

AUSTRIA

Julian Pehm

Nervous shock and bereavement in the case of adult siblings

Austrian Supreme Court (OGH) 29.11.2017,
7 Ob 105/17t

Facts

- the claimant's brother died after being treated in hospital
- physician did not perform an ultrasonic scanning
- the claimant sued the hospital operator for nervous shock and bereavement damages
- the claimant (34) and his brother (36) had an unusually close emotional relationship

Decision

- *Vertrag mit Schutzwirkungen zugunsten Dritter*
(‘contract with protective effects to the benefit of third parties’)
- OGH: Third parties are protected if they are ...
 - foreseeably affected by the performance
 - *and* either the performance had the purpose to benefit them, or the contractual partner has a visible interest in them, or the contractual partner owed them a duty of care.

Decision

- OGH: objective interpretation of the contract
 - the close relationship must have been foreseeable
 - typically no particularly close relationship between adult siblings
- OGH denied (quasi-)contractual basis for the claim

Relatives' claims under Austrian law

nervous shock and bereavement damages:

(bereavement only in cases of gross negligence: OGH 28.11.2017, 2 Ob 189/16g)

- accepted case law since 2001
- group of potential claimants includes: parents, children, spouses, fiancé(e)s, domestic partners, underage siblings ...

→ actual and intensive emotional relationship

Relatives' claims under Austrian law

e.g. OGH 21.4.2005, 2 Ob 90/05g (= ZVR 2005/73 Karner)

- two adult brothers (46 and 48 years old)
- one of whom was disabled
- very intensive and caring relationship
- similar to father-son relationship

Critical note

- The OGH's foreseeability requirement is too strict.
- It's not about individuals, but who is typically affected.
- The need to delimit secondary victims' claims arises both in contract and in tort.
- Decisive factor should be the actual and intensive emotional relationship between the family members.

AUSTRIA

Julian Pehm