

## Case law

### Case Details

**National ID:** 6 Ob 160/00y

**Member State:** Austria

**Common Name:** link

**Decision type:** Other

**Decision date:** 22/02/2001

**Court:** Oberster Gerichtshof (Supreme court)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [ANNEX I, 1.](#)

### Headnote

Any non-acceptance of liability for personal injury in STCs, where it refers to injury caused by minor negligence, is to be regarded as being in breach of good moral practice and therefore, even before § 6 para 1 line 9 KSchG came into force, was invalid on the grounds of being grossly discriminatory to the other party.

### Facts

In 1996, the then 12-year-old plaintiff, along with her mother and two younger sisters, visited the swimming pool run by the defendant. All three girls were non-swimmers. The entrance tickets indicated that the rules and regulations of the swimming pool applied. These rules contained a provision stating that the pool only accepted liability for accident and injury if caused by gross negligence on the part of swimming pool staff. When, in the evening, the mother left the swimming area to walk towards the changing rooms, she was holding her youngest daughter's hand and the other two sisters were following behind. Unwatched for a moment, these two sisters slipped away and returned to the general pool. One sister drowned. The other (the plaintiff) sustained lasting brain damage with long-term consequences caused by a lack of oxygen to the brain.

The brain-damaged girl, represented by her mother, filed a lawsuit against the swimming pool manager to establish her liability for future detriment and consequences arising from the accident. The plaintiff argued that the pool attendants had not fulfilled their duty to supervise the swimming pools and users. If they had been properly supervising the pool, they would have noticed the girl's struggle to survive, which had lasted several minutes, and intervened at the crucial moment. Furthermore, there was no valid agreement by the plaintiff to the exclusion of liability for minor negligence in the pool's rules and regulations. Moreover, such an exclusion was invalid in the case of minors since it infringed good moral practice. The defendant applied for the case to be dismissed, invoking the exclusion of liability and arguing that the pool attendants could not be blamed for the incident.

The Court of First Instance rejected the claim. In legal terms, it ruled that the plaintiff had acknowledged the provision contained in the swimming pool's rules and regulations on purchasing the entrance tickets. The restriction of liability was both permissible and standard practice. Moreover, there were no grounds for assuming that the swimming pool staff were even slightly at fault. The Court of Appeal quashed the verdict, referring the case back to the Court of First Instance and instructing this court to order a specialist medical report. The Court of Appeal argued that one pool attendant in particular could be accused of minor negligence since, despite twice being asked by the mother, he had not searched the general pool and continued to focus his attention solely on the sports pool.

### Legal issue

Following the Court of Appeal's ruling, the defendant lodged an appeal with the OGH. However, the Supreme Court concurred with the plaintiff's argument that the non-acceptance of liability, insofar as it encompassed physical injury, was in breach of good moral practice and upheld the Court of Appeal's ruling. Although, according to academic literature and case law, an exclusion of liability for future compensation claims in the case of minor negligence is valid in principle, this does not apply to consumers under § 6 para 1 line 9 KSchG. It is true that the latter provision only passed into law with the 1997 amendment to the KSchG and was thus not applicable to this particular case. However, the OGH had already clarified in a previous ruling that any non-acceptance of liability for personal injury in STCs, where it refers to injury caused by minor negligence, was to be regarded as being in breach of good moral practice. Therefore, such a non-acceptance of liability constituted gross discrimination against one party even before § 6 para 1 line 9 KSchG came into force. This applied to the case in question. Crucially, it reasoned, at least some swimming pool users opted for a swimming pool above other public places offering the opportunity to swim not simply because of its facilities, but also because the presence of trained pool attendants offered better safeguards against swimming accidents. This consideration was particularly relevant for cautious non-swimmers wishing to enter the water and parents with children that can not (yet) swim. Given their anticipation of the swimming experience they would have when entering a swimming pool and given the expectation that swimming pool attendants and supervisory procedures at the pool help to avoid accidents, it would be reasonable to assume that, as a rule, users would not critically evaluate the wording of rules and regulations on a board. Thus, with such an exclusion of liability, the swimming pool user is being grossly discriminated against as per § 879 para 3 ABGB. His interests in terms of being free from bodily harm, which are specially protected in law, are therefore being severely infringed.

### Decision

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### Legal Literature

No results available

### Result