept of *Treu und Glauben* (good faith) laid down in § 242 BGB. That concept precludes a victim who has consciously exposed himself or herself to danger, or contributed to create the dangerous situation, from shifting the burden of the resulting harm onto the injurer. Consequently, the courts should then apply § 254 by analogy since that provision is rooted in § 242 BGB as well,¹⁰ which also means that the defence of acting at one's own risk is not necessarily a complete defence but will normally lead to apportionment.

In the annotated judgment, the BGH adds to the earlier judgment that the concept of *Treu und Glauben* (§ 242 BGB) may sometimes lead to a different conclusion. That is particularly so where two persons participating in a competitive game (as football) – even if they comply with the rules of the game – could both potentially have been injurer or injured. In such a context of reciprocity, the concept must be understood to mean that none of the players is allowed to act inconsistently

⁹ Ibid.

¹⁰ Ibid. and Notes (1) and (2) below it.

with his or her own prior conduct (*venire contra factum proprium*). And since the victim, if he or she had been the injurer, would have relied on the same argument as the injurer now, *Treu und Glauben* should not allow him or her to sue for damages at all (the underlying reason being that both players having accepted the rules of the game, none of them should be allowed to claim damages sustained in the normal course of the game if the injurer has actually observed the rules of the game).

It follows therefrom that, in such a situation of reciprocity, *Treu und Glauben* leads to exclusion of the defendant's liability and not to apportionment under § 254 BGB. In other words, in such a situation, the same end result is reached (but for different reasons) as in the case where consent to a possible invasion of one's legal interest can still be regarded as a genuine and not merely an artificial defence.

BGH, 13 November 1973¹¹

7.G.21.

ELIMINATING LIABILITY FOR ANIMALS

Vanity does not pay

A plaintiff who puts himself or herself at risk will not be able to rely on the defendant's liability as a keeper under § 833 BGB where he or she used the animal for his or her own purposes and put himself or herself outside of the protective scope of § 833 BGB.

Facts: The defendant, the manager of so-called boarding stables (*Pensionsbetrieb*) of a riding club, kept his own horse 'E...' in the stable of the club. On 17 March 1969 he practised for the first time starting to gallop in counter canter. E... disobeyed and made things difficult for him. The plaintiff, an experienced show rider, who, in the past, had broken in E... for three months, observed the behaviour of the horse for approximately 15 minutes. Then he called out to the defendant: "M..., leave it to me." The defendant rode to the centre, dismounted and handed the horse, which was bridled with a snaffle, over to the plaintiff. The latter shortened the stirrups and swung himself into the saddle. At that moment or immediately after, E... for no apparent reason threw its head backwards, hit the head of the plaintiff, reared on its hindquarters, lost balance and fell on the left thigh of the plaintiff. The latter, who was already dazed from being hit by the horse's head if not indeed unconscious, sustained a fracture of the thigh. He claimed, *inter alia*, compensation for actual loss (*Sachschaden*) and loss of earnings as well as appropriate compensation for pain and suffering from the defendant as the keeper of the horse.

Held: The court of first instance upheld the claim against the defendant for half. The court of appeal reduced this apportionment to one third. The BGH quashed the judgment of the court of appeal and dismissed the claim.

Judgment: "II. The reasoning of the challenged judgment does not stand up to review.

1. The court of appeal rightly takes as a starting point that the defendant, as the keeper of the horse, E., would be liable on the basis of § 833 BGB for the injuries caused to the

¹¹ NJW 74, 234. Translation by I. Wendt and M. Jelbert.

DEFENCES

plaintiff as a consequence of a typical animal risk (*Tierrisiko*) unless this risk-based liability (*Gefährdungshaftung*) is not applicable because the injured person consciously exposed himself to the risk.

2. On the other hand, it is not possible to follow the court of appeal where it holds that risk-based liability is not fully excluded in this case [and] that § 254 BGB is the correct starting point in order to take account of the plaintiff's self-exposure to danger.

a) Contrary to the opinion of the court of appeal, this case is not covered by the reasoning which led this Chamber, in its judgment of 14 March 1961, BGHZ 34, 355,¹² to assess the impact of conscious self-exposure to danger (*bewußte Selbstgefährdung*) on the liability for damages *not* in the light of the concept of acting at one's own risk (*Handeln auf eigene Gefahr*), *but* in accordance with § 254 BGB. That judgment concerned a so-called free ride (*Gefälligkeitsfahrt*) in a motor vehicle, whereby the passenger was injured as a result of the action of the driver (whom the passenger knew was unfit to drive), and thus dealt with a claim for damages under § 823 BGB (and not under the risk-based liability regime of § 7 StVG, the application of which was excluded in any event pursuant to § 8a StVG). Here, however, the claim is founded on risk-based liability. Moreover, in that judgment the Chamber left open the impact of the concept of acting at one's own risk in those cases in which the behaviour of the injured person can be interpreted, without making artificial assumptions, as acquiescence to the potential infringement of the legally protected right (*Rechtsgutsverletzung*), as for example in the case of dangerous sports such as motor racing or daredevil rock climbing [references omitted]. Under particular circumstances, riding accidents might also come within this category. For instance, the RG did not grant compensation according to § 833 BGB to an injured person who was to break in and train the horse (RG, 13 July 1904, RGZ 58, 410, RG JW 1905, 143; [further references omitted]). In a case where a jockey claimed damages according to § 833 BGB, the Chamber also discussed the issue from a viewpoint of acting at one's own risk [reference omitted].

b) The facts of the present case do not present sufficient indications that the plaintiff, when taking over the horse, exposed himself to such a particular riding risk which could justify the application of the concept of 'acting at his own risk' (*Handeln auf eigene Gefahr*)... Therefore, the court of appeal was not wrong in holding that the liability of the keeper of the animal (*Tierhalterhaftung*) is not automatically excluded here because [the plaintiff] acted at his own risk.

3) However, the claim had to be dismissed since the case does not come within the ambit of protection of § 833 BGB...

At the root of the regime of risk-based liability for animals is the consideration that a person who creates a safety hazard in his own interest is liable for all damage to property or injury of third persons which is linked to that safety hazard and which is unavoidable even if the utmost care is applied [reference omitted]. This departure from fault-based liability is justified by social responsibility... for one's own venture and the constraint imposed on third persons to tolerate the keeping of the animal and to endure the attendant risks [reference omitted].

The [defendant] rightly claims that the application of risk-based liability for animals does not lead to a just and fair allocation of the accidental damage. This is particularly so if the injured person accepted control over the animal and thus accepted the direct capacity to

¹² *Supra*, 7.G.19.

influence primarily [the animal] in his own interest and with full knowledge of the danger associated with that particular animal...

These conditions apply here to the plaintiff. According to the findings of the court of appeal, he virtually forced himself on the defendant with the request to leave the horse to him, knowing that the horse was obstinate and refusing in its behaviour... Although it may also have been in the interest of the defendant that the plaintiff, who was known as the better rider, teach a lesson to the horse, nevertheless, the plaintiff's own interest in his reputation as an experienced show rider was by far predominant: he wanted to prove that he could teach the horse a lesson differently, more easily, more quickly and better. Such circumstances are outside of the ambit of protection of § 833 BGB [references omitted]."

Note

Under § 833 (1) BGB the keeper of an animal is liable for injuries incurred by another in consequence of a risk typically associated with animals,¹³ but only in so far as such liability is not eliminated because the victim consciously imposed such risk upon himself. In the annotated case, the court of appeal had not eliminated the keeper's liability but had apportioned liability under § 254 BGB, a decision for which it found support in the BGH judgment of 14 March 1961.¹⁴ In the annotated judgment the BGH rejected that line of reasoning by distinguishing the present case from that at issue in the 1961 judgment. Whilst the latter related to fault-based liability, the present one concerned risk-based liability. Moreover, the 1961 judgment had not excluded the possibility of invoking formal consent (*Einwilligung*) as a legal basis for a complete defence of acting at one's own risk,¹⁵ provided that such consent is genuine (and not based on fiction). According to the BGH,¹⁶ horse-riding accidents may, under certain circumstances, also fall within the category of genuine consent. However, the BGH accepted that such a situation did not arise in the annotated case.

Nonetheless, the BGH rejected the plaintiff's claim on the ground that the scope of application of risk-based liability (*Gefährdungshaftung*) under § 833 BGB does not cover a situation as the present one, where the plaintiff himself took charge of the horse (which he knew was being obstinate and reluctant) in his own interest, that is in order to demonstrate his ability to teach the horse a lesson, better than its rider could (and thus for vanity's sake).¹⁷

¹³ The regime of § 833 BGB is discussed *supra*, Chapter VI, 6.2.2. and Chapter VII, 7.G.9.

¹⁴ *Supra*, 7.G.19.; see also *supra*, 7.G.20.

¹⁵ *Supra*, 7.G.20., Note (3).

¹⁶ See BGH, 24 November 1954, VersR 1955, 116 relating to a claim for compensation brought under § 833 BGB by a jockey.

¹⁷ See Lange at 638.