CHAPTER EIGHT
REMEDIES

8.4. LOSS OF OR DAMAGE TO PROPERTY

This section deals with selected issues concerning the assessment of damages in the case of loss of, or damage to, property. The two main issues are 1) the appropriate measure of damages in respect of physical damage to property and 2) the recoverability of damage resulting from the loss of use of property. Two related issues, whether damages are reduced when the plaintiff obtains new for old and whether a plaintiff may claim damages for a damaged object when the plaintiff has a substitute available, are also examined.[1]

8.4.1. GERMAN LAW

Introductory Note

The cases studied in this section illustrate the principles presented in Section 2:[2]

a) The first topic studied is the principle of reparation in kind (*Naturalrestitution*) in its two forms - restoration of the property to its previous state by the defendant (the first sentence of § 249 BGB) or payment to the plaintiff of a sum of money required to effect such restoration (the second sentence of § 249 BGB)[3] - and the principle of *Dispositionsfreiheit* which allows the plaintiff to use as he wishes the monetary compensation paid to him.[4]

b) The second topic studied is the distinction between reparation in kind (*Naturalrestitution*) and genuine compensation (*Kompensation*) and the related rule[5] that a plaintiff cannot claim *Naturalrestitution* when reparation in kind is impossible, insufficient or possible only at disproportionate cost (§ 251 BGB). In this section, attention is paid to the *Differenzmethode* (comparison of the actual financial position with the financial position as it would have been but for the tort) as a basic principle governing the assessment of compensation in money (*Kompensation*) for material damage.[6]

[1] For a general overview of the laws of the EU Member States on those (and other) questions, see C. von Bar, "Damage without loss" in W. Swadling and G. Jones, (eds.), *The Search for Principle, Essays in Honour of Lord Goff of Chieveley* (Oxford: OUP, 2000), at 23-43; see also von Bar II at 4-30.

[2] See *supra*, **8.G.12.**

[3] See *infra*, **8.G.31.**

[4] See *infra*, **8.G.30.**

[5] See *supra* **8.G.12.** and notes thereafter.

[6] See *infra*, **8.G.30.** and **8.G.32.** and notes thereafter.

c) Thirdly, the importance of the boundary between material and non-material damage (§ 253 BGB) is studied.[7]

The significant role of judicial appraisal in weighing conflicting principles is evident in each of these areas.

BGH, 23 March 1976[8] **8.G.30.**

MEASURE OF DAMAGES IN CASE OF DAMAGE TO MOTOR CAR

Unrepaired car sold

The owner of a damaged car is, in principle, entitled to damages amounting to the cost of repair irrespective of whether the car is repaired or not, even when the unrepaired car is sold.

Facts: The plaintiff bought a new car instead of having the damaged one repaired. He sold the damaged car in part-payment for the new one, and claimed damages from the defendant for what would have been the cost of repair, as estimated by an expert.

Held: The court of first instance dismissed the plaintiff's claim. The judgment of the court of first instance was reversed by the court of appeal. The BGH upheld the decision of the court of appeal.

Judgment: "1. Insofar the plaintiff, as here, opts, as he is permitted to do, for *Naturalrestitution* under the second sentence of § 249 BGB [payment of the sum of money required to effect restoration]... *it is basically open to him to use the money received actually for the purpose of restoration, or otherwise*...[emphasis added].

Thus, he must in principle also be entitled to claim the amount that is, in the circumstances, required to effect the restoration even if, from the outset, he has no intention of effecting the restoration upon which the assessment of his claim is based, but rather wishes to help himself in another way or wishes to use the damages award for a completely different purpose. Any other evaluation would invalidate the principle that the award of money damages is at the free disposal of the plaintiff and would therefore be inconsistent with it [emphasis added]. Therefore the intention of the plaintiff to effect repair (a subjective matter which is scarcely verifiable in practice) cannot be raised as a condition of entitlement to payment of an award of the amount required to effect the repair.

2...a)... [T]he principle should be adhered to that the entitlement to repair costs depends on the continued existence of the possibility of repair. However, repair does not become impossible within the meaning of §§ 249, 251(1) BGB by reason of the mere fact that the plaintiff is himself no longer able [to effect repair] because of sale of the vehicle.

b) The hitherto unmistakably dominant opinion, that the plaintiff can claim the repair costs only as long as he is still able to restore the damaged object (*Instandsetzung*), cannot be followed taking into account the plaintiff's freedom of disposition (*Dispositionsfreiheit*) regarding the repair costs, at least for an important and, in the field of damage to motor

[7] See *infra*, **8.G.32.**

[8] BGHZ 66, 239. Translation by Y. P. Salmon.

vehicles, by far the most common class of case [i.e. the sale of an unrepaired car] [references omitted].

aa) It ceases to be possible to bring an action for repair costs, where repair by the plaintiff has become impossible as a result of a natural phenomenon (coincidental destruction of the damaged thing) or has become economically meaningless as a result of some market development... However it seems unreasonable also to bar the plaintiff from claiming the repair costs if he transfers the damaged thing [to a third party] while it is still in a state of disrepair but worth repairing. In those cases the car's state of disrepair, to be compensated by an award of damages, has either directly affected the estate (*Vermögen*) of the plaintiff, because for instance the sales proceeds were consequentially reduced, or in any case because the damage has impaired the economic result of the transfer, for instance [by reducing] the value of the damaged vehicle which the plaintiff had received as a present...

...Through the restoration of the condition of the plaintiff's estate (*Vermögen*) by the wrongdoer's payment, the damage to property (*Sachschaden*) has been definitively made good. That does not mean that the damage is thus treated in an abstract way (*Abstrahierung des Schadens*), which would be foreign to our liability law [references omitted]. That this is not so is evident from the fact that, according to the constant case law of the BGH, the sum of money required to effect the restoration, being the basis of the damages award, must be measured taking the particular position of the plaintiff into account, and thus also in a subject-oriented way (*subjektbezogen*)."

Notes

(1) The annotated case[9] deals with the role of the principle of *Dispositionsfreiheit* in the context of *Naturalrestitution* in the case of damage to property.[10] According to that principle, a plaintiff is entitled to the cost of repair under the second sentence of § 249 BGB irrespective of the plaintiff's use of the sum of money that he receives and even, as decided by the BGH in the annotated case, when he has put himself into a position where he can no longer[11] repair the car because he has sold it in its damaged state.[12] In other words, the sale of the damaged car does not mean that *Naturalrestitution* is impossible and that the plaintiff is entitled only to *Kompensation* under § 251 BGB.[13]

The acknowledgement of the plaintiff's *Dispositionsfreiheit* in this instance leads to the compensation of costs for repair which does not necessarily take place (*Ersatz fiktiver Reparaturkosten*), a concept which has given rise to profound

[9]Confirmed in BGH, 5 March 1985, NJW 1985, 2469, in which the assessment of the maximum amount of the recoverable hypothetical cost of repair is examined in detail. See *supra*, **8.G.12.** and notes thereafter.

[10]*Dispositionfreiheit* only comes into play in the context of property damage, not in cases of personal injury: *infra*, 8.5.1.

[11]According to a basic principle of the German law of damages, "the development of damage is to be taken into account up to the time of the close of the last oral submissions" (BGH, 23 March 1976, BGHZ 66, 239 at 239 and 241-242).

[12]§ 249 BGB no longer applies when the car has been incidentally destroyed before repairs have been carried out: see under 2. b) aa).

[13]See *supra*, **8.G.12.** and notes thereafter.

discussion in legal literature.[14] The BGH reached its conclusion by considering that it is the car's need of repair (*Reparaturbedürftigkeit*), brought about by the tortious act, which in itself affects the plaintiff's financial position (*Vermögen*) and that, since a car has only one function, as a means of transport, it is possible to assess the impact on the plaintiff's *Vermögen* uniformly and accurately, i.e. on the basis of the cost of repair. That is so, regardless of whether the plaintiff sells his damaged car or leaves it unrepaired, something that must therefore be irrelevant to the application of § 249 BGB.[15] In that respect, the recognition of the principle of *Dispositionsfreiheit* results in the use of an *objective* yardstick to assess damage.[16]

The BGH emphasizes, however, that the compensation of such "fictitious" (or hypothetical) repair costs does not lead to an abstract assessment of damages: the sum of money required for the purpose of making the damage good is to be assessed taking into account the concrete possibilities which are available to the plaintiff in his specific position (*subjektbezogen*).[17] However, the assessment of damages will only exceptionally be treated subjectively.[18]

(2) The solution described in the excerpted judgment does not necessarily apply in other situations. In its judgment of 2 October 1981,[19] the BGH regarded the case law concerning damaged cars as covering a specific situation (*Sonderbereich*) and declined to extend it to the case of a damaged house. In such a situation the plaintiff is also free to decide whether to use the award for the purpose of restoration, but that does not mean that a plaintiff *remains* entitled to an award as *Naturalrestitution* under the second sentence of § 249 BGB when he is no longer in a position to restore the house since he has sold it. The BGH acknowledged that the award of *Naturalrestitution* under the second sentence of § 249 BGB is available to a plaintiff

[14]*Inter alia* J. Karakatsanes, "Zur Zweckgebundenheit des Anspruchs aus § 249 S. 2 BGB bei noch nicht durchgeführter Herstellung" (1989) 189 AcP 19; G. Schiemann, "Schadensersatz und Praktikabilität - Zur Dispositionsfreiheit des Geschädigten" in E. Deutsch, E. Klingmüller and H.J. Kullmann, eds., *Festschrift für Erich Steffen zum 65. Geburtstag* (Berlin: de Gruyter, 1995) 399.

[15]It may be surprising that the BGH refers to the repercussions of the harm on the *Vermögen* although § 249 BGB is not directed to compensation for the depreciation of the plaintiff's *Vermögen*. See for a discussion R. Weber, "'Dispositionsfreiheit' des Geschädigten und fiktive Reparaturkosten" VersR 1990, 934 at 940 and 942. The BGH judgment of 14 January 1986, BGHZ 97, 14, provides an instructive summary of this case law, and concludes that a plaintiff is not entitled to the reimbursement of the cost of an operation which he has no intention of undergoing.

[16]Compare BGH, 26 May 1970, BGHZ 54, 83 at 85. See also U. Magnus, *Schaden und Ersatz* (Tübingen: Mohr, 1987) at 60.

[17]See *supra*, **8.G.12.**, Note (2)(b).

[18]See for instance BGH, 22 November 1977, VersR 1978, 182 concerning a plaintiff who, as a garage-owner, could buy a new car at a very advantageous price and see BGH, 26 May 1970, BGHZ 54, 82 and BGH, 8 December 1977, VersR 1978, 243 concerning the position of a plaintiff (e.g. a passenger transport company or a shipping company) that has its own workshop which can carry out the repairs. See M. Berger, "Abkehr von der konkreten Sachschadensberechnung?" VersR 1985, 403 at 404-405.

[19]BGH, 2 October 1981, BGHZ 81, 385.

who obtains a judgment[20] before selling the house: "thus, with the award, *Naturalherstellung* is realized in the legal sense, and the question of its impossibility no longer arises"; conversely, when the plaintiff has sold the house before obtaining the award, the aim and purpose of *Naturalherstellung*, intended to safeguard the plaintiff's interest in preserving the physical condition of his assets, can no longer be achieved and thus a claim under the second sentence of § 249 BGB no longer justified.[21]

The basis of the distinction thus drawn between a damaged car and a damaged house is unclear.[22] It seems that considerations of practicability and certainty have been decisive:[23] in a judgment of 5 March 1993, the BGH confirmed the 1981 judgment and stressed that its case law relating to damaged cars is based upon an idea which does not apply in respect of real estate, which is "that the economically meaningful use of a car demands its restoration to working order and the repair costs, because of their standardization, are easy to estimate".[24]

(3) The recognition of the principle of *Dispositionsfreiheit* also comes into play when considering whether value-added tax should be included in the assessment of the award of damages where the plaintiff either does not have his car repaired, or repairs it himself,[25] or where the plaintiff is entitled to replace the damaged car but decides not to buy a replacement, or buys a car from a private person without having to pay value-added tax. The BGH has allowed the plaintiff to claim the amount corresponding to the value-added tax. Indeed, the cost of repair generally includes value-added tax and in the case of replacement, the purchase of a replacement car from a professional car-seller is considered to be the most appropriate course of action[26] so that value-added tax is payable. As a consequence, the value-added tax is part of the "requisite" sum of money and, by virtue of the *Dispositionsfreiheit*, the plaintiff is free to choose to repair the car himself or not to have it repaired at all, as he is free to choose to buy a car privately or not to buy a replacement, and it is not for the defendant to take advantage of the plaintiff's decision.[27]

[20] As has been already mentioned, the judgment must take into account the damage at the close of the last oral submissions.

[21] BGH, 2 October 1981, BGHZ 81, 385 at 391.

[22] Critical: *inter alia* Lange at 230-231; Münchener-Grunsky, § 249, para. 15a; H. Kötz at 189; W. Grunsky, "Die Rechtsprechung des Bundesgerichtshofs zum Schadensersatzrecht seit 1992", JZ 1997, 764 (part I) and 825 (part II) at 825; see also Stoll, *Haftungsfolgen im bürgerlichen Recht* (Heidelberg: Müller, 1993) at 159.

[23] Lange at 230-231; R. Weber, "'Dispositionsfreiheit' des Geschädigten und fiktive Reparaturkosten", VersR 1990, 934 at 940 (but see also at 944); E. Steffen, "Der normative Verkehrsunfallschaden," NJW 1995, 2057 at 2059.

[24] BGH, 5 March 1993, NJW 1993, 1793 at 1794.

[25] BGH, 19 June 1973, BGHZ 61, 56.

[26] The BGH emphasizes this to be the most expedient way for the plaintiff, as then the technical reliability of the car will have been checked, and a guarantee is given: BGH, 4 May 1982, NJW 1982, 1864.

[27] See in that way, in the case of replacement, BGH, 4 May 1982, NJW 1982, 1864.

BGH, 24 March 1959[28] **8.G.31.**

REDUCTION OF DAMAGES WHERE THE PLAINTIFF HAS OBTAINED NEW FOR OLD

New for old

When the value of property after repairs is increased compared to its value at the time of the damaging event, the increase is deducted from the recoverable cost of repair.

Facts: The plaintiff's house was damaged as a consequence of arson committed by the defendant. The cost of repair was assessed at DEM 27,120; the plaintiff received an indemnity from his fire insurer on the basis of the original value of the house at the time (*Entschädigung nach dem Zeitwert*), amounting to DEM 21,463. As a result of the work of repair, the value of the house was increased. However, the plaintiff claimed the whole of the cost of repair less the insurance moneys (DEM 5,657) from the defendant..

Held: Both the court of first instance and the court of appeal awarded the plaintiff DEM 250 on the ground that the plaintiff should not be better off after having received damages than he was before the damaging event and, accordingly, that the increase in value due to the restoration of the house had to be deducted from the recoverable amount. The BGH upheld the judgment of the court of appeal.

Judgment: "1. The court of appeal was right in law in holding that in assessing damages for the damage or destruction of something that had depreciated in value through use and age or was already defective beforehand, a deduction is to be made for the difference between old and new, and that this also applies to the case at hand.

a)... For the purposes of both alternatives provided in § 249, the restoration of the earlier state means that a plaintiff who has sustained material harm must be returned to the same economic position as he would have been in but for the occurrence of the circumstances giving rise to the liability to pay compensation [references omitted]. The law does not require [the defendant] to recreate exactly the same state as existed before the occurrence of the harmful event; on the contrary, the question is what the economic position of the plaintiff would have been but for the harmful event [references omitted]. *The necessary comparison of the* [*plaintiff's*] *economic position for this purpose reflects the basic concept of damages law, that the plaintiff should be rendered neither poorer nor richer by the indemnification* [emphasis added]...

c) The present Chamber... has already referred to the fact that the legislature... has left to the courts to decide what advantages [to the plaintiff] are to be taken into account [to reduce the damages that would otherwise be payable]... In each individual case it is necessary to examine whether a deduction is in accordance with the sense and purpose of the duty to make redress... The admissibility of making a deduction on account of an advantage is a question of law; in deciding it, the court must take an overall view of the interests of plaintiff and defendant as they evolved in the situation which has arisen through the harmful event. The principle that one must deduct any advantage which has a causally adequate relationship

[28] BGHZ 30, 29. Translation by Y. P. Salmon.

with the harmful behaviour cannot... apply without exception; the boundaries of reasonableness must be observed. On the one hand, as a matter of principle the damages award is not to lead to the plaintiff's enrichment; on the other hand, the wrongdoer is not to be favoured unfairly [references omitted]. *The deduction of an advantage arising from the conversion of new for old is not per se unfair, even if, because the repair or replacement of the damaged thing may only be carried out in a more expensive way compared with the situation at the time of the damage, the plaintiff has been forced to make an outlay that he would not otherwise have made* [emphasis added]. Thus the increased expenditure which the plaintiff must make to reconstruct the fire-damaged buildings, is offset by the increase in value of the buildings, their increased lifespan and a postponement of future repairs. [In the present case] particular circumstances, which could be important for the question of reasonableness, for instance that the plaintiffs would not be in an economic position to raise the requisite extra funds, are not present on the facts as stated by the court of appeal, and are not put forward in the plaintiffs' submissions [on appeal to the BGH]."

Notes

(1) One might presume it to be irrelevant for the purposes of § 249 BGB that the plaintiff obtains "new for old", as it is hardly ever possible exactly to restore the situation existing before the injurious event, for instance by using second-hand materials of the same value as the damaged parts. It is true that the plaintiff will often gain an advantage as a consequence of the incorporation of new materials (increase in value, lengthening of the property's life span, deferred repairs) but since the plaintiff has no other choice than to repair his property, it may be argued that the plaintiff's claim for *Naturalrestitution* should not be curtailed by such an unavoidable increase in value. As is evident from the excerpted case, the BGH rejects such reasoning, based on the principle that, just as the plaintiff may not be placed in a worse position than prior to the injurious event, the plaintiff may likewise not profit from it (the so-called *Bereicherungsverbot*),[29] and therefore cannot successfully resist the increase in value, as a result of the use of new materials, being taken into account in the claim for damages.

(2) It should be noted that the BGH considers the issue of "new for old" from the perspective of offsetting losses by advantages due to the damaging event (*Vorteilsausgleichung*).[30]

[29]Some consider the *Bereicherungsverbot* to be merely an application of the *Differenzmethode* (see Introductory Note, above, under b) from a specific perspective (Münchener-Grunsky, Vor § 249 at para. 6a). Others are of the opinion that the recognition by the BGH of a reduction because of "new for old" shows that the *Bereicherungsverbot* may come into conflict with the principle of full compensation (Lange at 9 and 260).

[30]Compare Lange at 259 and 484-485. See for a discussion of the issue of collateral benefits with respect to compensation for personal injury, *infra*, 8.5.1.

BGH, 9 July 1986[31] **8.G.32.**

RECOVERABILITY OF DAMAGE RESULTING FROM THE LOSS OF USE

Use of house prohibited by city council

Material loss (under § 251(1) BGB) may be recoverable for the temporary loss of use of property even when the owner has neither incurred expenses nor lost income as a result.

Facts: The defendant was held liable for damage to the plaintiff's private house. As a result of the damage, the plaintiff was prohibited by the city council from living in the house for about one month. She claimed damages for loss of use, even though she did not have to rent a substitute.

Held: The plaintiff's claim was rejected both at first instance and on appeal. The Fifth Civil Chamber of the BGH was of the opinion that, even if the plaintiff completely lost the use of her house for a period of time, there was no material loss but only an irrecoverable non-material loss. For the sake of unity of the case law, the Fifth Civil Chamber submitted the question of law to the full court, the Great Civil Chamber, which held that a recoverable material loss had occurred.

Judgment: "III. The Great Civil Chamber is of the view that, besides cases involving motor cars in private use, at least in cases involving things which the owner needs to have constantly available for personal use, such as the house in which he lives, the temporary loss of the possibility of using such things as a result of a wrongful infringement of property (Eingriff in das Eigentum) constitutes recoverable material harm (Vermögensschaden) in so far as the owner would have used the thing during the period in question. Subject to that limitation, neither the law nor the requirements of legal certainty (Rechtssicherheit) are conclusive obstacles to the award of monetary compensation. Indeed, just and full compensation of economic loss (Vermögensschäden) demands that such losses are not left without redress [emphasis added].

1. The BGB does not define the concepts of Vermögen or economic loss (Vermögensschäden) in the law of damages but leaves their formulation to legal writing and case law... The BGH generally assesses Vermögensschäden in the light of the global financial position [concerned], in a subject-oriented way by applying the Differenzmethode: it makes an arithmetical comparison between the financial position after the harmful event with that which would have existed had the harmful event not occurred [references omitted].

[The Fifth Civil Chamber] is right to point out that in an arithmetical comparison between two financial positions, the temporary loss of personal use of something does not, as such, feature. In such an assessment, if no costs are incurred for a substitute, the loss of use of something finds expression only in a loss of income due to the thwarting of the commercial application of the thing in question and in the costs and obligations which would have been avoided through its use.

[31] BGHZ 98, 212. Translation by Y. P. Salmon.

a) However the BGH has recognized that the Differenzmethode, being a value-neutral computation, does not preclude a need to appraise the factors that should be included in the comparison between the two financial positions (Differenzbilanz) in the light of the protective purpose of liability law and the compensatory function of damages [emphasis added]. In this sense the Differenzmethode… involves a normative appraisal [references omitted]. Certainly, a Vermögensschaden is always expressed in the form of a comparison between the two financial positions (Differenzbilanz) by a reduction of the asset items or an increase in the liability items of the claimant's Vermögen; however, it falls to the exercise of judicial appraisal to determine the items of the comparative balance sheet for the purposes of redress.

b) In making an arithmetical comparison to assess Vermögensschäden, one cannot ignore the fact that the Vermögen's nature and significance amount to more than its mere contents ("Haben"); rather they include the opportunities embodied in the Vermögen, for the owner to realize his life goals by its use [references omitted; emphasis added]. This functional character of the Vermögen is protected in law.

If compensation for the loss of use resulting from a tort were to take account only of commercial use of the Vermögen, it would fail to recognize that the Vermögen is used for other purposes: its use in the domestic sphere is also economically "rewarding" and its impairment can likewise affect the personal economic circumstances of the individual, even if no actual loss of income results....

2. Nor does § 252 BGB militate against [the award of monetary compensation for the loss of use].

When the utility value (Nutzungswert) of something that is used to generate income or increase capital is diminished, it involves a loss of income for which compensation is expressly provided in § 252(2) BGB. That provision underlines the importance in damages law that the legislature attached to the use of economic goods (Wirtschaftsgüter) as sources of income or capital gain, and there is no corresponding provision for property in private use. However, one cannot infer from this, as the Fifth Chamber did, that the provision shows that it was decided not to grant monetary compensation for the loss of use of Wirtschaftsgüter that are put to private use when the loss of use did not result in a loss of income... A refinement of the law, drawn from the productive use of property, so as to include in the redress of Vermögensschäden the use of property for private purposes analogous to commercial uses need not, as the Fifth Chamber fears, lead to the injured party being unfairly advantaged in establishing his claim, if there continues to be an assurance that no award is made for abstract loss of use (abstrakte Nutzungsentschädigung), which the BGB allows only exceptionally (§§ 288, 290, 849 BGB) [emphasis added]. The case law concerning the loss of use of a motor car has made its recovery dependent on the concept that the loss be "perceptible" to the victim, that he would in fact have used the car had it not been damaged, that is to say, that he was willing and able to do so. This limitation is also applicable to other kinds of Wirtschaftsgüter, and places the wrongdoer in an evidentiary position similar to his position in claims for the loss of profitable use. It also ensures that compensation for the loss of enjoyment of privately used property is geared to the individual case, which does not however mean that it may not be necessary to assess damages according to the general characteristics of the case and according to a tariff.

3. Without such an expansion the law will have unsatisfactory results, especially with regard to those Wirtschaftsgüter that are of central importance to the individual's way of life...

4. Admittedly such an extension of the law must apply only to those things that people typically need to have constantly available to them for their [personal use]. Any further expansion of the [remedy] would not be justified by the need to harmonize the law of damages as to the use of property for private and for commercial purposes. Indeed to go any further by awarding damages for non-material harm would risk infringing § 253 BGB and would also conflict with the requirements of legal certainty and assessability of damages [emphasis added]..."

Notes

(1) The excerpted case deals with the question as to whether and, if so, under what conditions loss of use of property constitutes a recoverable loss under § 251 BGB, when the plaintiff does not rent or hire a substitute. That question has been rigorously discussed in case law and in legal writing[32] since it raises fundamental issues of the law of damages: the appropriateness of the *Differenzmethode* in assessing the existence of material harm; the distinction between material and non-material harm; the distinction between *Naturalrestitution* (and the connected principle of *Dispositionsfreiheit)* and *Kompensation*.[33]

(2) The recoverability of damage resulting from loss of use as such is problematic when the loss of use does not result, according to the *Differenzmethode* as defined in the excerpt,[34] in a diminution of the plaintiff's *Vermögen*.

In the excerpt, the BGH explains that the *Differenzmethode* involves an arithmetical comparison between the *financial position* (*Vermögenslage*) after the harmful event and that which would have existed if the harmful event had not occurred. It may be noted, however, that the *Differenzmethode* (or *Differenzhypothese*) has also a more general meaning according to which harm is to be considered as the difference between the *situation* after the injurious event and the *situation* as it would have developed in the absence of that event (compare the first sentence of § 249 BGB). In its more specific meaning, referring to the

[32]See the judgment of the Fifth Civil Chamber preceding the annotated judgment, BGH, 22 November 1985, JZ 1986, 387, annotated by A. Zeuner. See also H. Hagen, "Entgangene Gerbrauchsvorteile als Vermögensschaden", JZ 1983, 833. For further references see Lange at 280.

[33]In the case of *abstrakte Nutzungsentschädigung* (abstract assessment of compensation for loss of use), the award is based on § 251 and not on § 249 BGB. *Naturalrestitution* under § 249 BGB, by providing a substitute (or the sum of money required to hire or rent a substitute) for loss of use which has already occurred, is impossible: a lost opportunity to use a thing cannot be actually restored; see Lange at 281-282. This line of reasoning has been criticized: the BGB did not follow this principle in the case of a plaintiff who sold his damaged car without having repairs carried out (see *supra*, **8.G.30.**); why then should the plaintiff's *Dispositionsfreiheit* not be acknowledged when the plaintiff decided not to hire or rent a substitute car? See and compare *inter alia* T. Rauscher, "Abschied vom Schadensersatz für Nutzungsausfall?" NJW 1986, 2011 at 2013; W. Grunsky, *Aktuelle Probleme zum Begriff des Vermögensschadens* (Bad Homburg: Gehlen, 1968) at 30-33 and 46-49; G. Schiemann, Note under BGH 7 May 1996, JZ 1996, 1077 at 1079; E. Steffen, "Der normative Verkehrsunfallschaden", NJW 1995, 2057 at 2060.

[34]See under III.1, first and second paragraphs.

arithmetical difference between two *financial positions*, the *Differenzmethode* is used to ascertain the existence and the extent of material loss for which money compensation in the sense of § 251 BGB (*Kompensation*) is available. In its more general meaning, the *Differenzmethode* is not confined to material damage as, indeed,[35] *Naturalrestitution* (§ 249 BGB) to which this general meaning refers, aims to safeguard the plaintiff's interests overall (*Integritätsinteresse*) including non-material interest and irrespective of the effects on the plaintiff's *Vermögen*.[36]

In its more specific meaning the *Differenzmethode* may lead to the conclusion that the loss of use as such, that is in the absence of lost profits or incurred expenses, is not a material loss and is also not recoverable under the heading of non-material harm because of § 253 BGB which allows the recovery of such harm only when authorized by statute. For the BGH to allow the recovery of loss of use not reflected in pecuniary loss, it had thus to overcome the limitations inherent in the specific meaning of the *Differenzmethode* which it did by accepting that the value of an asset may be assessed from a normative viewpoint,[37] and, by virtue thereof, acknowledging that material damage (*Vermögensschaden*) consists not only in the deterioration of a piece of property as such, but also in the loss by the owner of the possibility of making use of it "in the realization of his life goals".[38] However, to preclude compensation for non-material harm, which would be inconsistent with § 253 BGB, the BGH underlines the necessity of setting appropriate limits,[39] and needs therefore an objective standard to assess the specific damage resulting from the loss of use of assets,[40] which is believed to be found in the requirement that people need to have them constantly available for personal use.[41]

Similar reasoning has been followed in the earlier case law of the BGH with regard to motorcars. The permanent availability of a car contributes to the fulfilment of the (private) way of life of its user. That is demonstrated by the fact that in case of temporary loss of use of a car, the owner often hires a replacement, from which an objective yardstick arises.[42] A policy consideration is brought into play as well: if the plaintiff would have hired a substitute car, he would have been entitled to damages. Thus, the defendant may not benefit from the

[35] See *supra*, **8.G.12.**, Note (1)(c).

[36] Lange at 45.

[37] See under III.1 a) - b). See also BGH, 15 April 1966, BGHZ 45, 212 at 218; BGH, 30 November 1979, NJW 1980, 775 at 776: "*ergänzende wertende (normative) Betrachtungsweise*".

[38] See under III.1 b).

[39] See under III.4.

[40] In the annotated judgment, the BGH explains, in general terms, how the award of damages for loss of use is to be assessed: see the annotated judgment under IV, not excerpted. The case refers more than once to the need for a standardized assessment of damages, that is according to a tariff (*Pauschalierung*), e.g. for loss of use of a car. In that respect, the BGH recognized the appropriateness of the tariff elaborated by Sanden, Danner and Küppersbusch which is used in legal practice; see BGH, 18 May 1971, BGHZ 56, 214. See for more details Lange at 291-293.

[41] The reasoning is further elaborated in a part of the judgment not excerpted herein.

[42] BGH, 15 April 1966, BGHZ 45, 212 at 215. See also BGH, 18 May 1971, BGHZ 56, 214 at 216 considering that "the time saved through the availability of the car, even outside of the commercial sphere 'is money'".

fact that the plaintiff did not do so, e.g. because of his impecuniosity or because he did not want to bear a financial risk.[43]

(3) The question as to whether and, if so, under what conditions loss of use of property constitutes a recoverable loss when the plaintiff does not rent or hire a substitute, is commonly referred to as the question of *abstrakte Nutzungsentschädigung*,[44] a somewhat misleading expression since "abstract" may refer either to the existence of damage itself or to the assessment of the amount of damages. In the annotated judgment the BGH stresses that its appraisal does *not* lead to "*abstrakte Nutzungsentschädigung*" in the first meaning which is only exceptionally authorized by the BGB[45] and which would involve that loss of use would be recoverable independently of the concrete circumstances of the case and without regard to the actual existence, and extent, of harmful consequences. According to the BGH, "abstract" means in the present context only that, in the absence of incurred expenses or lost income, damages which are stated to exist, cannot be assessed, obviously, on the basis of expenditure or income, but are assessed on the basis of the pecuniary value of the lost use.[46] As to the requirement of actual existence of harmful consequences, the BGH recognizes with a reference to case law concerning the loss of use of a car,[47] that there is a recoverable loss only in case of a noticeable loss of use (*fühlbare Nutzungsbeeinträchtigung*), which implies that the plaintiff must have had the intention, and the possibility, to use his car (*Nutzungswille* and *Nutzungsmöglichkeit*). Hence, there is no loss of use not only when the plaintiff was travelling abroad – a fact unrelated to the accident – and would not have used his car[48] but also when the plaintiff was unable to use his car because of injuries sustained in the traffic accident.[49]

For the sake of completeness, it should be noted that (1) where the plaintiff hires a substitute during the period needed for repair or replacement of the damaged object, e.g. a car, he may charge the expense, in so far as it is reasonable,[50] to the defendant under the second sentence of § 249 BGB; (2) when a vehicle, e.g. a taxi, is directly used for the provision of commercial services ("*Erbringung gewerblicher Leistungen*"), damages are assessed either on the basis of the expenses incurred in obtaining a substitute or on the basis

[43] BGH, 15 April 1966, BGHZ 45, 212 at 216-217.

[44] Lange at 280ff.; U. Magnus, *Schaden und Ersatz* (Tübingen: Mohr, 1987) at 131ff.

[45] See under 2. *Abstrakte Schadensersatz* is allowed only under §§ 288, 290 and 849 BGB. These provisions entitle a creditor to interest irrespective of whether the creditor has suffered a loss to that extent.

[46] BGH, 19 November 1974, VersR 1975, 261 at 262.

[47] BGH, 15 April 1966, BGHZ 45, 212 at 219.

[48] BGH, 30 September 1963, BGHZ 40, 345 at 353. See also BGH, 26 March 1985, NJW 1985, 2471 dismissing the claim of the *Bundeswehr* with regard to the loss of use of an ambulance for a period of 30 days during which it would neither have been used nor lent out.

[49] BGH, 7 June 1968, VersR 1968, 803; BGH, 19 September 1974, VersR 1975, 37.

[50] Subject to the principles and limitations inherent in §§ 249 ff. BGB: *Wirtschaftlichkeitspostulat*, *subjektbezogene Schadensbetrachtung*, disproportionality as a limit to *Naturalrestitution* and the duty to mitigate the damage; see *supra* **8.G.12.** and notes thereafter. See for more details Lange at 270 ff.

of lost profits (§ 252 BGB);[51] (3) when the plaintiff substitutes, for the damaged vehicle, a vehicle held in reserve, the plaintiff is entitled to damages amounting to the cost incurred in maintaining the reserve vehicle during the period when he loses the use of the damaged vehicle, as "it can make no legally significant difference... whether the owner... hires a substitute vehicle or whether he substitutes a vehicle which he had already himself purchased and kept specifically as a precaution..."[52]

[51]The loss of use may be assessed "abstractly" only when "because of the special personal efforts or sacrifices of the plaintiff it did not affect trade returns": BGH, 10 January 1978, BGHZ 70, 199 at 203; see Lange at 287-288.

[52]BGH, 10 May 1960, BGHZ 32, 280 at 284-285 where the BGH held that "it would not be in accordance with principles of *Treu und Glauben* (§ 242 BGB)" to treat an entrepreneur who, through the provident provision of vehicles held in reserve, saves the wrongdoer from expense, worse than an entrepreneur who has not made such provision. See also BGH, 10 January 1978, BGHZ 70, 199 where the applicable principles are discussed further. This case law deals with one example of the so-called issue of *Vorsorgeaufwendungen*, i.e. expenses incurred by the plaintiff in taking measures to cope with future damage or to enable the plaintiff to trace unlawful acts and the persons liable for them; see Lange at 293 ff.