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## German Perspective on OGH 4 Ob 8/11x

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THOMAS THIEDE\*

The Austrian Case OGH 4 Ob 8/11x serves brilliantly as a starting point for revisiting the German doctrine covering actions in cases where the right of contact of one parent is violated by the other parent as two entirely different foundations for such actions may apply: breach of a legal duty and, of course, a general action in tort.

A quick diversion to explain the former (originally merely contractual) action may bring clarity: as the original general law of obligations in the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) at the time of enactment in 1900 recognized only two types of contractual breach (non-performance and delay), cases of simple misperformance could not be handled thoroughly.<sup>1</sup> Accordingly, the courts quite quickly adopted a third category where the main duty was misperformed or additional secondary obligations were violated (*positive Forderungsverletzung*).<sup>2</sup> In order to establish such a claim, some kind of contractual or legal obligation must have existed, stipulating a duty that was violated as a result of culpable behaviour by the other party to the obligation.

According to a judgment of the German Federal Supreme Court (*Bundesgerichtshof*, BGH) rendered in 2002 in a case where the costs incurred by the claimant in order to visit his child were frustrated by the custodial parent, this very concept was applied.<sup>3</sup> The legal obligation necessary was deduced from section 1634 paragraph 1 BGB obs,<sup>4</sup> determining that the child has the right to contact with each parent and, correspondingly, each parent has a right of contact with the child. In the view of the BGH, there is a legal duty rooted in family law between both parents allowing for visitation and contact – which in addition is shaped by the second paragraph of that provision that provides that each parent must refrain from anything that renders the relationship of the child to the other parent more

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1 See F. WIEACKER, *A History of Private Law in Europe* (translated by T. Weir), OUP, Oxford 1995, p. 412; H. STAUB, *Die positiven Vertragsverletzungen und ihre Rechtsfolgen, Festschrift für den XXVI. Deutschen Juristentag*, Guttentag, Berlin 1902, p. 29; for further explanations, see B. MARKESINIS *et al.*, *The German Law of Obligations*, vol. I, Clarendon, Oxford 1997, pp. 418 *et seq.*

2 In the meantime, the concept has been added to the BGB and comes under sec. 280 para. 1: 'If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby.'

3 BGH 19 Jun. 2002, *BGHZ (Entscheidungen des Bundesgerichtshofs in Zivilsachen)* 151, 155.

4 Now sec. 1684 BGB.

difficult (*good conduct clause*) – of which the child is the beneficiary. As the costs resulting from the exercise of the right to contact are to be borne by the parent incurring them,<sup>5</sup> the legal relationship between both parents includes – in the best interest of the child – the obligation of both parents to take regard of the economic situation of the other parent and to avoid extra expenses, which would lead to a frustration of that right in the future.<sup>6</sup> Any breach of this obligation would justify an action for damages that could result commonly though not invariably in pecuniary damages. As the other parent intentionally created additional costs by frustrating the costs of visitation, the claimant was awarded his additional costs to see his child.<sup>7</sup> However, this case was the only instance where the concept of *positive Forderungsverletzung* was invoked and was met with reluctance, as it would also entitle the custodial parent waiting for the visit to damages for frustrated expenses – and apparently a majority of parents who have a right to visit simply do not observe such rights. Moreover, among other questions,<sup>8</sup> it seems rather unclear whether a parent would also be entitled to compensation for pain and suffering under that heading.<sup>9</sup>

Obviously the more straightforward solution would be to deal with such claims resulting from the violation of the right to contact under the general tort law clause of section 323 paragraph 1 BGB as the enumerated interests and rights contained therein cover not only the health of the victim but residually includes any ‘other right’ (*sonstiges Recht*), which is deemed worthy of protection. Under the first heading any adverse interference with the person, in particular, externally provoked psychological disturbances of the kind suffered by the claimant here,

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- 5 BGH 9 Nov. 1994, *FamRZ (Zeitschrift für das gesamte Familienrecht)* 1995, 215; OLG (Oberlandesgericht, Higher Regional Court) FRANKFURT MAIN, *NJW-RR (Neue Juristische Wochenschrift – Rechtsprechungsreport)* 2005, 1339.
- 6 BGH 9 Nov. 1994, *FamRZ* 1995, 215; OLG HAMM 27 Jun. 2003, *FamRZ* 2004, 560; see also BVERFG (Bundesverfassungsgericht, German Federal Constitutional Court) 5 Feb. 2002, *NJW* 2002, 1363; OLG ZWEIBRÜCKEN 28 Jul. 1998, *FamRZ* 1998, 1465.
- 7 See references in n. 6 and OLG KARLSRUHE 21 Dec. 2001, *FamRZ* 2002, 1056; AG (Amtsgericht, District Court) GÜTERSLOH 19 Mar. 1997, *FamRZ* 1998, 576; AG ESSEN, 17 Dec. 1999, *FamRZ* 2000, 1110; G. HOHLOCH, ‘Schadensersatz bei Verletzung des Umgangsrechts’, *FF (Forum Familienrecht)* 2004, 202, at 207; D. HENRICH, ‘Anmerkung zu BGH 9.6.2002’, *JZ (Juristenzeitung)* 2003, 49; I. RAKETE-DOMBEK, ‘Schadensersatz bei Nichtgewährung des familiengerichtlich geregelten Umgangsrechts’, *FF* 2002, 210, at 212.
- 8 For example, whether the child to be visited is entitled to damages if the parent fails to visit. See the critical appraisal by T. RAUSCHER, *Familienrecht*, C.F. Müller, Heidelberg 2nd edn 2008, no. 1098; D. WEYCHARD, ‘Anmerkung BGH 19.6.2002’, *FamRZ* 2003, 927; B. HEIDERHOFF, ‘Schuldrechtliche Ersatzansprüche zwischen Eltern bei Verletzungen des Umgangsrechts?’, *FamRZ* 2004, 324, at 325; D. SCHWAB, ‘Gemeinsame elterliche Verantwortung - ein Schuldverhältnis?’, *FamRZ* 2002, 1297, at 1300; I. RAKETE-DOMBEK, *supra* n. 7, p. 212.
- 9 See LG (Landgericht, County Court) ESSEN 17 Dec. 2007, *FamRZ* 2008, 2032; AG ESSEN 5 Jun. 2007, *FamRZ* 2008, 717, at 718 = *NJOZ (Neue Juristische Online Zeitschrift)* 2008, at 1167.

would be covered. Psychiatric injury is, clearly, injury to health in the sense of section 323 paragraph 1 BGB, as long as it entails medically recognizable physical or psychological consequences that would have been suffered by the ordinary, not over-sensitive, citizen.<sup>10</sup> For the second heading, ‘other right’ has always been understood to mean that the rights and interests protected by this formulation must be absolute rights, that is, rights can be asserted against everyone (*rights in rem*).<sup>11</sup> It is good law that the right to visit in section 1684 BGB is such an absolute right, which can be maintained not only against third parties but also against the other parent to a child.<sup>12</sup>

The difficult question regarding a claim for damages for this type of psychiatric illness would then be whether the defendant parent’s conduct played a sufficient role in bringing about his violation of rights and interest or, in short, whether the conduct was causally connected to the harm inflicted. Under German law, three different concepts are used to determine whether particular conduct led to the victim’s harm. First, the but-for test (*conditio sine qua non*) would ask whether the victim’s harm would have occurred but for the defendant’s conduct.<sup>13</sup> The obvious answer in the case at hand would be in the affirmative. However, such impeccable logic yields a potentially infinite number of causes for any given harm,<sup>14</sup> and thus, even the original procreation of the child (or indeed of the parents and their parents) would be a sufficient cause for the claimant’s eventual psychiatric illness. As a consequence, German courts concur that further criteria must be laid down in order to prevent such infinite expansion of attribution of harm. Such a restrictive criterion is applied when assessing the adequacy (*Adäquanz*) of a

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- 10 Consistent case law, cf. BGH 11 Jan. 1972, *BGHZ* 58, at 48 *et seq.* = *NJW* 1972, at 1126; BGH 5 Feb. 1985, *BGHZ* 93, 351, at 355 *et seq.* = *NJW* 1985, 1390 *et seq.*; BGH 6 Jun. 1989, *BGHZ* 107, 359, at 363; BGH 30 Apr. 1996, *BGHZ* 132, 341, at 344 = *NJW* 1996, 2425; BGH 11 Nov. 1997, *BGHZ* 137, 142, at 145 *et seq.* = *NJW* 1998, 810; BGH 22 May 2007, *BGHZ* 172, 263; OLG KÖLN 29.7.1999, *NJW-RR* 2000, 760; OLG HAMM 2 Apr. 2001, *NJW-RR* 2001, 1676.
- 11 Cf. H. SPRAU in ‘Palandt, Bürgerliches Gesetzbuch’, 70th edn, C.H. Beck, München 2011, sec. 323 no. 11.
- 12 BGH 24 Apr. 1990, *BGHZ* 111, 168 = *NJW* 1990, at 2060; OLG FRANKFURT AM MAIN 29 Apr. 2005, *NJW-RR* 2005, at 1339; OLG KARLSRUHE 21 Dec. 2001, *FamRZ* 2002, at 1056, RAUSCHER, *supra* n. 8, no. 956; U. DIEDERICHSEN, in *Palandt, Bürgerliches Gesetzbuch*, C.H. Beck, München 70th edn 2011, sec. 1626 no. 2; L.M. PESCHEL-GUTZEIT in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, vol. IV, Sellier-de Gruyter, Berlin 14th edn 2007, sec. 1626 no. 20; H.-W. STRÄTZ, in *Soergel, Bürgerliches Gesetzbuch*, vol. 19, Kohlhammer, Stuttgart 13th edn 2002, sec. 1626 no. 4; L. MICHALSKI in *Erman, Bürgerliches Gesetzbuch*, vol. II, Dr. Otto Schmidt, Köln 12th edn 2008, sec. 1626 no. 1.
- 13 BGH 11 May 1951, *BGHZ* 2, 138, at 141 = *NJW* 1951, at 711; BGH 2 Jul. 1957, *BGHZ* 25, 86, at 88 = *NJW* 1957, at 1475; BGH 24 Oct. 1985, *BGHZ* 96, 157, 172 = *NJW* 1986, at 576; BGH 4 Jul. 1994, *NJW* 1995, 126, at 127.
- 14 C. VON BAR, *Gemeineuropäisches Deliktsrecht*, vol. II, C.H. Beck, München 1999, no. 437; G. BRÜGGEMEIER, *Haftungsrecht: Strukturen, Prinzipien, Schutzbereich*, Springer, Berlin/New York 2006, 28; C. VAN DAM, *European Tort Law*, OUP, Oxford 2006, pp. 286 *et seq.*

‘but-for’ cause: If even a particularly well-informed and careful person would not have anticipated the harmful result as a likely possibility the person responsible under the *csqn* criterion should not be held liable.<sup>15</sup> Again our answer would be in the affirmative, as it is likely that a parent who is denied the chance to visit his or her child will suffer mentally. Third, one may then refer to the concept of the protective purpose of the rule in question (*Schutzzweck der Norm*), postulating that there should be no attribution if the harm is not within the scope of the rule in question, that is, not the misconduct that the statute was designed to prevent.<sup>16</sup> The wording of section 1684 paragraph 1 BGB stipulates that the parent’s right of contact with his or her child grants the claimant an absolute right also against the other parent. This absolute right does not seem to envisage only pecuniary interests – the protection of which, as we have seen, has been accepted – but all the more the purely non-pecuniary interest in having contact with the child. That the violation of a protected non-pecuniary interest could result in non-pecuniary harm and, hence, falls under the protective purpose of the norm violated seems to be self-evident from this perspective.

If the argument of the direct applicability of section 1684 BGB to the claimant is rejected and, accordingly, he is depicted (only) as a secondary victim (with the ‘non-visited’ child as the primary victim), one may also deduce arguments from the so-called shock-damage cases and the concept of psychological causation (*psychische Kausalität*):<sup>17</sup> The crucial point for such line of argument is that refusing the right to contact did not directly inflict the harm but rather did so indirectly. To some extent comparable with Austria, it is good law that secondary (shock) victims can claim damages if they suffer from a significant reaction to the events. This is regularly the case if this reaction amounts to a recognized pathological illness, that is, psychological disturbances with amounts to a somatic illness.<sup>18</sup> As a parent is sufficiently close<sup>19</sup> to his child and the rejection of the visit amounted to an injury to health, one may suggest that the defendant would be held

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- 15 BGH 23 Oct. 1951, *BGHZ* 3, 261, at 266; BGH 18 Nov. 1957, *BGHZ* 26, 69, at 76 = *NJW* 1958, at 341; BGH 19 Nov. 1971, *BGHZ* 57, 245, at 255 = *NJW* 1972, at 195; BGH 26 Jun. 1972, *BGHZ* 59, 139, at 144 = *NJW* 1972, at 1943; BGH 3 Feb. 1976, *NJW* 1976, 1143, at 1144; BGH 16 Apr. 2002, *NJW* 2002, 2232, at 2233.
- 16 E. RABEL, *Recht des Warenkaufs*, vol. I (re-print), de Gruyter, Berlin 1957, pp. 495 *et seq.*, 502 *et seq.*; BGH 19 Nov. 1957, *BGHZ* 57, 245, at 256 = *NJW* 1972, at 195; BGH 25 Mar. 2003, *NJW* 2003, 1929, at 1930.
- 17 BGH 13 Jul. 1971, *BGHZ* 57, 25, at 29 = *NJW* 1971, at 1980; BGH 4 Jul. 1994, *NJW* 1995, 126, at 127; BGH 17 Oct. 2000, *NJW* 2001, 512, at 513; BGH 16 Apr. 2002, *NJW* 2002, 2232, at 2233.
- 18 BGH 11 May 1971, *BGHZ* 56, 163, at 165 = *NJW* 1971, 1883; N. ADELMANN, ‘Schmerzensgeld wegen des Miterlebens der schweren Verletzung oder Tötung eines anderen im Straßenverkehr’, *VersR (Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht)* 2009, pp. 449 *et seq.*
- 19 BGH 22 May 2007, *BGHZ* 172, 263 *et seq.* = *NJW* 2007, 2764; ADELMANN, *supra* n. 18, pp. 449 *et seq.*

liable not due to the violation of the right to visit but due to the infringement to health suffered by the claimant.

Finally, one may also draw an analogy to awards of non-pecuniary damages in cases of invasion of personality rights. As the text of BGB is limited in that regard, the BGH referred to the protection enshrined in Articles 1 and 2 of the German Constitution (*Grundgesetz, GG*).<sup>20</sup> It held that the Constitution, in its express desire to protect human dignity and personality, makes the extension of this civil remedy both desirable and necessary. Any elimination of damages from the protection of personality would mean that the injury to the dignity and honour would remain without the sanction of the civil law and thereby the strongest and often only instrument to ensure respect for the personal worth of the individual would be frustrated. This, however, will only be the case when the tortfeasor can be blamed for gross fault or when the injury is objectively significant; only when such disturbances are serious may the civil law react against the injury by granting satisfaction to the person affected.<sup>21</sup> And indeed, not only human dignity and personality are guaranteed by the German Constitution but also parental rights: Article 6 paragraph 2 GG provides that '[t]he care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them'. According to case law, section 1684 BGB is a substantiation of this fundamental right.<sup>22</sup> Correspondingly, the exercise of the right to visit as a fundamental right would remain toothless if non-pecuniary damages were not awarded. As the additional prerequisite of gross fault on the part of the defendant seems to be fulfilled in the case at hand, one may conclude that the express desire of the Constitution to protect the parent's right of care and upbringing of their children makes this imperative the extension of a civil remedy, which is appropriate to the nature of the harm suffered and intended to be protected by the right.

One may conclude that comparable case law to the OGH's judgment in favour of a civil remedy – either due to a *positive Forderungsverletzung* or on the basis of section 823 paragraph 1 BGB – is likely to be of only marginal impact. This is due to three reasons: first, the psychological disturbances suffered by the claimant parent must amount to a recognized pathological somatic illness, which rarely seems to be the case.<sup>23</sup> Second, other judicial remedies, such as removal of

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20 BGH 14 Feb. 1958, *BGHZ* 26, 349; BGH 1 Oct. 1996, *NJW* 1997, 1152; BGH 5 Dec. 1995, *NJW* 1996, 984; BGH 1 Dec. 1999, *NJW* 2000, 2201; BGH 26 Oct. 2006, *NJW* 2007, 689; BVerfG 8 Mar. 2000, *NJW* 2000, 2187; BVerfG 22 Aug. 2006, *NJW* 1006, 3409; T. THIEDE, *Internationale Persönlichkeitsrechtsverletzungen*, Jan Sramek, Wien 2010, no. 2, pp. 49 *et seq.*

21 BGH 19 Sep. 1961, *BGHZ* 35, 363 = *NJW* 1961, 1059; BGH 15 Nov. 1994, *NJW* 1995, 861; BGH 1 Dec. 1999, *BGHZ* 2000, 2201; BGH 25 Feb. 1969, *NJW* 1969, 1110; BGH 17 Mar. 1970, *NJW* 1970, 1077.

22 BVerfG 31 May 1983, *NJW* 1983, 2491; BVerfG 5 Nov. 1980, BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*), 55, 171, at 178.

23 See the decision of AG ESSEN, *supra* n. 9.

parental custody,<sup>24</sup> the withdrawal of maintenance payments<sup>25</sup> or even fines<sup>26</sup> are more in the focus of judicial review as claimants are more likely to seek the establishment of real contact with their child rather than damages for their non-pecuniary loss. This reduces such remedies to a mere side-show of the litigation process. Third, as bemoaned by practitioners, custody litigation and the subsequent litigation on the right to visit are apt to be faced with a boycott attitude of one parent.<sup>27</sup> It is open to doubt whether damages for non-pecuniary loss would have any positive effect and thus would actually become a customary civil remedy in this field.

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24 See sec. 1666 BGB: '(1)Where the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish or are not able to avert the danger, the family court must take the measures necessary to avert the danger. (2)In general it is to be presumed that the property of the child is endangered if the person with care for the property of the child violates his maintenance obligation towards the child or his duties connected with the care for the property of the child or fails to comply with orders of the court that relate to the care for the property of the child. (3)The court measures in accordance with subsection (1) include in particular: 1. instructions to seek public assistance, such as benefits of child and youth welfare and healthcare, 2. instructions to ensure that the obligation to attend school is complied with, 3. prohibitions to use the family home or another dwelling temporarily or for an indefinite period, to be within a certain radius of the home or to visit certain other places where the child regularly spends time, 4. prohibitions to establish contact with the child or to bring about a meeting with the child, 5. substitution of declarations of the person with parental custody, 6. part or complete removal of parental custody.'

25 Section 1570 BGB.

26 OLG ROSTOCK 29 Oct. 2001, *FamRZ* 2002, 967; OLG KARLSRUHE 6 Aug. 1997, *NJW-RR* 1998, 939; OLG KARLSRUHE 16 Dec. 2003, *FamRZ* 2005, 919; OLG CELLE 22 May 1998, *FamRZ* 1999, 173; OLG ZWEIBRÜCKEN 9 Feb. 1998, *FamRZ* 1999, 173; OLG FRANKFURT/MAIN 11 Mar. 2003, <[www.hefam.de/urteile/3WF21002.html](http://www.hefam.de/urteile/3WF21002.html)>.

27 I. RAKETE-DOMBEK, *supra* n. 7, p.212.