

Germany

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Agenda

- I. New Law on Compensation of Secondary Victims for Pain and Suffering ("P&S"): *Hinterbliebenengeldgesetz*

- II. Non-inheritability of Pending Damages Claims for Personality Right Infringements ("PRI"): Cases *Demjanjuk* and *Kohl*

Compensation of Secondary Victims for P&S

Background

Old law

- Secondary victims needed to prove *Schockschäden* (pathological level of distress)
- Primary victim's claim could in certain cases be inherited
- Consequence: often little compensation/forum shopping
- Germanwings downing (2015)

New law

- § 844(3) BGB + special statutes (Road Traffic Act, etc.)
- Fault + strict liability for wrongful death, not: severe injuries

Compensation of Secondary Victims for P&S

The '*Hinterbliebenengeld*'

Who can claim damages from tortfeasor?

- Everyone having a 'close personal relationship' with the primary victim
- Relationship is presumed by law for parents, children, spouses and registered partners (presumption is rebuttable)
- Every other claimant must prove close relationship
- Non-relatives (e.g. close friends) are not excluded from claiming compensation
- Open issue: test for sufficient closeness?

Compensation of Secondary Victims for P&S

The '*Hinterbliebenengeld*' (2)

How much damages can be claimed?

- 'Adequate compensation'
- Assessment on a case-by-case basis
- Rule of thumb: € 10,000?
- Additional *Schockschaden*?

Assessment

New law is step in right direction, but poses considerable challenges for courts

Inheritance of Pending Damages Claims for PRI

BGH, NJW 2017, 3004 – *Demjanjuk*

- Former concentration camp warden sues tabloid press for PRI but dies before any judgment can be delivered.
 - Can heir pursue the damages claim?
- German Supreme Court: PRI claims cannot be inherited
 - Personality rights are vested exclusively in the person of the bearer (*'höchstpersönliches Recht'*)
 - Claim is intended to provide satisfaction to the victim
 - No exception for pending claims

Inheritance of Pending Damages Claims for PRI

LG Köln, BeckRS 2017, 125934 – *Kohl*

- Former German chancellor Kohl sues his 'ghost-writers' for PRI. Court awards compensation of € 1 million. Defendants appeal. Kohl dies before a final judgment can be delivered.
 - Can heirs pursue the damages claim?
- **(P)** *Demjanjuk* case indicates that a final judgment is needed
 - But: First judgment did grant some satisfaction in lifetime
 - Wrongdoers would get away with the profits made
 - OLG Köln (2018): parties should settle

Assessment: Call for legislature?