

## Case law

### Case Details

**National ID:** X ZR 119/01

**Member State:** Germany

**Common Name:** link

**Decision type:** Other

**Decision date:** 09/11/2004

**Court:** BGH (Supreme court)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Package Travel Directive, [Article 5, 2.](#)

### Headnote

1. If a traveller seeks damages from a package travel contract due to non-performance according to § 651f BGB (Bürgerliches Gesetzbuch - German Civil Code), then the travel organiser carries the burden of establishing and proving that all facts which could seriously be considered to ground fault on its part were not present.

2. § 651f (1) BGB is to be interpreted consistently with the Package Travel Directive so that no stricter requirements apply to the proof of exoneration of the travel organiser than for the proof of absence of fault in the context of an assessment according to § 276 BGB.

### Facts

2. The claimants seek damages from the respondent due to a riding accident on a holiday trip. The respondent, a large holiday company, offered travel packages in holiday resorts in numerous countries. In the respondent's travel brochure sporting activities were offered to holidaymakers and specific reference was made to a stables within a resort and riding trips: the husband of the 1st claimant and the father of the 2nd and third claimants (hereafter: settlor) booked a package holiday in Tunisia inclusive of flights and accommodation with the respondents for himself and his family for the period 21.12.1994 until 4.1.1995. On 25.12.1994 the settlor, an accomplished rider, took part in a riding trip, which he booked and paid for at the club. There were only stallions in the riding stables. Six riders took part in the riding excursion. After about a half an hour the horse of a 13-year-old rider, the stallion "Mistzral", became agitated, whereupon the settlor stated he would be willing to take over the horse. This he did. However, the stallion became agitated once more, so the settlor dismounted and held "Mistral" by the reins. At this moment the horse jumped in the air with all four legs at the same time and hit the settlor on the left knee. The latter sustained a fracture to the head of the tibia, necessitating surgery in Tunisia. Following his return to Germany the settlor suffered severe pains and was unable to work. Following several knee operations, he died on 29.7.1995 because of a thrombotic-thrombocytopenic purpura.

By their claim, the claimants sought material damages, mainly due to loss of income of the settlor, and damages for pain and suffering as well as the recognition of a further duty incumbent on the respondents to pay damages. In the previous instances, the claims were rejected. The Landgericht (district court) reasoned that the riding trip was not a subject of the travel package contract. The Berufungsgericht (court to which appeals on points of fact and law are made) accepted that the respondent had established that it was not at fault.

### Legal issue

The court started by interpreting § 651f (1) BGB against the background of Art. 5 (2), 1st sentence Package Travel Directive 90/314/EEC. The Directive names there as the last reason for exoneration "an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall". This formulation corresponds exactly, in the view of the BGH, with the definition of absence of fault according to § 276 BGB. Nothing indicates, according to the BGH, that Art. 5 (2), 1st sentence Package Travel Directive lays down any stronger requirements than the "adherence to the degree of care necessary in the circumstances" in § 276 BGB, for example in the sense of an increased level of care, which could only be achieved by adhering to the highest level of care at all possible in the circumstances. Moreover, the wording deviating from § 276 BGB in the German text of the Directive is based on the English and French wording of the Directive, in which is stated "with all due care" and "avec tout la diligence nécessaire" respectively. § 651f (1) BGB is therefore, in light of the Directive, to be restrictively interpreted, so that the travel organiser could only be exonerated from fault where either the rider or a third party was at fault or the damage occurred as a result of acts of God.

The claimants submitted various arguments, which indicate fault on the part of the respondent. The claimants referred to the fact that the riding leader, as vicarious agent of the respondent, should not have used several stallions together, he should not have used the stallion "Hengst" who was already previously declared unsuitable for riding trips and not least should he have assigned him to a 13-year-old girl. Ultimately, the riding leader should have taken the agitated horse himself or at least attempted to calm him down by a brief spell riding him himself. The BGH thus held that the respondent had failed to establish proof of exoneration as it did not establish that the riding leader should have been allowed to assign the nervous horse to the settlor.

This assessment is not affected by the fact that the settlor also voluntarily took on the horse that had become nervous, in knowledge of its state. The indication of willingness to take on the stallion in a difficult situation, in the grounds of and upon request of the ride leader, was a giving of aid to the ride leader, the vicarious agent of the respondent, which ultimately was to the benefit of the respondent. It would therefore contradict good faith (§ 242 BGB) if the respondent would derive an accusation of fault from the settlor's willingness to help. Whoever requests voluntary help, upon which the helper sustains injury, is behaving contradictorily, if he subsequently derives an accusation of contributory fault against the helper merely out of the circumstance that the helper fulfilled this request and thereby put himself in danger.

In the outcome the BGH – in a purely appellate capacity – overturned the challenged judgment and, as the further requirements of a claim for damages required further judicial findings of fact, referred the case back to the Berufungsgericht.

### Decision

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