

CHAPTER SEVEN DEFENCES

7.3. ILLEGALITY

7.3.2. GERMAN LAW

Introductory Note

The BGB contains specific provisions which declare a legal act null and void for being *contra bonos mores* (*guten Sitten*) (§ 138(1) BGB), or order restitution of what has been received *contra bonos mores* where the recipient has not acted equally reprehensibly (§ 817 BGB).¹ As seen previously,² § 826 BGB states that a person who intentionally caused harm to another in a manner which offends *guten Sitten* will be liable in tort. There is no equivalent provision concerning the impact of conduct *contra bonos mores* on the part of the plaintiff. However, that does not prevent a plaintiff who has acted *contra bonos mores* from being held contributorily negligent which, under the general provision of § 254(1) BGB, may lead to apportionment of liability.³

Two BGH judgments illustrate the above, first in a case where the plaintiff participated in a criminal offence (unlawful abortion), and second in a case where the plaintiff, a prostitute, brought an action in tort to be compensated for earnings from immoral conduct which she lost as a consequence of being injured in a car accident.

¹ The second sentence of § 817 BGB – which holds that the recipient, i.e. the plaintiff, is not allowed to obtain restitution where he has equally offended *bonos mores* – was held, in RG, 1 October 1914, RGZ 85, 293 at 295, not to be applicable to actions in tort. See further Zweigert and Kötz at 578-579.

² See *supra*, Chapter II, 2.4.2.B.

³ See *supra*, 7.G.7.

BGH, 25 September 1952⁴

7.G.26.

PLAINTIFF'S PARTICIPATION IN CRIMINAL OFFENCE

Abortion requested

A doctor who carried out an unlawful abortion cannot invoke the pregnant woman's explicit request to have an abortion as a defence against the unlawfulness of his act. However, the woman's conduct can be invoked as contributory negligence.

Facts: Mrs. S requested a doctor to carry out an abortion (which at that time was unlawful⁵). As a result of complications which occurred a few minutes after the doctor left her house and which, upon his return, appeared to have caused severe internal haemorrhage, Mrs. S died in the clinic to which she had been transported. Her estate sued the doctor.

Held: Both the court of first instance and the court of appeal dismissed claim. The BGH disagreed with the court of appeal and referred the case back for further determination on the issue of contributory negligence.

Judgment: "2. The liability of the defendant cannot be denied here... on the ground that the necessary causal link is missing between the unlawful operation and the fatal outcome. That ground would only be relevant if... the deceased not only consented to the operation but expressly requested it [thus breaking the chain of causation]. The court of appeal could [however] refrain from adopting a more detailed position on [that] question... [as it] confined itself to the proposition that consent in an abortion is in any event prohibited and therefore without legal effect [as a causal factor]. The important question here is whether declared consent to an operation is totally ineffective because it constitutes an infringement of a legal prohibition... Just as, according to established case law of the Chamber, the preclusion of liability on account of conduct at one's own risk (*Handeln auf eigene Gefahr*) requires a declaration of consent equal to that needed to conclude a valid legal act (*Rechtsgeschäft*), such a declaration of consent is also required to carry out an operation. Such consent is ineffective not only if lack of will can be proven [reference omitted], but also if it infringes a legal norm or runs counter to good morals (*contra bonos mores*) (§§ 134, 138 BGB). This proposition is rightly affirmed here by the court of appeal, since the infringement of § 218 StGB makes both the doctor and the pregnant woman liable to punishment.

Against the assertion of liability in such cases, it cannot be argued that anyone who asks another person to interfere with his health in a specific way acts maliciously and against good faith if he derives claims for damages from the effect of the interference he has called for...

3. By undertaking the operation, the defendant not only deliberately injured the body of Mrs S, but also breached the protective provisions of §§ 223, 218 StGB... Moreover...

⁴ BGHZ 7, 199. Translation by M. Jelbert.

⁵ Recent developments under German law concerning abortions and civil liability are reviewed *supra*, Chapter II, 2.G.1. and notes thereafter.

contrary to the view held by the court of appeal, there is a causal link between the death of Mrs S and the operation [undertaken by the defendant].

However, in spite of the foregoing considerations, the legal dispute is not yet ready for decision because the defendant can still invoke the consent and the wishes of the dead woman as a fault which has contributed to the undertaking of the operation. If she had not desired the operation as she did, the defendant would not have carried it out in the way he did. The (contributory) fault of the woman is to be weighed against that of the defendant, regard being had to the causal impact [of both faults] (§ 254 BGB), and the defence of contributory negligence can also be invoked against the claim of third parties according to § 846 BGB.”

Note

The annotated judgment concerns a plaintiff’s voluntary participation in an unlawful abortion, that is a criminal offence at the time of the case, which the defendant doctor conducted with the plaintiff’s consent, and the impact thereof on the defendant’s liability in tort under § 823 BGB. The BGH refuses to admit that the woman’s consent can be regarded as a justification for the doctor, because it is given in violation of a legal rule which, under the circumstances of the case, makes abortion a criminal offence for both the doctor and the pregnant woman. The BGH also refuses to accept the defendant’s argument that the woman had acted maliciously (*arglistig*) and against good faith (*Treu und Glauben*) by asking the doctor to interfere with her health, which would have made the claim for damages resulting from the interference inadmissible. The BGH accepts, however, that the defendant may invoke the woman’s consent for him to interfere with her health, in a defence of contributory negligence against the plaintiff. Under § 254 BGB, such a defence leads to apportionment of liability by weighing both the conduct of the injurer and that of the injured from a viewpoint of causation. Moreover, according to § 846 contributory fault of the injured can also be invoked against claims brought by dependants under § 844 BGB.

*BGH, 6 July 1976*⁶

7.G.27.

LOSS OF INCOME OF PROSTITUTE

Incapacitated prostitute

An injured prostitute can claim damages for lost earnings but only up to the amount of a minimum subsistence income.

Facts: The plaintiff, a prostitute, was injured in a car accident caused by the defendant. She claimed compensation for being unable to work for 30 days following the accident.

⁶ BGHZ 67, 119; NJW 1976, 1883. Translation by M. Jelbert.

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Held: The court of first instance and the court of appeal granted DEM 5940. The BGH quashed the decision of the court of appeal.

Judgment: “I... [T]he court of appeal has no objection to considering the loss of a prostitute’s earnings as legally eligible for compensation. It concedes that a prostitute’s earnings for the provision of paid sex are void according to § 138(1) BGB, but believes that the immorality of the earnings lost through the accident cannot negate their eligibility for compensation... [reference omitted]. On this question, the court of appeal considers that the State not only tolerated prostitution, but also made its proceeds subject to income tax. Moreover, the wages earned by the prostitute were protected as property [reference omitted]. The establishment of brothels was at times promoted by municipalities, and tenancy agreements for brothels and prostitutes’ accommodation were recognized as effective in law, be it subject to some limitations. In view of this, it appeared no longer justified [to the court of appeal] not to consider the loss of a prostitute’s earnings ‘as injury within the meaning of § 249 BGB’.

II. The contested judgment cannot be followed... The question at issue here is whether the plaintiff is prevented from claiming compensation of the amount of the lost earnings which she obtained by acting in breach of the law or against morality. Admittedly, the loss of earnings which, as a head of damage, must be taken into account under §§ 252, 842 BGB, need not have been earned for a service deemed to be economically beneficial... However, that does not allow an injured party to obtain compensation for services which, according to generally held standards, are regarded to be unpermissible. This is not only the case, without exception, where the earnings were possible only through the infringement of a legal prohibition (BGH, 7 May 1974, NJW 1974, 1374, VersR 1974, 968)... But it is also the case where a remunerative activity, prevented through the tortious act, would infringe ... the sense of decency of all reasonably and justly thinking people, i.e. morality (thus already BGH, 14 July 1954, VersR 1954, 498)...

III. Nevertheless, the moral unworthiness of the plaintiff’s job which became impossible in the present case must not, in the view of this Chamber, lead to the rejection of the complaint in full.

1. In so far as a victim – other than here – demands compensation for the lost fruits of a *legally forbidden* action, the rejection of such a claim in full results from the context of the legal system [emphasis added], as it would be inherently contradictory if the legal system assisted the enforcement of claims which have for effect to replace the earnings from an activity which it declares unlawful. However, the emphasis lies somewhat differently if, as here, the proceeds lost as a result of a tortious act, derive from an activity which is *immoral*, but, although legally not recognized, appears to be tolerated [emphasis added]. It [remains] justified for the tortfeasor to object that he could not fairly be expected (§ 242 BGB) to substitute earnings resulting from immoral conduct, and that State courts should not be involved in enforcing a claim for compensation for such earnings. Yet it must remain possible, and advisable, to limit the scope of that objection to compensation in having fair consideration for the interests of both parties...

2. All things considered, the Chamber considers it appropriate to place an upper limit on the damages for lost earnings from prostitution which are hence considered admissible in

part (against the hitherto prevailing view) up to the amount of a subsistence income obtainable, according to experience, by a healthy person in straightforward relationships...”

Notes

(1) The annotated judgment concerns the issue of legitimate interests. In such a case the question is not, as in the preceding case, whether a plaintiff who participated in wrongful conduct can claim compensation in tort at all. The question is rather whether a plaintiff who suffered harm through the wrongful conduct of someone else can claim compensation for income which he or she earned in violation of the law or good morals.⁷ With a reference to § 138 (1) BGB which declares legal transactions offending good morals to be null and void,⁸ the annotated judgment came to the conclusion that a plaintiff cannot claim compensation for illegitimate income, even although the income generating activity is tolerated by the State. In a long unexcerpted part of the judgment, the BGH dismissed various arguments which led to the opposite conclusion.⁹

(2) The refusal to grant the plaintiff compensation for loss of illegitimate earnings, as a matter of principle, does not necessarily lead, however, to a complete dismissal of her claim. To come to that conclusion the BGH first enunciates that the situation at issue is not one where the plaintiff claims compensation for lost income derived from *legally forbidden* conduct. If that were so, it could not be accepted that the legal order lends its hand to enforce claims which it has forbidden. The situation is different however, where the conduct, although morally reprehensible, is nonetheless tolerated by the legal order. In such a situation it is possible and appropriate, according to the BGH, to weigh the interests of plaintiff and defendant in equity, within the framework of a balancing act, as required by § 242 BGB (*Treu und Glauben*). The BGH decides to grant compensation up to a maximum amount of what is needed as a subsistence income (*existenzdeckendes Einkommen*). The solution reached in the annotated judgment raised many questions¹⁰ and remains controversial.¹¹

⁷ The distinction is also applied to French law: see *supra*, 7.3.1, Introductory note under (a) and (b) and **7.F.27.**, as well as Chapter II, **2.F.19.**

⁸ *Supra*, 7.3.2, Introductory Note.

⁹ Those arguments relate to the fact that prostitution was not explicitly forbidden by law, at least not at the time of the facts (Under II.1.b) of the judgment) and that prostitution was no longer a criminal offence, since it was tolerated in the legal administrative context (even subjected to taxation) and also less severely judged by public opinion (although still considered to be *contra bonos mores*) (under II.2.a), b) and c).

¹⁰ See H. Schack and H.-P. Ackmann, *Höchststrichterliche Rechtsprechung zum Bürgerlichen Recht*, 3rd ed. (München: Beck, 1993), where the judgment is reproduced at 91-95 and questions raised at 95.

¹¹ See Markesinis at 915.