

CHAPTER EIGHT
REMEDIES

8.5. COMPENSATION: PERSONAL INJURY AND DEATH

In this section, some of the main issues with regard to the assessment of damage resulting from personal injury and death will be discussed: the assessment of future damage sustained by the primary victim or his dependents; the assessment of damage if the personal injury does not result in a “tangible” pecuniary loss (loss of earning capacity not resulting in an actual loss of wages; loss of housekeeping capacity); and the recoverability of damages where third persons render services to the victim gratuitously. Attention will also be paid to the issue of collateral benefits: particularly in cases of personal injury or death, the question arises whether certain benefits received by the plaintiff as a consequence of the defendant’s wrongdoing are to be taken into account in assessing damages.

8.5.1. GERMAN LAW

Introductory Note

a) The recoverable damage in case of personal injury and death is dealt with in §§ 842ff. BGB:

– In case of *death*, the defendant is liable for funeral expenses (§ 844(1) BGB) to the person who is legally obliged to incur them (in principle the victim’s heirs). The defendant is also liable to pay damages, as a general rule in the form of periodical payments, to persons whom the victim was or might have become bound by law to maintain: this “lost maintenance” (*Unterhaltsschaden*) amounts to the sum of money for which the victim would have been liable during his lifetime (§ 844(2) BGB)

– In case of *personal injury*, the injured person is entitled under § 249 BGB to compensation for medical expenses (“*Heilungskosten*”).¹ Secondly, he or she can claim damages under § 843(1) BGB, again as a general rule in the form of periodical payments, for so-called “*vermehrte Bedürfnisse*”, i.e. “recurrent sums which have the purpose of compensating those disadvantages which arise for the victim due to the continuing impairment of his or her physical well-being”.² Thirdly, the defendant is liable, under § 842 BGB, to pay compensation for “the detriment which the act occasions to the plaintiff’s earnings or prospects”,³ again as a general rule in the

¹See for more details Lange at 308-310.

²BGH, 19 May 1981, NJW 1982, 757 at 757.

³See for more details Lange at 311ff.

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form of periodical payments (§ 843(1) BGB). Fourthly, the defendant is liable to pay an equitable amount in damages for non-material harm (§ 847 BGB).

– In case of *death or personal injury* (or deprivation of liberty), the defendant is liable, under § 845 BGB, to pay compensation for the loss of services rendered by the (primary) victim who was bound by law to render those services in the plaintiff's family or firm. At present, this provision is still applicable in cases of death or personal injury of a child living at home and bound by law to render services to his or her parents.⁴

b) In what follows, a case concerning *loss of earning capacity*, which did not result in an actual loss of earnings, is excerpted first,⁵ followed by a case concerning the question whether remarriage affects the plaintiff's entitlement to compensation for "*Unterhaltsschaden*" (lost maintenance).⁶ Under the first annotated case the occasion arises to discuss some other collateral benefits (the benefit of receiving *full pay during disability*⁷ and the benefit of *assistance benevolently rendered* by a third person⁸). Attention is also given to how § 252 BGB and § 287 ZPO affect the way in which courts have to deal with the probability of future damage and with uncertainty of the extent of damage when assessing compensation for a future loss of earnings.⁹

*BGH, 5 May 1970*¹⁰

8.G.42.

LOSS OF EARNING CAPACITY

Qualified chemist

Loss of earning capacity as such, without a consequential loss of earnings, does not constitute a material loss.

Facts: The plaintiff, a chemist and owner of a small pharmaceutical factory, carried out laboratory research to develop new preparations to be produced in his firm. He sustained personal injury in a traffic accident and his ability to work was affected. He argued that after the accident he was no longer able to develop new preparations and that he was consequently unable to increase his turnover and operating profit which remained at the same level as before the accident. He claimed damages in the amount of the wages that he would have paid had he appointed a highly qualified researcher to carry out the research, which it was alleged he could no longer carry out himself.

⁴See for more details Lange at 321-322. See for instance in the case of the death of a child who rendered assistance on the parents' farm: BGH, 6 November 1990, VersR 1991, 428.

⁵**8.G.42.**

⁶**8.G.43.**

⁷**8.G.42.**, Note (4).

⁸Ibid., Note (5).

⁹See *ibid.*, Note (2). For an overview E. Scheffen, "Erwerbsausfallschaden bei verletzten und getöteten Personen (§§ 842 bis 844 BGB)", VersR 1990, 926. On § 287 ZPO, see also *supra*, Chapter IV, **4.G.19.**, Note (4).

¹⁰BGHZ 54, 45. Translation by Y.P. Salmon.

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Held: The plaintiff's claim was rejected both at first instance and on appeal. The BGH upheld the court of appeal's judgment.

Judgment: "b)... The plaintiff cannot successfully claim... that merely through the impairment of his ability to undertake independent professional research work, he has sustained damage to his *Vermögen* from a "normative" viewpoint, albeit that it is not arithmetically assessable.

aa) Capacity for work (*Arbeitskraft*) and earning capacity (*Erwerbsfähigkeit*) are characteristics of the individual which, seen from the perspective of liability law, are connected primarily with the legally protected interests (*Rechtsgüter*) of physical integrity and health. According to § 823 BGB, § 11 StVG¹¹... the violation of these *Rechtsgüter* alone does not trigger an obligation to make good the material loss (vermögensrechtliche Ersatzpflicht) (as distinct from Schmerzensgeld payable under § 847 BGB) [emphasis added]. That obligation arises only if material damage occurred from the violation of these *Rechtsgüter* (comp. § 11 StVG). Earning capacity is therefore not already in itself a financial asset (*Vermögenswert*)... In any event, the activity of an entrepreneur of the kind in question here depends on his individual abilities and application and, as a matter of economics, because of the substantial business risks involved, [the value of] his ability to work (*Arbeitsfähigkeit*) is dependent on economic results (*erfolgsabhängig*) and is subject-oriented (*subjektbezogen*). The money value of the ability to work (*Arbeitsfähigkeit*) cannot be objectively determined according to generally accepted standards on the basis of the level of capacity for work (*Arbeitskraft*). Therefore the plaintiff cannot rely on the theory of "normative damage"...

bb) It follows that the loss of the plaintiff's earning capacity as such does not itself afford an entitlement to periodical payments under §§ 842, 843 BGB or 11 StVG. In contrast to social security law, in civil liability law the ability to work (*Arbeitsfähigkeit*) is not an objective financial asset which [when infringed] would as such give rise to compensation [references omitted]. Therefore, someone who has not suffered a loss of earnings, but has lived on the income from his assets or on his retirement pension and, without the injury, would have continued to live on that income, sustains no damage, and so likewise has no claim to damages. So a long-term unemployed person, someone as yet unwilling to work, or someone destined to remain in training for a long time, will not be able to claim the abstract "value" of his possible abilities to work as his damage [references omitted]. The same goes for a self-employed person, who - for instance owing to the loyalty of his regular customers [references omitted] - does not sustain a loss of income despite the temporary loss of earning capacity (*Erwerbsfähigkeit*), so that his loss of income will have to be considered only for the period of his short-term incapacity. Likewise a government employee who loses a leg in an accident, but is re-employed in the same agency or another agency in the same wage bracket, often sustains no loss of earnings [references omitted]. Thus a plaintiff whose ability to work (*Arbeitsfähigkeit*) is harmed, can recover damages only if the suspension or

¹¹§ 11 StVG: "In cases of injury to the body or health, compensation is to be made through reimbursement of health care expenses as well as for the economic loss which the victim suffers as a result of the injury where it destroyed or reduced his earning power temporarily or permanently, or resulted in an increase in his needs." The StVG is discussed in greater detail *supra*, Chapter VI, 6.2.1.A.

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reduction of his occupational activities (Erwerbstätigkeit) has had concrete and tangible results [emphasis added; references omitted].

However, damages can be recovered not only where a loss of income is established but also where expected and even increased gains could not be made (§ 252 BGB), as may be the case with the self-employed. That the entrepreneur can rely on the provisions of § 252 BGB and § 287 ZPO, providing for a relaxation of the burden of proof (*Beweiserleichterungen*), has already been mentioned. However, that does not alter the fact that a completely abstract assessment of the loss of earnings (*Erwerbsschaden*) i.e. without any consideration of the actual development of the business, as the plaintiff claims here, is inadmissible.”

Notes

(1) The excerpted judgment states that an *inability to work* is *not* a *material loss* as such. A material loss can be established only where the disability leads to a concrete and tangible (“*konkret und sichtbar*”) loss of earnings, ascertainable by application of the *Differenzmethode*.¹² Thus, a partial disability not affecting the plaintiff’s income does not constitute a material loss and, conversely, a partially disabled plaintiff who, without failing to fulfil his duty to mitigate the damage, does not find another job is entitled to damages amounting to the full loss of earnings.¹³

The question was put, however, whether it should not be possible to assess material damage in another way. In this respect, the case deals with a key question of the German law of damages: is harm always to be assessed in accordance with the *Differenzmethode*, or may it be ascertained even where the *Differenzmethode* does not show an arithmetically calculable loss, and if so, on what basis? The traditional attachment of the German law of damages to the *Differenzmethode* explains why the issue of loss of earning capacity, like the issue of “abstract” loss of use,¹⁴ has given rise to great discussion.

In the annotated case, the plaintiff had referred to the case law of the BGH concerning compensation for “abstract” loss of use, for loss of housekeeping capacity¹⁵ and for loss of earnings (sustained by the employee but claimed by the employer) where the employer continues to pay wages (“*Lohnfortzahlungsfall*”).¹⁶ The judgment, in a passage not printed above, gives an overview of this case law, discussing the reasons for a departure from the *Differenzmethode* in those cases, to explain why the *Differenzmethode* cannot be departed from in the case under discussion.¹⁷ It is in this context that the BGH refers to the so-called “normative” concept of damage (“*normativer Schadensbegriff*”) applicable to the losses of the kind just mentioned but not to the loss of earning capacity. It should be noted that the

¹²See *supra*, **8.G.32**. This judgment is in line with earlier case law: Lange at 380. See *inter alia* BGH, 24 January 1956, VersR 1956, 218; BGH, 2 February 1965, VersR 1965, 489. It seems that the Bundesarbeitsgericht was inclined to decide the other way: Lange at 381-382; see also M. Lieb, “‘Wegfall der Arbeitskraft’ und normativer Schadensbegriff” JZ 1971, 358.

¹³BGB, 25 January 1968, VersR 1968, 396.

¹⁴See *supra*, **8.G.32**.

¹⁵See *infra*, Note (5).

¹⁶See *infra*, Note (4).

¹⁷An overview of this case law is given in the annotated judgment under 2.a) (not excerpted); the discussion of this case law follows under 2. b) aa) (not excerpted).

“normative” concept of damage does not have a definite meaning: it generally refers to the supplementation (“*normative Ergänzungen*”) of the *Differenzmethode* by a normative assessment (“*wertende Betrachtung*”).¹⁸

(2) A plaintiff may be faced with insurmountable difficulties when the compensation for his injury is dependent upon *proof* of the exact amount of his loss. As the annotated case shows, the plaintiff is not allowed to assess the harm sustained on the basis of an abstract standard (the amount of wages which he would have had to pay had he appointed a highly qualified researcher as a replacement). The requirement of proof of the exact amount of profits lost may pose particular problems for a self-employed person.

As mentioned at the end of the excerpt, two provisions lighten the onus of proof incumbent on the plaintiff.¹⁹ The second sentence of § 252 BGB provides that “profit is deemed to have been lost which could with probability have been expected *in the ordinary course of things* or in the light of the special circumstances of the case...” [emphasis added].²⁰ § 287 ZPO entitles the court to assess the existence and extent of damage *freely* by an assessment of all the circumstances of the case. § 287 ZPO was intended to make possible a rough-and ready assessment (*ex aequo et bono*), as a departure from the earlier rule that a plaintiff had to prove and calculate the damage down to the last penny (“*auf Heller und Pfennig*”).²¹ It must be emphasized that the appraisal of probability (“*Wahrscheinlichkeitsprognose*”) expressed in § 252 BGB and the estimation of damage under § 287 ZPO do not, however, lead to an unlimitedly liberal assessment of damage.

The degree of probability required under § 252 BGB does not relieve the plaintiff from the need to prove “tangible facts, since only on the basis of established circumstances can it be said how things would have continued to develop”.²² A judicial assessment needs “tangible reference points” without which, as the BGH states, an assessment would “be left floating in the air”.²³ Whether the plaintiff meets this requirement is to be decided on a case-by-case basis. Once the claim is established, lack of “certainty” concerning the amount of damage does not allow the court to dismiss the claim; the judge is allowed to assess damages freely (“*Schadensschätzung*”) under § 287 ZPO. In the annotated case, the BGH found that the plaintiff had failed to produce proof of a loss of profits.²⁴

It may be noted that the BGH may review the court’s appraisal of probability: thus, in a judgment of 14 January 1997,²⁵ the BGH held that a court has to take into

¹⁸Lange at 38; H. Hagen, “Zur Normativität des Schadensbegriff in der Rechtsprechung des Bundesgerichtshofes” in E. von Caemmerer, R. Fischer, eds., *Festschrift für Fritz Hauß zum 70. Geburtstag* (Karlsruhe: Verlag Versicherungswirtschaft, 1978) 83 at 100. See for a very instructive overview E. Steffen, “Der normative Verkehrsunfallschaden” NJW 1995, 2057.

¹⁹See for more details Lange at 340ff.

²⁰The assessment of damages “in the ordinary course of things” is commonly called “abstract” but this denomination leads to confusion: Lange at 356.

²¹H. Stoll, “Haftungsverlagerung durch beweisrechtliche Mittel” (1976) AcP 176, 145 at 183-184.

²²See annotated judgment under II (not excerpted).

²³Ibid.

²⁴See annotated judgment under II. 1.) (not excerpted).

²⁵BGH, 14 January 1997, NJW 1997, 937.

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account probable *future* developments and should not focus exclusively on the circumstances existing at the time of accident.

In the case in question, a twenty year old plaintiff, rendered paraplegic as a result of a traffic accident, claimed compensation for loss of earnings (exceeding his disablement benefit), assessed on the basis of the wage of a qualified baker. At the time of the accident, the plaintiff was unemployed and appeared to be uninterested in exercising his craft. The court of appeal held that the plaintiff had not produced proof with regard to his future working life. The BGH quashed the judgment of the court of appeal, holding that “without... concrete reference points it cannot be assumed, that in the long-term [the plaintiff] would not take advantage of the possibilities open to him for profitable gainful employment”.²⁶

(3) In the annotated case, the BGH emphasizes the need to distinguish between a claim for compensation for loss of earnings (*Erwerbsschäden*) and a claim for compensation, under § 843 (1) BGB, for recurrent expenses which are incurred by the injured person in seeking to improve his condition, such as nursing, renewals of a prosthesis and other consequential (literally, increased) needs (*vermehrte Bedürfnisse*). Damage resulting from “*vermehrte Bedürfnisse*” is characterized by the fact that *the need itself* gives rise to compensation. Consequently, it is immaterial whether the plaintiff spends the sum of money for the purpose for which it is granted.²⁷

In the annotated case, because the claim for loss of earning and the claim for “*vermehrte Bedürfnisse*” must be distinguished, the BGH refused to treat loss of earning capacity in the same way as the latter and to consider it as constituting recoverable damage as such, that is independently of any pecuniary consequence.²⁸

A different approach is applied to *medical expenses* claimed under § 249 BGB. In case of personal injury, there is no room here for *Dispositionsfreiheit* (that is the plaintiff’s right to use for any purpose the money awarded to him or her by way of damages) : the plaintiff is not entitled to compensation for medical expenses which he or she does not intend to incur. To be sure, in a case in which the plaintiff did not purchase a prescribed tonic because of his impecuniosity,²⁹ the BGH did grant a claim for compensation for the cost of the medicine, but the judgment is to be explained on policy grounds: a defendant is not to be released from liability for damages because the plaintiff, as a consequence of his impecuniosity, was not able to incur appropriate costs. That policy consideration was emphasized in a judgment of 14 January 1986,³⁰ in which the BGH held that the plaintiff was not entitled to compensation for fictitious costs of surgery (“*fiktive Operationskosten*”), in that case the cost of plastic surgery to hide a scar. Indeed, in cases of personal injury the remedial costs (*Herstellungskosten*) are ear-marked for a specific purpose

²⁶Ibid. at 938.

²⁷Lange at 311. However, the fact that the plaintiff does not actually incur these expenses may show that there is no longer a need.

²⁸See the annotated judgment under I.1.) (not excerpted).

²⁹BGH, 29 October 1957, VersR 1958, 176.

³⁰BGH, 14 January 1986, BGHZ 97, 14; JZ 1986, 638, annotated by A. Zeuner. See also W. Grunsky, “Zur Erstattungsfähigkeit fiktiver Heilungskosten” JuS 1987, 441.

(*zweckgebunden*), a conclusion which the BGH reached on the basis of § 253 BGB (limited recoverability of non-material damage): a plaintiff who claims the cost of medical treatment which he has no intention of undergoing, in fact claims compensation for non-material damage to which §§ 253 and 847 BGB are applicable.³¹

(4) The excerpted judgment refers to cases where *wages* continue to be paid to the victim by his employer (*Lohnfortzahlungsfällen*) as an application of the concept of normative damage.³² This category of collateral benefits is discussed briefly below.

Various statutory provisions provide that a disabled employee is, for some time, entitled to full pay. Since, so far as pay is concerned, the employee's financial position therefore remains, for that period, the same after the injurious event, the employee might seem to sustain no pecuniary loss in that regard.³³ Moreover, as the employer is not one of the indirectly injured plaintiffs (*mittelbar Geschädigter*) who can rely on §§ 844-845 BGB, the employer is not entitled to claim compensation on account of the fact that he paid wages without receiving work in return.³⁴ The BGH does not however reach the conclusion that the defendant is released from all liability in this regard. In a judgment of 19 June 1952,³⁵ it held that, from the viewpoint of the doctrine of collateral benefits (*Vorteilsausgleichung*), the defendant cannot plead that the employee is legally entitled to receive his full salary and that he therefore does not sustain pecuniary loss. However, the employee is required to assign his claim to the employer.³⁶

As a further basis for that conclusion, the BGH reasoned by analogy with another collateral benefit, namely the money received from a benevolent third person. In general, *benevolent payments* do not release the defendant from liability for damages,³⁷ and the same must be true where provision for payment is made by general law, unless it was the legislature's intention to release the defendant from liability.³⁸ Finally, the BGH refers to § 843(4) BGB as the expression of a more general principle that a defendant is not released from liability where a third person (or body) protects the plaintiff against the injurious consequences of a tort.³⁹

(5) Loss of *housekeeping capacity* provides another example of a case where a normative concept of damage applies.

³¹Ibid. at 19. With regard to §§ 253 and 847 BGB, see *supra*, 8.G.12., Note (1)(e).

³²See also BGH, 27 April 1965, BGHZ 43, 378 at 381.

³³Ibid.

³⁴BGH, 19 June 1952, BGHZ 7, 30 at 33-34.

³⁵Ibid.

³⁶Ibid. at 49-50.

³⁷Unless the third person intends to release the wrongdoer: see Lange at 517-518.

³⁸BGH, 22 June 1956, BGHZ 21, 112 at 118-119.

³⁹Ibid. at 116. See also *infra*, Note (5).

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Until the *Gleichberechtigungsgesetz*,⁴⁰ a husband could claim damages under § 845 BGB for loss of personal services where a wrong committed by the defendant had killed or injured his wife. The assumption underlying the application of § 845 BGB was that the wife was bound by law to render services to the husband who was the beneficiary of the housework done by his wife. The 1957 Act invalidated that assumption as a result of which the husband's claim under § 845 BGB was no longer possible and the BGH held that, in case of injury, *only the injured person* (wife or husband) may now claim compensation under § 842 BGB⁴¹ for not being able, as a result of the injury, to contribute to the household work, whilst in case of death of the wife or husband, the dependents may claim compensation on the basis of § 844 BGB (loss of right of maintenance).⁴²

In the annotated case the BGH recognized the existence of a recoverable loss where, despite the spouse's injuries, the housekeeping is done without outside domestic help and accordingly no expenses are incurred. In such a case, when the *Differenzmethode* is applied strictly, there is no arithmetically assessable loss; as the BGH recognized, the award of damages then constitutes a departure from the "*reine Differenzmethode*".

As the BGH explained in the annotated case, the case law concerning loss of *housekeeping* capacity cannot be relied on by a plaintiff claiming compensation for the loss of *earning* capacity. If the BGH recognizes the existence of a recoverable loss, in the former case, that is not because of the loss of capacity in itself (*Wegfall der Arbeitskraft selbst*) but because of the loss of *actual* household services of the spouse (*Ausfall der Arbeitsleistung*).

Of course, when outside domestic help is engaged, the resulting expense (including the employer's social security contribution) is recoverable.⁴³ But when such expenses are not incurred because no outside help is engaged, on what basis are damages to be assessed? The BGH has emphasized that the loss of housekeeping services cannot be equated with the loss of property: in the latter case the plaintiff is entitled to the sum of money (based on prices payable on the market, including value-added tax), which is required to effect restoration and which he is free to use as he wishes (second sentence of § 249 BGB); by contrast, compensation for loss of household services is "not in such a manner tied to a 'market price' and is not unrelated to the actual development of the damage".⁴⁴ As a consequence, where a housewife is killed, dependents cannot claim damages amounting to the *gross* cost of employing a domestic help, including the employer's social security contribution, where such a help is not actually engaged. However, that does not mean that such damages are assessed in a way that is wholly unrelated to that cost, since they will be assessed, as the BGH decided, on the basis of the *net* salary for such help, i.e. the

⁴⁰*Gleichberechtigungsgesetz* (Equal Rights Act) of 18 July 1957, BGBI.1.609.

⁴¹BGH, 25 September 1962, BGHZ 38, 55 at 59; BGH, 9 July 1968, BGHZ 50, 304 at 305-306.

⁴²BGH, 26 November 1968, BGHZ 51, 109.

⁴³BGH, 8 February 1983, BGHZ 86, 372 at 376, dealing with an award under § 844(2) BGB in the case of the death of a housewife.

⁴⁴*Ibid.* at 376-377.

monetary value of the housekeeping services to the member of the household who now actually performs them.⁴⁵

Furthermore, the fact that a *relative* takes up the housewife's role without remuneration, does not relieve the defendant from liability in damages. That solution is based on the general idea ("*allgemeiner Rechtsgedanke*") underlying § 843(4) BGB, a provision which is not only applicable to claims under § 843 but also to claims under §§ 844-845 BGB (see the reference in those provisions to §843(4)). According to § 843(4) the plaintiff's claim for compensation is not excluded by the fact that another is bound to maintain the injured. The general idea underlying that provision is that, where a third person renders assistance out of the goodness of his or her heart (that is to say under no legal obligation), the defendant is not relieved.⁴⁶ Furthermore, the BGH's case law relating to the benevolent rendering of assistance shows that damages are assessed by reference to the concrete circumstances of the case, such as the specific family arrangements that were made after the housewife's death.⁴⁷

In conclusion, it may be said that the assessment of damages in the case of loss of housekeeping capacity under German law is based on a combination of normative, concrete and objective approaches: *normative* because a recoverable loss is recognized without applying the *Differenzmethode*, *concrete* because actual arrangements are taken into account and *objective* because the assessment is based on the market value of the services. This approach is also applicable e.g. to the assessment of *nursing costs* for a paraplegic of whom a relative benevolently takes care.⁴⁸

(6) Similarly, on the basis of a normative assessment (*wertende Betrachtung*)⁴⁹ the victim may recover the *costs incurred by relatives in visiting him or her*, such as travelling expenses or loss of earnings. Such costs are considered to be therapeutic costs (*Heilungskosten*) because of their beneficial effect on the victim's condition,

⁴⁵Ibid. at 377-378. It may be noted that the award may be revised where domestic help is engaged later on: Ibid. at 378. The assessment of damages on the basis of the market value shows some similarity to an assessment of "*fiktive Ersatzkosten*" under the second sentence of § 249 BGB (*Dispositionsfreiheit*) in the case of damage to property; see 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 at 410.

⁴⁶See for more details on this issue: Lange at 514-516.

⁴⁷See for instance BGH, 8 June 1982, NJW 1982, 2864, a case in which a relative assumed the care of an orphaned child. See E. Steffen, "Abkehr von der konkreten Berechnung des Personenschadens und kein Ende?" *VersR* 1985, 605 at 607 and E. Scheffen, "Erwerbsausfallschaden bei verletzten und getöteten Personen (§§ 842 bis 844 BGB)", *VersR* 1990, 926 at 929ff.

⁴⁸BGH, 8 November 1977, *VersR* 1978, 149 at 150 dealing with a paraplegic plaintiff cared for by the grandmother. In the same way BGH, 1 October 1985, *VersR* 1986, 59. See also BGH, 22 November 1988, BGHZ 106, 28 at 31, confirming this case law and emphasizing that the market value of the assistance may be assessed "according to objective calculation criteria". In this respect, the judgment refers to BGH, 9 July 1986, *supra*, **8.G.32.**, dealing with the issue of "abstract" loss of use.

⁴⁹In that way BGH, 22 November 1988, BGHZ 106, 28 at 30 and BGH, 19 February 1991, NJW 1991, 2340 at 2341.

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which the victim may himself recover, irrespective of the fact that they were incurred by a third person and that the plaintiff was under no duty to pay them.⁵⁰

BGH, 16 February 1970⁵¹

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COLLATERAL BENEFITS: BENEFITS RESULTING FROM A NEW MARRIAGE

Remarriage of widower

The services rendered by the widower's second wife decrease the amount of damages.

Facts: The plaintiff's first wife died in an accident for which the defendant was liable. Before her death she had rendered services in the plaintiff's business. The plaintiff remarried; his second wife had an occupation of her own. The plaintiff claimed damages from the defendant for the loss of services rendered by his first wife including the period after his remarriage.

Held: The court of appeal dismissed the claim with regard to the loss of services after the plaintiff's remarriage. The BGH upheld this judgment.

Judgment: "4... Since a claim under § 845 BGB⁵² [references omitted] is a true claim for damages, it is subject to the general principles of *Vorteilsausgleichung* [the offsetting of losses by advantages due to the damaging event] [references omitted] and *Schadensminderung* [mitigation of damage] which are applicable in the law of damages, so that the damages award is to be reduced on account of advantages which have an adequate causal link with the event giving rise to the obligation to pay damages [references omitted], and will be reduced or even completely fall away if the damage that has been sustained is mitigated or completely offset through the *consequent* occurrence of particular circumstances related to the damaging event (legal consequence derived from § 254 BGB) [emphasis in original; references omitted].

These basic concepts of damages law are also applicable in cases in which a married woman, who as such is under an obligation to render services, is injured or killed... If for example the widower remarries and his second wife now renders him – on the basis of the conjugal duty of maintenance under §§ 1356, 1360 BGB – the same domestic and professional services as his first wife had rendered, his damage is thereby offset and the claim against the wrongdoer falls away. However, in accordance with the general purpose of

⁵⁰Lange at 308-309 and at 457; see *inter alia* BGH, 24 October 1989, NJW 1990, 1037 (allowing the recovery of costs incurred for a baby-sitter by the victim's parents for the period of their visit) and BGH, 19 February 1991, NJW 1991, 2340 (with regard to the conditions under which there is a recoverable loss; this judgment appears to be more restrictive). See for a very thorough discussion of this issue H.-J. Seidel, "Der Ersatz von Besuchskosten im Schadensrecht" VersR 1991, 1319.

⁵¹NJW 1970, 1127. Translation Y.P. Salmon.

⁵²As mentioned in the annotated judgment, the plaintiff was entitled by an earlier judgment to damages under § 845 BGB before the BGH's case law with regard to the appropriate basis of the dependant's claim was firmly established. However, that fact is immaterial for the issue under discussion whether § 844 or § 845 BGB is applied.

damages law, this legal consequence cannot be limited to cases in which the second wife in fact renders the same services...

5. § 843(4) does not militate against this result, since § 843 BGB is not concerned with cases in which, as here, a widowed spouse contracts a new marriage and, in consequence, is entitled, under §§ 1360 and 1356 BGB, to claim maintenance from the second spouse. It follows from § 843(4) read in connection with §§ 844(2), 845 BGB, that the fact that a third party has an obligation to maintain the victim does not exclude a claim to damages for injury to health or bodily injury or consequent upon death. According to the general view, that provision refers to benefits which third parties “have to provide as a consequence of the injury”, whether under an obligation imposed by general law or under a contract ... and which the plaintiff obtains “by reason of the injury” [references omitted]. Thus § 843(4) BGB applies to benefits that accrue “through the damaging event, as a consequence of the injury”, i.e. benefits that have a direct causal connection with the damaging event, as long as they are not furnished benevolently with a view to avoid damage. The conjugal maintenance obligations which have their foundation in a remarriage, are not to be counted among such benefits. Thus the plaintiff’s entitlement to maintenance by his second wife, which arises from his remarriage, has no direct causal link with the harmful event, i.e. the death of his first wife; and even if the second marriage was facilitated by the killing, then nevertheless the entitlement to maintenance by the second wife does not arise “as a consequence” of the death of the first wife. Rather the new entitlement to maintenance is caused entirely by the remarriage, which is independent of the harmful event and therefore does not belong to the cases in which a third party has a duty to maintain [the plaintiff] “as a consequence” of the harmful event, regardless of whether the third party is already liable so to do at the time of the accident or becomes liable later... It is only in those cases does that the rule in § 843(3) BGB applies; however it finds no application in the case of remarriage [references omitted].”

Notes

(1) The solution reached in the excerpted judgment is in line with a long-established body of case law.⁵³ Remarriage does not mean that the plaintiff loses his claim for damages as such, but the benefits derived from the remarriage are taken into account in assessing damages relating to the period after it has taken place.⁵⁴ It may be noted that, in line with the unrestricted possibility of revision of a periodical payments award, the plaintiff may see his claim for damages fully restored if the second marriage comes to an end.⁵⁵

The probability of remarriage must be taken into account where the damage sustained by the surviving spouse is compensated in the form of a capital payment,⁵⁶ but not where periodical payments are awarded, as the defendant may bring an action under § 323 ZPO for variation of the award (*Abänderungsklage*).⁵⁷

⁵³Lange at 516.

⁵⁴Münchener-Grünsky, Vor § 249 at para. 108a.

⁵⁵BGH, 17 October 1978, NJW 1979, 268.

⁵⁶G. Küppersbusch, *Ersatzansprüche bei Personenschaden*, 6th edn. (München: Beck, 1996) at para. 657.

⁵⁷BGH, 28 January 1969, VersR 1969, 424. On the *Abänderungsklage*, see *supra*, **8.G.23**.

REMEDIES

(2) In a judgment of 19 June 1984,⁵⁸ the BGH held that the fact that the plaintiff has formed a relationship with a new partner outside the bonds of matrimony does not reduce the plaintiff's entitlement to damages, by reason of the lack of a legal relationship (*rechtliche Beziehung*) between the partners and the fact that any support given has a benevolent character and can be instantly withdrawn.⁵⁹ Moreover, the maintenance actually received by the plaintiff is to be seen as a benefit bestowed on the plaintiff voluntarily which, in accordance with the policy rationale (*allgemeinen Rechtsgedanke*) underlying § 843(4) BGB, need not be taken into account. As an additional justification, the BGH stressed that just as the partner in an unmarried relationship is not entitled to the benefits of maintenance that a spouse is legally obliged to provide, equally the plaintiff need not give credit for the benefits accruing from an unmarried relationship.⁶⁰

The judgment of 19 June 1984 has been criticized, on the ground that the extent of maintenance *actually* received by the partner should be decisive, rather than the existence of a *right* to maintenance,⁶¹ particularly because the loss of a right to maintenance is in itself not equated with damage. Indeed, the BGH has held that a claim under § 844(2) BGB remains a claim for damages and does not impose a duty of maintenance on the defendant. As a consequence, there is no damage "despite the loss of 'right to maintenance' ... if the entitled party would not have recovered anything from the one obliged to pay maintenance anyway, even by taking coercive measures".⁶²

(3) The judgment of 19 June 1984 also deals with the duty incumbent on the widow or widower to mitigate his or her loss by seeking an occupation after the victim's death (*Erwerbsobliegenheit*) the existence of which had been recognized in a leading case of 13 December 1953.⁶³ In deciding whether a plaintiff is subject to such a duty, account is to be taken of the plaintiff's characteristics (age, skills, psychological and physical flexibility, study,...), his or her earlier career, the economic and social position of husband and wife, the length of the marriage and the presence of children for whom the widow or widower must take care.

In the 1984 judgment, the BGH held that the plaintiff was entitled to opt for the benefits of a relationship outside the bonds of matrimony, without taking up a profession, although the decision to do so might constitute a failure to fulfil the *Erwerbsobliegenheit*.

If the plaintiff fails to fulfil the *Erwerbsobliegenheit*, the plaintiff will be presumed, for the purpose of assessing damages, to have the income that would have been generated by the professional activity which he or she could have undertaken and was obliged to undertake to fulfil his duty to mitigate damage.⁶⁴ Conversely, where the plaintiff takes up a profession after the death of his or her spouse without

⁵⁸BGH, 19 June 1984, BGHZ 91, 357.

⁵⁹Ibid. at 359-360.

⁶⁰Ibid. at 364.

⁶¹Lange at 517-518; Münchener-Grunsky, Vor § 249 at para. 108b.

⁶²BGH, 23 April 1974, NJW 1974, 1373.

⁶³BGH, 13 December 1953, BGHZ 4, 170. See for a summary of this case law BGH, 19 June 1984, BGHZ 91, 357 at 365-366.

⁶⁴BGH, 19 June 1984, *ibid.* at 365.

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[8.5]

being subject to an *Erwerbsobliegenheit*, any resultant financial benefits will not reduce the award of damages.⁶⁵

⁶⁵Lange at 512.