

THE PROFESSIONAL
NEGLIGENCE
LAW REVIEW

Editor
Nicholas Bird

THE LAWREVIEWS

THE PROFESSIONAL
NEGLIGENCE
LAW REVIEW

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Nicholas Bird

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGER

Pere Aspinall

ACCOUNT MANAGERS

Sophie Emberson, Jack Bagnall

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCHER

Arthur Hunter

EDITORIAL COORDINATOR

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Robbie Kelly

SUBEDITOR

Anne Borthwick

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-08-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAWREVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW
THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW
THE ASSET MANAGEMENT REVIEW
THE ASSET TRACING AND RECOVERY REVIEW
THE AVIATION LAW REVIEW
THE BANKING LITIGATION LAW REVIEW
THE BANKING REGULATION REVIEW
THE CARTELS AND LENIENCY REVIEW
THE CLASS ACTIONS LAW REVIEW
THE CONSUMER FINANCE LAW REVIEW
THE CORPORATE GOVERNANCE REVIEW
THE CORPORATE IMMIGRATION REVIEW
THE DISPUTE RESOLUTION REVIEW
THE DOMINANCE AND MONOPOLIES REVIEW
THE EMPLOYMENT LAW REVIEW
THE ENERGY REGULATION AND MARKETS REVIEW
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW
THE EXECUTIVE REMUNERATION REVIEW
THE FINANCIAL TECHNOLOGY LAW REVIEW
THE FOREIGN INVESTMENT REGULATION REVIEW
THE FRANCHISE LAW REVIEW
THE GAMBLING LAW REVIEW
THE GOVERNMENT PROCUREMENT REVIEW
THE HEALTHCARE LAW REVIEW
THE INITIAL PUBLIC OFFERINGS LAW REVIEW
THE INSOLVENCY REVIEW
THE INSURANCE AND REINSURANCE LAW REVIEW
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW
THE INTELLECTUAL PROPERTY REVIEW
THE INTERNATIONAL ARBITRATION REVIEW
THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW
THE INTERNATIONAL TRADE LAW REVIEW
THE INVESTMENT TREATY ARBITRATION REVIEW
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW
THE LABOUR AND EMPLOYMENT DISPUTES REVIEW
THE LENDING AND SECURED FINANCE REVIEW
THE LIFE SCIENCES LAW REVIEW
THE MERGER CONTROL REVIEW
THE MERGERS AND ACQUISITIONS REVIEW
THE MINING LAW REVIEW
THE OIL AND GAS LAW REVIEW
THE PATENT LITIGATION LAW REVIEW
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW
THE PRIVATE COMPETITION ENFORCEMENT REVIEW
THE PRIVATE EQUITY REVIEW
THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW
THE PRODUCT REGULATION AND LIABILITY REVIEW
THE PROJECTS AND CONSTRUCTION REVIEW
THE PUBLIC COMPETITION ENFORCEMENT REVIEW
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW
THE REAL ESTATE LAW REVIEW
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW
THE RESTRUCTURING REVIEW
THE SECURITIES LITIGATION REVIEW
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
THE SHIPPING LAW REVIEW
THE SPORTS LAW REVIEW
THE TAX DISPUTES AND LITIGATION REVIEW
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
THE THIRD PARTY LITIGATION FUNDING LAW REVIEW
THE TRADEMARKS LAW REVIEW
THE TRANSFER PRICING LAW REVIEW
THE TRANSPORT FINANCE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BLD BACH LANGHEID DALLMAYR

BSA AHMAD BIN HEZEEM & ASSOCIATES LLP

DEMAREST ADVOGADOS

GORRISSEN FEDERSPIEL

HAMILTON ADVOKATBYRÅ

HOGAN LOVELLS

MATHESON

PMT STUDIO LEGALE

REYNOLDS PORTER CHAMBERLAIN LLP

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

CONTENTS

PREFACE.....	v
<i>Nicholas Bird</i>	
Chapter 1 BRAZIL.....	1
<i>Marcia Cicarelli, Camila Affonso Prado and Laura Pelegrini</i>	
Chapter 2 COLOMBIA.....	12
<i>Laura Restrepo Madrid</i>	
Chapter 3 DENMARK.....	24
<i>Jacob Skude Rasmussen and Andrew Poole</i>	
Chapter 4 ENGLAND AND WALES.....	33
<i>Nicholas Bird and Sophie Newton</i>	
Chapter 5 GERMANY.....	42
<i>Martin Alexander and Carsten Hösker</i>	
Chapter 6 IRELAND.....	55
<i>April McClements and Rebecca Ryan</i>	
Chapter 7 ITALY.....	70
<i>Serena Triboldi</i>	
Chapter 8 MEXICO.....	82
<i>Omar Guerrero Rodríguez, Jorge Francisco Valdés King, Elisa Legorreta Pastor and Eduardo Lobatón Guzmán</i>	
Chapter 9 PORTUGAL.....	98
<i>Adriano Squillacce and Nair Maurício Cordas</i>	
Chapter 10 SPAIN.....	112
<i>Alejandro Ferreres Comella</i>	

Contents

Chapter 11	SWEDEN.....	121
	<i>Johannes Ericson and Carl Rother-Schirren</i>	
Chapter 12	UNITED ARAB EMIRATES	131
	<i>Michael Kortbawi and Adam Tighe</i>	
Appendix 1	ABOUT THE AUTHORS.....	137
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	147

PREFACE

This first edition of *The Professional Negligence Law Review* comes at a time of unusual political challenge to some elements of globalisation. Yet international trade and cross-border transactions are, and will remain, firmly entrenched in the day-to-day business of commercial institutions, and the fact that this is the 54th title published by *The Law Reviews* comes as little surprise. The insight that each title provides into the major commercial jurisdictions is invaluable to all those conducting and advising on modern commerce in specific areas.

Professionals play a vital role in the activities of most commercial entities. Value creation today is more sophisticated than it has ever been, and access to specialist expertise is an essential element of success. Equally, businesses now operate in the fastest ever period of technological development, and professional service providers are having to learn about and participate in these new areas. Understanding the varied conduct- and obligation-based duties of professionals involved in our transactions and engagements is an essential part of project management and enforcement of rights. And as we look forward to emerging developments, such as blockchain and artificial intelligence, the application of the core principles of professional obligations in this complex environment makes a guide like this indispensable.

In my own jurisdiction in England and Wales, the courts continue to be concerned with the scope of the professional's duty, the principles that govern the imposition of duties in relation to non-clients, the type of loss that the professional should be responsible for, and whether it is enough that the professional give correct or non-negligent advice or whether the client also has to be told about the risks. In addition, data-loss incidents continue both in and out of the public gaze, and data collection and processing are an increasing and potentially severe risk concern for all firms. A survey of the chapters reveals a limited number of common themes and a striking amount of diversity of law and practice in the different jurisdictions. The absence of any substantial homogeneity further underlines the need for a work like this.

This first edition is the product of the skill and knowledge of leading practitioners in various jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all of those who have contributed to this first edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found on page 137 onwards. I would especially like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and to Sophie Newton in particular. Finally, the team at Law Business Research has managed this project from inception to delivery with huge passion and care; I am very grateful to all of them.

Nicholas Bird

Reynolds Porter Chamberlain LLP

London

June 2018

GERMANY

Martin Alexander and Carsten Hösker¹

I INTRODUCTION

i Legal framework

Professional liability primarily follows the rules German civil law recognises for contractual and tort liability in general. While there exist several codes containing specific rules for different professions, the German Civil Code (BGB) provides the core legal framework from a liability perspective. It contains the applicable rules regarding both liability on the merits in contractual (Sections 280 et seq.) and in tort law (Sections 823 et seq.) and the material rules for calculating the amount of damages (Sections 249 et seq.).

The BGB generally requires faulty conduct by a contracting party or a tortfeasor in liability claims.

As one can see, it is a peculiarity of German civil law that it recognises a strict segregation between liability from contracts and from tort. While it is possible that the facts of the case establish liability from both legal doctrines at the same time, the legal requirements of both regimes are quite different. The most striking differences between both regimes are:

- a* the law assumes fault by a contracting party while the plaintiff has to positively show and prove the tortfeasor's fault; and
- b* contractual liability recognises damage consisting of pure financial loss, while tort liability only does so to a very limited extent.

German liability recognises strict liability, of course, but not necessarily in terms of professional liability – rather in such areas as product liability pursuant to the EU product liability directive, or motor liability.

The first question to be answered is whether an individual indeed breached a duty of care. This question is largely dependent on case law and there exists a vast multitude of judgments of German courts addressing various professions (e.g., doctors and other medical professionals, architects and engineers, lawyers, tax advisers and accountants, insurance brokers and banking professionals). Claims pursuant to tort law, however, are merely triggered if the tortfeasor violates certain 'absolute' legal positions (e.g., life, health, freedom, property) as defined by law. Thus, a breach of duty may lead to liability under contractual provisions, but not in tort. Needless to say, tort law only plays a role in certain areas of professional liability (e.g., medical malpractice and liability of construction professionals) while it is not applicable in other areas (e.g., insurance-broking malpractice and lawyers' liability).

¹ Martin Alexander and Carsten Hösker are partners at BLD Bach Langheid Dallmayr.

Once a plaintiff is able to establish a certain breach of duty, one has to consider whether this breach indeed resulted in the damage claimed by the plaintiff. This causation aspect is one of the most relevant issues in professional negligence litigation and the German Federal Court of Justice (FCJ) has decided on these matters several times. Since it has not always taken the same legal position, and, in particular, has resolved questions of onus and proof differently in different areas, such as lawyers' or banking professionals' liability, or in medical malpractice, the core issues of this very important aspect of professional liability are worth dealing with even at this stage.

As stated above, the client bears the onus of showing and proving causation between a breach of duty (especially wrong advice or omission of certain advice) and damage. The FCJ has acknowledged (from the early 1970s onwards, following a case that dealt with liability of an advertising agency)² that it will generally be difficult for plaintiffs to prevail in such litigation since it is nearly impossible to show and prove that one would have acted differently in full knowledge of the matter. The different senates of the FCJ have used different approaches to this issue. Some have taken the position that it is not incumbent on the plaintiff to show that it would have complied with the (omitted or wrong) advice provided by the defendant, and accordingly have proceeded on the assumption that the plaintiff would have complied, had the advice been rendered correctly.³ Some senates have taken the view that *prima facie* evidence rules are to be applied, which requires a situation that is suited to a generalised approach because of the circumstances at hand. According to the FCJ, this is the case when only one decision could reasonably have been made by the plaintiff, had correct advice been rendered to him or her.⁴ There might at first seem to be little difference in these positions, but the truth is that these different rules shift the onus onto the defendant significantly: if the legal assumption is made that the plaintiff would have complied with the defendant's advice (had it been given correctly), the defendant must strictly show and prove that this was not the case (which is usually impossible). If the court (merely) applies *prima facie* rules, it is sufficient for the defendant to show that there is no state of affairs that indicates a generalised approach, thus quashing the *prima facie* evidence.

A court will then determine whether a contracting party or a tortfeasor acted with fault, meaning at least a slight form of negligence is required. As described above, fault is assumed by law in contractual liability while the plaintiff has to positively show and prove the tortfeasor's fault. This distinction leads to different procedural requirements and eventually to a shift in the onus that can make the difference between winning and losing in litigation. Another notable difference is that a contracting party has to assume fault by its servants and auxiliary personnel while the tortfeasor is merely liable for its own conduct and only has to bear its own *culpa in eligendo*.

2 German Federal Court of Justice (FCJ), decision of 5 July 1973 – VII ZR 12/73, NJW 1973, 1688.

3 FCJ, decision of 22 November 1983 – VI ZR 85/82, NJW 1984, 658 (medical malpractice); same, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512 (banking professionals); Federal Constitutional Court, decision of 08 December 2011 – 1 BvR 2514/11, NJW 2012, 443 (banking professionals).

4 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; same, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494 (lawyers); same, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795 (lawyers and tax advisers); same decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447.

Common defences consist of contributory negligence by the plaintiff (or its servants and auxiliary personnel) and objections to the amount of loss alleged by the plaintiff. Those defences are available against both contractual and tort claims.

This is just a short introduction to the legal framework at hand, and to the most common legal issues that parties argue about. It is, however, safe to say that the applicable legal doctrines regarding liability differ considerably across the various professions, and these doctrinal differences are characteristic of the main legal questions – both material and recurring – that bear on the matter of liability in the different professions.

ii Limitation and prescription

Claims under German civil law are subject to limitation. There exist several different limitation periods, but practitioners have seen an effort over the past few years to align those different periods to a similar standard to make the statute of limitations more predictable. However, there still exists a multitude of limitation periods, be it six months in certain claims arising from rental contracts, one year in certain commercial contracts, two years in warranty claims pursuant to sales contracts or even 30 years pertaining to rights *in rem*. The standard limitation period for liability claims is three years.

The standard limitation period depends on whether the plaintiff has gained knowledge of the defendant and of further circumstances establishing a claim. The three-year period commences on expiry of the year that the aforementioned requirements are fulfilled. However, to provide legal certainty, the law provides for a maximum limitation period of 10 or 20 years, depending on the violated right.

Other limitation periods merely depend on objective circumstances. For example, warranty and liability claims in sales contracts fall under the statute of limitations upon the elapse of two years after the good was handed over to the buyer (special rules apply to real estate).

Negotiations between the parties suspend the limitation period. Since it often is unclear when negotiations have begun and were eventually terminated, relying on this provision is usually not preferable. Parties would usually choose to waive the statute of limitations for a certain amount of time, which is legally possible. However, since German courts interpret this provision quite broadly, there is usually at least a short period, of a few days or weeks, in which the limitation period is suspended and the plaintiff given the time it needs to commence litigation.

German law recognises means by which limitation periods can be suspended for a longer period. These means suspend the limitation period and thus, ultimately, annul the defendant's potential objection that a claim has expired under the statute of limitations. The most usual means are by commencing litigation, entering into alternative dispute resolution (ADR) or serving third-party notices. Since the standard limitation period usually elapses at the year's end, it is often at this time of year that plaintiffs commence litigation. Third-party notices are an adequate procedural means for a defendant seeking to secure possible subrogation claims from becoming time-barred.

Limitation under German civil law is an objection (i.e., the defendant has to raise this objection to make it effective). The fact that a claim has expired under the statute of limitations does not need to be reviewed *ex officio* by the judge. In fact, if a claim is raised, even if it has obviously become time-barred – but the defendant does not raise this objection – the court will not (and is not even allowed to) dismiss the claim for this reason. The

legal theoretical effect of this is not that the claim will cease to exist but rather will become unenforceable. In practice, it does not make a difference except that the defendant has to plead limitation.

The legal term 'prescription' is (obviously) used with different senses in common law countries. It can mean acquisition of a right or of an obligation as a result of a certain amount of time having elapsed. It can, however, also be used in a negative sense, meaning that a claim ceases to exist after a certain time has elapsed. While German civil law recognises this concept (e.g., Section 13 of the Product Liability Act contains this rule), it does not play a role in professional negligence claims pursuant to common German contractual or tort law.

iii Dispute fora and resolution

The civil court system in Germany consists of county courts, district or regional courts, higher regional courts and the FCJ. The county courts deal with matters of a value up to €5,000, and certain areas of law regardless of the amount at stake (e.g., family law and rental law). Matters concerning an amount in dispute of above €5,000 have to be brought before a district court. County and regional courts are virtually the only courts of first instance. District courts also serve as appellate courts for decisions by county courts. The higher regional courts serve as appellate courts for appeals against county court decisions in family law and against all regional court judgments where the procedural requirements for lodging an appeal are fulfilled. They serve as courts of first instance in a very limited way only (e.g., for litigation pursuant to the Capital Markets Investor's Model Litigation Act). The FCJ only deals with appeals against appellate judgments (and very seldom with first instance decisions) and only on the legal aspects of a matter (i.e., it does not serve as a trial court). As professional liability claims usually involve damages in excess of €5,000, they are generally dealt with in a district court or – upon appeal – in a higher regional court. Most district courts have established special chambers (e.g., for medical malpractice cases). The FCJ has issued several decisions in various professional areas as well.

Various means of ADR are recognised in Germany, such as arbitration, mediation or ombudsperson procedures. However, none of these proceedings is mandatory (at least not in professional liability matters) before litigation in court is commenced. Since litigating cases in Germany is not extraordinarily expensive and legal costs insurance is common, there seems to be a smaller call for ADR (except in medical malpractice cases) than in other countries. Moreover, courts are bound by law to try to settle cases at every stage of litigation, and most courts offer mediation by specially qualified judges, thus there is simply no need to get involved in ADR proceedings when these means are addressed as part of litigation anyway.

Mediation through ombudspersons has become established in quite a number of areas over the past few years, especially since the Alternative Dispute Resolution for Consumers Act came into force. While ombudspersons existed beforehand and were active in professional liability cases, especially in insurance and banking, the past few years have seen an increase in ombudspersons acting in matters such as lawyers' professional indemnity (and fee disputes), investment funds or real estate. Decisions of those ombudspersons are binding only to a limited extent, usually dependent on the amount in dispute (e.g., below an amount of €15,000 or €5,000, depending on the respective ombudspersons' procedural rules). That said, since professional liability claims are generally higher than the aforementioned amounts, they are commonly litigated in the courts.

Civil litigation is predominantly governed by the German Act on Civil Proceedings (ZPO). While other codes, such as the German Act on the Constitution of the Courts are

also relevant, the ZPO covers all principal aspects. For example, it contains rules regarding the course of litigation (including all appeals) and the court's conduct, service of documents, requirements regarding the parties' submissions, means of taking evidence, rules regarding judgments (including appellate judgments) and their enforcement, rules on arbitration, and so on. As such, the ZPO is applicable to all professional liability claims litigated in court.

iv Remedies and loss

German civil law recognises a multitude of remedies, depending on the particular area of law.

The most important contractual remedy is 'performance'. A contracting party can claim for performance by its counterpart. In particular, in sales and working contracts when, under certain circumstances, it is possible to repeat performance of a contractual duty (usually when the original performance was not successful), remedies for performance and repeated performance are relevant in litigation practice.

Many professional liability claims, however, are based on irreversible damage (e.g., injuries that cannot simply be undone or progressive diseases that have been overseen and have become untreatable in the interim). Claims for performance would be preposterous in such situations.

Basically, four remedies must be considered that may serve the plaintiff's desire best:

- a* avoidance (thus urging both parties to a contract to reconstitute all contractual performances);
- b* disclosure of certain information or documents;
- c* claim for damages (from contract or tort); and
- d* claim in restitution for unjust enrichment.

Avoidance and claims in restitution for unjust enrichment are certainly limited to rare occasions since they do not result in an award of damages. Disclosure and claims for damages are the remedies generally sought by plaintiffs – usually in an action by stages – since plaintiffs need disclosure of information or documents and use those to substantiate their claims for damages (e.g., in medical malpractice). German civil procedural law does not recognise discovery.

Where damages are concerned, it is important to know which damages a plaintiff may demand. Basically, German civil law differentiates between pecuniary (especially property and personal injury damages) and non-pecuniary loss (especially bereavement damages and damages for pain and suffering). Another categorisation differentiates between damages for positive interest and damages for preservation of the legal status quo (comprising negative interest and loss of integrity). Positive interest describes the plaintiff's interest to be awarded the equivalent of the promised bargain of a contract. Negative interest describes the plaintiff's interest to be awarded the loss resulting from the plaintiff's belief in a contractual declaration or avowal. Loss of integrity means the violation of the right to the integrity of certain legal positions (life, body, health, freedom, etc.), which is usually protected not only by contract, but also by tort law. German law recognises neither punitive damages nor 'bad-faith' claims.

It is usually incumbent on the plaintiff to show there was damage that resulted from professional faulty conduct. If the existence of damage or the amount of damages claimed by the plaintiff are in dispute, it is incumbent on the plaintiff to prove the facts in dispute. While the strict rules of proof pursuant to Section 286 ZPO apply, Section 287 ZPO contains relaxations of the aforementioned burden of proof that apply to the existence of damage and the amount of damages.

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Germany are bound to become members of the lawyer's chamber that supervises the area in which their firm or their office is located by way of compulsory membership. There exist several chambers (one in each higher regional court's circuit, and a federal one). The relevant chamber gives advice to its member lawyers in, for example, fee disputes, disputes between lawyers, advice regarding employments, acquisitions of other firms and assessments of firm values. Furthermore, it represents the interests of its member lawyers in legislative and executive affairs, licensing questions and questions of education and training, and serves as the regulatory body for disciplinary affairs. Lawyers' courts are affiliated to each chamber, dealing with violations of rules of professional conduct.

The German Federal Code for the Legal Profession (BRAO) governs the profession itself, and the Rules of Professional Practice for Lawyers govern professional conduct. Moreover, lawyers' fees are regulated in the Scale of Lawyers' Fees.

All lawyers (and law firms) offering their services in Germany need to obtain and maintain compulsory insurance pursuant to Sections 51 et seq. BRAO. All licensed liability insurers may offer professional insurance for lawyers, but it must fulfil the requirements of the aforementioned provisions. Sections 51 et seq. BRAO, for example, provides for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The most relevant procedural effect of the lawyer's liability insurance being a compulsory insurance is that (e.g., in cases of bankruptcy or where the policyholder vanishes) the plaintiff can commence litigation directly against the liability insurer pursuant to Section 115 of the German Insurance Contract Act (VVG), which is impossible otherwise.

As explained above, the FCJ has dealt with causation matters in different ways and one way of handling this issue is to apply *prima facie* evidence rules. Especially the FCJ senate dealing with lawyers' professional liability is of the opinion that wrongful or omitted advice by a lawyer typically falls under the *prima facie* evidence rules. This doctrine is, however, inapplicable if, according to the lawyer's advice, more than one form of conduct is reasonable, since in that case a generalised situation leading to only one reasonable reaction on the plaintiff's part does not exist.⁵

Courts in the past applied the doctrine of 'secondary liability'. This doctrine dated back to case law of the Supreme Court of the German Reich⁶ and was adopted by the FCJ.⁷ This doctrine says that there is a duty of care for a lawyer to apprise its client of its own professional liability and on the statute of limitations that would apply in a claim against the lawyer. However, this obligation on the lawyer was justified by the fact that the BRAO recognised a special limitation that would be beyond the scope of the client's knowledge of the defendant and of further circumstances establishing a claim (unlike the current rules under the BGB, as mentioned above). Since the aforementioned special limitation has ceased to exist, it is doubtful that the doctrine of secondary liability still exists. On abrogating the

5 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; FCJ, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494; FCJ, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795; FCJ, decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447, and FCJ, decision of 22 June 1993 – XI ZR 215/92, NJW 1993, 2434 before the FCJ changed its position.

6 RGZ (civil law decisions of the Supreme Court of the German Reich), 158, 130.

7 FCJ, decision of 7 February 2008 – IX ZR 194/04, NJW 2008, 2041.

aforementioned special limitation, the new legislation explained that since the standard rules have become applicable and these are dependent on the client's knowledge, there was no call for the doctrine of secondary liability any more.

ii Medical practitioners

Medical practitioners in Germany are bound to become members of the medical practitioners' chamber that supervises physicians in their particular state (only the German state of North Rhine-Westphalia maintains two chambers, and there also exists a federal chamber organised in the form of an unincorporated association). The chambers' areas of competence are similar to those of the lawyer's chambers.

The Federal Medical Practitioners' Act governs the profession (and especially the licence to practise medicine), and professional conduct is governed by the (Model) Professional Code for Medical Practitioners, which serves as a model for the (binding) Code of Professional Conduct of Medical Practitioners that each state chamber issues for its members. Moreover, physicians' fees are regulated in the Scale of Physician's Fees.

Those acts promulgated by the state chambers contain the requirement for medical practitioners to obtain and maintain 'sufficient' insurance cover. These provisions may serve as an order to obtain and maintain compulsory insurance (without explaining what 'sufficient' coverage means, but the minimum requirements of Section 114 VVG will apply in this case). The fact that the duty to obtain and maintain sufficient liability insurance is not enacted in an act of parliament but only in acts promulgated by the state chambers is sufficient to qualify the insurance as compulsory pursuant to Section 113 VVG as the respective states have empowered the chambers to impose the obligation (although this is contested in German literature with regard to some states). The legal effects of Section 115 VVG are the same as described in the chapter concerning lawyers above.

ADR plays a relevant role in medical liability cases. First of all, patients may ask their statutory health insurance to cover the issue of expert reports (at no charge) when they believe a physician's conduct has amounted to malpractice. Furthermore, the chambers have introduced arbitration boards that can conduct expert procedures upon the consent of both parties (patient and physician), thus giving parties an opportunity for early settlement; the results, however, are non-binding. These procedures are also free of charge for the patient, as the costs are borne by the medical practitioner's liability insurance.

Medical practitioners in hospitals are usually liable under tort law, and the patient's contractual partner – either the hospital or the medical practitioner who entered into a contract with the patient – is (additionally) liable under contract law. Any breaches of duty by employed physicians are to be attributed to its employer (usually a hospital) by law. German courts have developed a differentiated system of liability resulting from medical malpractice and from violation of the duty to inform the patient. Medical malpractice is established when a medical practitioner is in breach of medicinal standards that derive from medicinal science and clinical experiences, and this must be shown and proven by experts in litigation. This breach of medicinal standards must cause damage to the patient's health to establish the physician's or hospital's liability. Liability from a breach of duty to inform the patient is led by the idea that a physician's medical intervention violates the patient's bodily integrity even if this conduct is *lege artis*. The intervention may be justified if the patient has given prior consent; this, however, requires prior and proper elucidation of the proposed medical procedure for the patient's benefit, which again requires an explanation of the general risks of the procedure, so that the patient may form an accurate picture of the

medical intervention that will be suffered. The level of detail to be provided to the patient depends on the medical indications for the planned intervention. The patient must then show and prove that the risk that was not explained to him or her has indeed been realised in the health damage suffered.

Medical malpractice litigation recognises some peculiarities especially regarding substantiation of a claim: the patient does not need to substantiate his or her claim in detail – it is sufficient to allege the facts establishing a claim. While the onus lies with the patient, the courts have developed an assumption of the physician's malpractice when entirely controllable risks materialise or when the physician's documentation in the patient's file is incomplete. Furthermore, the patient will usually not be able to show causation between the breach of duty and his or her health issues. Thus, the courts have developed a shift in the onus onto the medical practitioner in cases where the malpractice was grossly negligently or where the physician abstained from proper assessment of diagnostic findings. Ultimately, proper conduct regarding informing the patient is to be shown and proven by the physician.

iii Banking and finance professionals

Unlike lawyers, accountants, auditors, architects and medical practitioners, banking and finance professionals are not organised in chambers since the existence of chambers is first and foremost justified historically by the idea that certain professions complement governmental duties and responsibilities, and thus access to and the conduct of such professions should be properly monitored. From a regulatory perspective, that is not the case for banking and finance professionals. German civil law, however, recognises special banking law in several regulations contained in the German BGB and in other acts such as the Securities Trading Act or the Banking Act.

It is common that banking products (e.g., funds, company shares, derivative instruments or bonds) are sold by banks (through their employees) themselves, thus professional liability of banking and finance professionals is usually litigated against the bank itself. Any breaches of duty by those professionals are attributed to their employers, usually a bank. Besides, there exist other professionals engaged in selling banking products, such as investment brokers or financial services brokers. Their professional conduct (especially the requirements to be fulfilled to obtain a licence) is governed by Sections 32 et seq. of the Banking Act and Section 34f/34h of the Trade, Commerce and Industry Regulation Act (GewO), depending on which type of business they specialise in.

Section 34f/34h GewO requires liability insurance for finance brokers, making such coverage compulsory pursuant to Sections 113 et seq. VVG. The option, under Section 33 Paragraph 1 Section 2 of the Banking Act, to fulfil the statutory capital requirements by substitute insurance coverage does not qualify as compulsory insurance.

As explained above, the FCJ has dealt with causation issues in different ways and one way of handling this issue is to concede to the plaintiff that it would have complied with the defendant's advice, had it been rendered correctly.⁸ The FCJ applies this doctrine

8 FCJ, decision of 30 September 1993 – IX ZR 73/93, NJW 1993, 3259; same, decision of 23 September 2004 – IX ZR 137/03, NJW-RR 2005, 494 (lawyers); same, decision of 15 May 2014 – IX ZR 267/12, NJW 2014, 2795 (lawyers and tax advisers); same, decision of 16 July 2015 – IX ZR 197/14, NJW 2015, 3447.

in banking and finance professionals' liability.⁹ In 2012, the FCJ extended this judicial principle to professional liability in investment broking cases (and especially with regard to kickback fees).¹⁰

Another notable example of the FCJ case law regarding banking law and banking professionals' liability pertains to the FCJ's tendency to assume that contracting parties (bank and customer) enter into an advisory contract virtually upon the 'first meeting' of the parties. While German literature has discussed and criticised this standpoint multiple times for imputing to parties a non-existent will to enter into a contract,¹¹ the FCJ has adhered to this position so far and it has been upheld by the German Federal Constitutional Court.¹²

iv Computer and information technology professionals

There are no notable peculiarities regarding professional liability of computer and information technology professionals.

v Real property surveyors

There are no notable peculiarities regarding professional liability of real property surveyors, unless they are construction professionals.

vi Construction professionals

Architects in Germany are bound to become members of the architects' chambers that supervise architects in their respective states; the state chambers are members of the federal architects' chamber, which is organised as an incorporated association. The chambers' areas of competence are similar to those of the lawyers' and medical practitioners' chambers. There also exist engineers' chambers, which are assigned to the respective architects' chambers.

Individual state architect acts govern the profession itself, and a code of professional conduct issued by each state chamber governs professional conduct. Architects' and engineers' fees are regulated in the Scale of Architects' and Engineers' Fees. Ultimately, architects and engineers are subject to a multitude of federal and state laws (building codes, safety regulations, public procurement laws, etc.).

The situation regarding compulsory insurance is the same as that faced by medical practitioners: rules for compulsory insurance are not regulated in one specific law but in each applicable state law (because the professional architect's and engineer's law is state law for constitutional reasons). To a very limited extent, there exist rules for compulsory insurance of real property surveyors, mainly in eastern Germany.

The doctrine of secondary liability (which has probably ceased to exist in legal professions) is still applicable in the liability law of construction professionals. According to this doctrine, there is a duty of care for an architect or construction professional to apprise his or her client of building defects and the root causes of the defects, as well as the legal situation arising, even if that pertains to planning or supervisory errors by the construction

9 FCJ, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512.

10 FCJ, decision of 08 May 2012 – XI ZR 262/10, NJW 2012, 2427; same, decision of 15 March 2016 – XI ZR 122/14, NJW-RR 2016, 1187.

11 Cf. Emmerich in MünchKomm-BGB, vol. 2, 7th ed. 2016, § 311 margin No. 97 et seq.

12 Federal Constitutional Court, decision of 8 December 2011 – 1 BvR 2514/11, NJW 2012, 443.

professional himself or herself.¹³ Since the limitation of professional liability claims is (like the above-noted legal situation in legal professions) still independent from the client's knowledge of the defendant and of further circumstances establishing a claim, there still exists a necessity for this doctrine.

vii Accountants and auditors

Tax accountants and auditors in Germany are bound to become members of their respective chambers. There exist 21 tax accountants' chambers, which supervise the area in which their firm or their office is located by way of compulsory membership. Furthermore, there exists one federal tax accountants chamber and one federal auditor's chamber. The aforementioned chambers' areas of competence are similar to those of the lawyers' chambers, but, unlike the lawyers' chambers, they also execute and supervise the exams that must be passed to become a tax accountant or an adviser.

The German Tax Accountants Act governs the profession itself, and the Act of Professional Conduct of Tax Accountants governs professional conduct. Moreover, tax accountant's fees are regulated in the Scale of Tax Accountant's fees. The German Auditors Act governs the profession itself, as well as professional conduct and auditors' fees.

All tax accountants and auditors (and tax accountancy and auditing companies) offering their services in Germany must obtain and maintain compulsory insurance pursuant to Sections 67 et seq. of the German Tax Accountants Act and Section 54 of the German Auditors Act. All licensed liability insurers may offer professional insurance for accountants and auditors, but it must fulfil the requirements of the aforementioned provisions. Like Sections 51 et seq. of the German Federal Code for the Legal Profession, the aforementioned provisions provide for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The procedural effects of Section 115 VVG also apply.

The causation issues as explained in the chapter on lawyer's liability pertain to tax accountant's and auditor's liability as well since these professions' liability is supervised by the same FCJ senate as the lawyer's liability.

The secondary liability of tax accountants and auditors is likely to have ceased to exist as well pursuant to the same reasons as explained in the chapter regarding lawyer's liability.

viii Insurance professionals

Like banking and finance professionals, insurance professionals are – for the same reasons – not organised in chambers. German civil law, however, recognises special insurance law in several regulations contained in the VVG, the GewO and the German Insurance Supervision Act.

It is common that insurance products are sold by either insurance agents (usually as salesmen for one or a few insurers) or insurance brokers, who enter into a contract with the policyholder.

That differentiation is picked up in Section 6 VVG, which provides for duties of information and elucidation to be fulfilled by the insurer, except when the policyholder has entered into a contract with an insurance broker. Violations of Section 6 VVG give rise to

13 FCJ, decision of 26 October 2006 – VII ZR 133/04, NJW 2007, 365; same, decision of 10 October 2013 – VII ZR 19/12, NJW 2014, 206.

claims against the insurer itself. As insurers working with insurance agents usually fulfil their duties under Section 6 VVG through these insurance mediators, any breaches of duty by such persons are attributed to the insurer.

Sections 61 et seq. VVG provides for the same duties to inform, and explain to, the policyholder, but these duties pertain to the insurance agent and insurance broker only. Any breach of these duties by insurance agents or brokers may give rise to claims against the aforementioned insurance mediators.

The professional conduct (especially the requirements regarding obtaining a licence) of both insurance agents and insurance brokers is governed by Section 34d GewO.

Section 34d GewO requires liability insurance for insurance agents and insurance brokers, making such coverage compulsory pursuant to Sections 113 et seq. VVG. The extent of the minimum coverage is regulated by Sections 8 et seq. of the German Regulation on Insurance Mediation.

The causation issues explained in the section on banking and finance professionals' liability also pertain to insurance professionals' liability.¹⁴

III YEAR IN REVIEW

The BGB contains provisions for working contracts that, until the end of 2017, applied to architects' and engineers' contracts, under the FCJ's authority. As of the beginning of 2018, following new legislation, a completely revised law of building contracts entered into force. The most relevant provision regarding professional liability is the new Section 650t BGB, which addresses the following issue. Since the 1960s, it had been a commonly held view in Germany that a contractor and the architect (despite legal concerns) are jointly and severally liable to the builder if the contractor executes a planning error by the architect, or if the architect fails to recognise faulty work by the contractor and fails to correct defects although the architect has been retained to supervise the work.¹⁵ This regime led to the problem that the builder could choose whom to make a claim against, the architect or the contractor. Since the contractor had a right to repeat its performance, the builder often instead raised direct claims against the architect and went for damages, thus effectively taking the chance to obtain repeat performance from the contractor, while coercing the contractor to satisfy the architect's internal subrogation claim that resulted from the joint and several liability pursuant to Section 426 BGB. Section 650t BGB now eliminates this flaw by granting the architect a right to deny the claim if the builder has not requested, unsuccessfully, repeat performance from the contractor beforehand.

The FCJ amended its decades-old regime dealing with damages arising from a building defect. While previously the builder was generally able to make a claim for correction costs even if the defect was remediated, the FCJ has now taken the exact opposite view. In February 2018, the FCJ decided that builders can only make a claim for correction costs if indeed

14 FCJ, decision of 22 May 1985 – IV a ZR 190/93, NJW 1985, 2595; same, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.

15 FCJ, decision of 01 February 1965 – GSZ 1/64, NJW 1965, 1175; same, decision of 22 December 2011 – VII ZR 7/11, NJW 2012, 1071.

the defect was remediated. This is also the case for damages claims against construction professionals if the claim is based on planning or supervision errors that have already been executed in a building.¹⁶

The FCJ amended its position in relation to tax adviser's liability at the beginning of 2017. It ruled that the tax adviser is liable for damages resulting from a delayed insolvency filing if the adviser's duty was to issue the annual financial statements and if, on the basis of the figures made available to the adviser or upon other indications, the adviser failed to point out to the board that the company might be on the verge of falling into bankruptcy.¹⁷

The FCJ decided that in the matter of insurance professionals' liability, claims in relation to damage resulting from improper claims-handling are to be assessed pursuant to Section 280 BGB, not special provisions of the VVG, and that insurance brokers are generally obliged to support policyholders in claims-handling. The insurance broker cannot defend itself by using the objection that the insurer had already advised the policyholder about obligations that must be fulfilled under German insurance law to maintain coverage (this concept differs significantly from the English concept of conditions precedent).¹⁸

IV OUTLOOK AND FUTURE DEVELOPMENTS

As explained in Section I, the FCJ has in the past shown inclinations to be quite consumer-friendly. There have not been any indications that this trend will stop in the near future.

For example, liability of legal advisers, especially lawyers, has been expanded significantly over the past few years. A notable judgment of the FCJ in 2015¹⁹ – despite claiming the opposite – overturned the Roman law axiom of *iura novit curia* in deciding that a lawyer has to not only accurately show the facts of the case, but also convince the court that its legal assessment is incorrect – and even rectify the legal errors the court is succumbing to, thus asking more from a lawyer than from the court itself.

This is just one example showing that the FCJ is prone to assume liability on the merits quite quickly. It is, however, a completely different matter when it comes to amounts of damages awarded to plaintiffs in the past.

While this issue is not exclusive to professional liability, it has certainly had some impact in this area, and especially in relation to medical malpractice. Traditionally, German courts have been reluctant to award extensive damages for pain and suffering. Seldom has a German court awarded damages for pain and suffering in excess of €500,000. This Pandora's box could, however, be opened in the near future in the wake of new legislation regarding damages for pain and suffering for survivors: pursuant to German law *de lege lata* until mid-2017, survivors could not be awarded damages for pain and suffering had they not suffered a condition that culminated in shock or even in their own injury. Suffering the 'usual' feelings that attend the loss of loved ones was not deemed sufficient. The aforementioned new legislation now dispenses with personal shock or injury as a requirement to be awarded damages for pain and suffering upon injury or death of loved ones (although harm from

16 FCJ, decision of 22 February 2018 – VII ZR 46/17, NZBau 2018, 201.

17 FCJ, decision of 26 January 2017 – IX ZR 285/14, NJW 2017, 1611.

18 FCJ, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.

19 FCJ, decision of 10 December 2015 – IX ZR 272/14, NJW 2016, 957.

shock or bereavement may still be incurred). Legal professionals will have to wait and see if this new law will lead to a more liberal handling of damages for pain and suffering, and in turn lead to new 'record-breaking damages' in the near future.

It will be interesting to see how – and if – the downside of these developments will be absorbed by the insurance industry. In the face of constantly increasing claims expenditures in relation to medical malpractice, some well-known insurers have retreated from that business. This has led to discussions in Germany as to whether and how medical malpractice coverage, especially in obstetric medicine, will sustain in the years to come.

ABOUT THE AUTHORS

MARTIN ALEXANDER

BLD Bach Langheid Dallmayr

Dr Martin Alexander, LL.M. is a specialised insurance lawyer and lecturer for product and general commercial liability insurance at the University of Münster as well as for international insurance law at the University of Applied Sciences in Cologne.

He completed his education in Germany, the United States and Scotland.

He was admitted to the Bar and has been a lawyer with BLD in Cologne since 2006. He was promoted to partner at BLD in 2009 and he co-heads the firm's product liability team.

Martin has specialised in contentious and non-contentious liability and coverage claims in product, environmental, industrial and commercial disputes (especially in relation to plant engineering and construction, and the automotive industry) in national and international matters and works on all kinds of professional liability matters. Martin has a vast experience in arbitration as well as in aviation.

He is frequently recommended by German publication *JUVE* for product liability law and by *Chambers* for insurance law.

CARSTEN HÖSKER

BLD Bach Langheid Dallmayr

Carsten Hösker, LL.M. is a specialised insurance lawyer and lecturer for product liability insurance at the University of Münster, as well as for international insurance law at the University of Applied Sciences in Cologne.

He completed his education in Germany and the United Kingdom.

He was admitted to the Bar and has been a lawyer with BLD in Cologne since 2013; he was promoted to partner at BLD in 2018.

Carsten has specialised in contentious and non-contentious liability and coverage claims regarding product liability and safety, and product recalls (especially in relation to plant engineering and construction, and the automotive industry) in national and international matters, and he frequently advises foreign insurers on drafting matters and works on all kinds of professional liability issues.

He was recently recommended by *The Legal 500* for insurance law.

BLD BACH LANGHEID DALLMAYR

Theodor-Heuss-Ring 13–15

50668 Cologne

Germany

Tel: +49 221 944 027 911

Fax: +49 221 944 027 985

martin.alexander@bld.de

carsten.hoesker@bld.de

www.bld.eu/www.bld.de

Law
Business
Research

ISBN 978-1-912228-08-9