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temporarily prevented the plaintiff from complying with his contractual obligation towards the mill; but this reasoning cannot be accepted. The existence of such obligation does not mean that the navigability of a waterway, which a person engaged in shipping has to use within the framework of his contractual obligations, is to be regarded as falling within the sphere of that person's commercial enterprises. The contrary opinion of the Court of Appeal cannot be supported either by the consideration that at the time when the river-wall collapsed the journeys of the plaintiff's vessel on behalf of the mill represented an important part of the plaintiff's commercial activities. The question as to what falls within the commercial enterprise of a person engaged in shipping cannot be determined by the fact that one or several of his vessels are principally employed on certain river routes, seeing that this depends on the offers to load them made by third parties. The Court of Appeal is therefore wrong in holding that in the present case the defendant is liable to pay damages for having interfered with the plaintiff's established and active commercial enterprise also in so far as he could not for a time use the channel for his vessels. If this opinion were accepted it would mean that common users would be protected under the heading of "any other rights" of § 823 I BGB, if only by the circuitous route of a right in an established and active commercial or industrial enterprise.

It follows that the judgment appealed against is only to be upheld to the extent that it declares the plaintiff's claim arising out of the "imprisonment" of the motor vessel *Christel* to be justified (DM 24,086). The additional claim (DM 6965) must be dismissed.

Case 15

BUNDESGERICHTSHOF (SIXTH CIVIL SENATE) 21 JUNE 1977
NJW 1977, 2264 = VERSR 1977, 965

The defendant was the liquidator in the bankruptcy of a limited partnership and of its deceased partner D who was personally liable. The partnership had conducted the business of a major petrol depot. In May 1972, a motorised petrol tanker belonging to a third party attended the depot in order to take on petrol. Owing to the negligence of the tanker's driver, a fire broke out, but the partnership as owners of the premises and the deceased partner were also to be blamed for having failed to prevent the negligent handling of the loading process by the driver of the tanker. Fearing that the fire might spread to the depot as a whole, the police ordered the temporary closure of the plaintiff's business premises for two hours and blocked for another three hours the access roads in order to keep them clear for the fire brigade. The plaintiff, on whose premises work had stopped for five hours, claimed damages representing wages paid and general expenses incurred in respect of the period of closure. He sued the defendant, the owner of the tanker and his employee.

The Court of First Instance and the Court of Appeal of Bamberg gave judgment for the plaintiff. Upon a second appeal by the defendant the judgment of the Court was quashed and the case was referred back to the Court of First Instance for the following.

Reasons

I. The Court of Appeal is of the opinion that the bankrupt is liable to pay damages because he has negligently damaged the established and active commercial enterprise of the plaintiff ("another right" in the meaning of § 823 I BGB). It held that in view of the existing danger to life the police could not allow the persons necessary to run the plaintiff's business to remain; thus the head office of the enterprise had ceased to function between 8.30 am and 10.30 am. Thus the fire had directly affected the running of the plaintiff's enterprise. Therefore the non-productive expenditure of wages and other running costs covering the five hours during which business was interrupted, as alleged by the plaintiff, constituted a direct damage to be compensated in accordance with § 823 I BGB. In this respect it held that the claim for damages was well founded. The Court of Appeal refrained therefore from determining whether the claim could also be maintained on the ground that the plaintiff's property in the business premises had been violated or on the basis of § 823 II BGB in conjunction with the Decree concerning Inflammable Liquids of 5 June 1970 (henceforth called the Decree) [reference].

II. The arguments cannot be supported in law for several reasons. It must be objected in the first place that the Court of Appeal has wrongly simplified the account of the facts referred to in the plaintiff's pleadings seeking to establish liability. A distinction must be drawn between the first period of two hours during which the business premises of the plaintiff were in immediate danger and were evacuated upon the order of the police and the ensuing period when, because of the fire in the tank depot, vehicles of the police and the fire brigade only blocked the (public) access road to the plaintiff's business premises, as a result of which, as the plaintiff alleges, no vehicles could leave the premises, thus making it impossible to supply the building lots for which he was responsible.

These two situations must be considered separately from the legal point of view. During the first period the plaintiff's premises and his power to dispose of them were directly curtailed. Subsequently however, the plaintiff was only prevented from enjoying the common use of a public highway, although he may have been particularly affected, since his premises border on to it, particularly as it provided the only access. The facts as found by the Court of First Instance do not disclose whether this interruption of traffic was damage resulting from the dangerous situation which threatened the plaintiff's premises or was the result of the measures to remove the danger.

1. Damage resulting from the closure of the business premises during the final two hours

(*a*) In this respect it is altogether questionable why the Court of Appeal was able to affirm that an interference with an established and active commercial enterprise had occurred. It is noted in the judgment and admitted that the Bundesgerichtshof regards it as imperative that the interference must be aimed at the enterprise [references] and that the Bundesgerichtshof is concerned above all to counter any excess, contrary to the legal system, of this special remedy in tort [reference]. The requirement that the interference must be aimed at the enterprise, to be meaningful, can only be understood in the sense that he who interfered must have violated those duties of conduct incumbent upon him in view of the particular needs of protection of a commercial or industrial enterprise. Nothing else can be deduced either from the dogmatic considerations contained in the aforementioned decision of this Division [reference], contrary to the Court of Appeal. It is necessary, however, to enlarge on this aspect. Precisely for the reason that the special remedy in tort created by the practice of this court is only intended to fulfil a need peculiar to commercial or industrial enterprise, it only concerns a situation not covered otherwise [references] which must give way to other legal grounds [references]. For this reason alone it was therefore wrong for the Court of Appeal, without considering other

grounds for the claim, to proceed immediately to an examination as to whether a right in an established and active commercial or industrial enterprise had been violated.

(*b*) In fact, to the extent that it is based on the temporary evacuation on the order of the police and the acute danger of a fire and an explosion which was the reason for it, the plaintiff's claim for damages is justified under § 823 I BGB because his ownership and possession were infringed.

It is true that the substance of the premises and of the installations of the enterprise were not touched; this, however, is not essential [references]. As this Division has already stated in its decision of 14 February 1967 [references], the deprivation of an object, even if unaccompanied by damage or destruction, may constitute a violation of ownership in the meaning of § 823 I BGB [references]; the same applies to interference with an object which renders its use impossible [references]. On the other hand the mere fact that an object was endangered physically was not always treated as a violation of property [references]. This Division cannot share that view in a case such as the present where the existence of an acute danger obviously precluded any use, at least for a while. Moreover the right of ownership of the plaintiff (§ 903 BGB) was seriously restricted by the order of the police to evacuate the premises, even if only temporarily. For both these reasons those responsible for the fire in the petrol depot are liable for the violation of another's protected legal interest.

Thus the claim, to the extent considered at this stage, is justified as a violation of property (§ 823 I BGB). It need not be decided here whether the same result could be reached by applying § 823 II BGB in conjunction with the Decree or with § 309 of the Criminal Code.

2. *Damage resulting from the blocking of the public access road*

According to the plaintiff's pleadings . . . after the evacuation of his premises at the orders of the police had come to an end, he was prevented from dispatching his vehicles loaded with materials because the feeder road providing access to the business premises of the plaintiff continued to be blocked by vehicles of the police and of the fire brigade. Their presence, it would appear, no longer served the direct purpose of protecting the plaintiff's premises but in order to secure and to guard the place of the fire itself (see above, Introduction to II). It would seem that in the opinion of the Court of Appeal, the plaintiff's claim in respect of the ensuing loss was justified. This Division cannot accept this conclusion even in principle—unlike in the situation dealt with in (1), above.

(*a*) As stated previously, there are no indications that the damage is connected with the temporary danger to and evacuation of the premises of the plaintiff's enterprise. Consequently the damage cannot, to this extent, be the result of the violation of property examined in (1), above. It would also be wrong to regard the short-time interruption of public traffic on the access roads to the plaintiff's premises as an interference with the ownership of business premises. The difference from the case decided by the Bundesgerichtshof in [reference] (an inland waterways vessel being detained for months in a channel of a river) is obvious. The plaintiff has not put forward this view either; further, it is unnecessary to take into account that the Court of First Instance—the Court of Appeal left the question open—rightly requested the negligent conduct of the bankrupt owners of the petrol depot as involving several violations of provisions of the Decree. The reason is that there are no indications that these provisions of § 309 of the Criminal Code are intended to provide protection individually for traffic users [reference] whose freedom of movement is restricted temporarily as a result of the closure of a road for the purpose of extinguishing a fire and for safety measures. It is insufficient that the plaintiff, as the owner of neighbouring premises, was particularly affected by the closure.

The special remedy intended to cover a situation not provided for otherwise, namely for interference with a facility and an active or commercial or industrial enterprise cannot assist either. It is not the purpose of this special remedy to provide businessmen with a claim for damages in respect of losses which others would have to bear in similar circumstances without being able to make any claim. This applies at all events where the common user of a public highway is obstructed temporarily. For it is recognized that a common user is not "another right" protected by § 823 I BGB [reference]. This principle must not be evaded by granting protection to an established and active commercial or industrial enterprise. For the same reason any such interference must not be regarded as aimed at an enterprise [reference]. In the absence of evidence to the contrary it cannot be so aimed if every other interested person is exposed to the same impediment and must bear his own losses having regard to the substantive principles which attribute liability in damages. Such is the case where the common user of a public highway is interrupted temporarily. As regards the provisions of the Decree and of § 309 of the Criminal Code this conclusion was reached before. The same applies to infringements of the law which typically leads to a temporary standstill of traffic, in particular if provisions of the Road Traffic Regulations are contravened. In such cases the practice of the courts has attributed to the guilty party accidents suffered by others which resulted from a continuing situation creating a danger [reference]. On the other hand, it would seem that claims for damages by such users of a public highway have never been allowed under § 823 II BGB in conjunction with the traffic regulations which had been violated, if the claimants suffered pecuniary losses as a result of a hold-up of traffic following an accident. Here the argument applies once again that the purpose of traffic regulations cannot be to provide protection to that extent, seeing that such adverse consequences must be accepted without compensation by every person using public highways as a matter of chance.

(*b*) If this is so, no special right can exist either viewed from the perspective of a right in an established and active commercial or industrial enterprise. Instead those carrying on a commercial or an industrial enterprise can be expected to bear without compensation such losses as does everyone else living under the same law who suffers severe pecuniary damage through loss of time. This applies certainly to such restrictions in the common user of a public highway which, while they may be particularly serious for a commercial or industrial enterprise, remain on the whole within those limits which other road users must also tolerate without compensation. This applies in the present case. In view of the facts the question must not be decided here possibly in the light of the law relating to expropriation or of sacrifice for the public good as to whether a tort by a private person may so affect a common user adversely as to require that person to pay damages, at least when the interference is of long or even indeterminate duration [reference]. In such a case the commercial or industrial enterprise would be seriously prejudiced while any interference which may even last for several weeks would have to be tolerated without compensation [reference], and it would then have to be considered whether a tort had been committed by interference with an established and active commercial or industrial enterprise.

III. 1. . . .

The Court of First Instance, to which the issue will be referred back to determine the amount of damages will have to take into account in particular that the plaintiff cannot, as he has done hitherto, specify his damages in the abstract in accordance with the extent of his expenses which have turned out to be useless. No legal rule requires that all expenses which have become useless as a result of the damaging event must be compensated, [reference] . . . Instead the Court of First Instance will have to examine on its own to what extent the plaintiff has been lastingly deprived of profits as a result of those incidents of interference with his business which give rise to a claim for damages.

Case 16

BUNDESGERICHTSHOF (SECOND CIVIL SENATE) 9 APRIL 1984
NJW 1984, 2569 = VERSR 1984, 584

Facts

In the summer of 1980 the plaintiff started to construct an inner harbour wall about 230 metres long out of steel shuttering. The employer and owner of the harbour was the city. On 16 March 1981 while building operations were still in train, the barge TS on entering the harbour collided with and damaged the part of the wall, which had been constructed. The plaintiff repaired the wall and sued the defendant as owner of the barge for its expense in so doing, claiming both in its own right and as assignee of the city.

The Rhine Navigation Court held the claim admissible, but the Rhine Navigation Court of Appeal dismissed it. The Bundesgerichtshof reversed and remanded.

Reasons

1. The owner of a ship is answerable for damage done to a third party by the fault of any of the crew in the execution of his functions (§ 3 (1) BinnSchG). Not only must causative fault on the part of a crew member be shown but that person must actually be liable to the third party [references]. The relevant basis of liability here is § 823 I BGB.

2. The Court of Appeal did not decide whether any of the crew were at fault in the collision with the coffer-dam, nor whether the navigational signs at the harbour entrance had been correctly positioned by the city, as the plaintiff alleged. For the purposes of this appeal both assumptions must be made in favour of the plaintiff.

3. According to the Court of Appeal the plaintiff cannot complain of damage to property because the plaintiff did not own the part of the wall which was damaged: it belonged to the city.

The piles driven into the harbour bed were firmly attached to it and formed an essential component of the harbour itself, which was vested in the city. The piles were not there as a merely temporary measure: they were to remain there for the duration of the works. It is irrelevant that at the time of the accident the city had not yet accepted the half-built wall. Important as acceptance is for the contractual relations between the plaintiff and the city (see §§ 640 ff. BGB) it is irrelevant to the question of the ownership of the constructed part of the wall. That falls to be determined by §§ 94, 946 BGB, as the court below correctly stated. This turns on objective factors (permanent fixture to the soil) and not on the attitudes of the contractor and owner of the land. To the extent that these have a role to play under § 95 BGB, the appellant is bound by the finding that the piles were driven into the ground for the duration and not for subsequent removal, so that there can be no question of this being "a purely temporary measure" [references].

4. The Court of Appeal further held that the plaintiff could not base a claim on interference with possession. It held:

> At the time of the accident the plaintiff was certainly still in possession of the standing portion of the wall; for the purpose of executing its building operations, it had direct physical control of the building site, the piles already installed, and the wall, on which they were still working. But possession is protected by § 823 I BGB only in so far as it confers a right to possession, use, or enjoyment. The claim under § 823 I BGB is geared in principle to the replacement of the injury to possession, not to injury to the thing itself; but the plaintiff's claim is addressed to injury to the thing itself so that it does not lie under the heading of interference with possession.

Contrary to the view of the Court of Appeal the plaintiff's possession of the coffer-dam is a sufficient basis for its claim, on the factual assumptions made for the purposes of this appeal (2. above). The plaintiff was still bound to complete the work after it had been damaged (see §§ 631, 644 BGB). Until the city accepted it, the plaintiff bore the risk of having to repair at its own expense any damage to the wall caused by third parties, and until that was done the city was bound neither to accept the work nor pay the agreed fee. Thus the plaintiff's possession of the wall was associated with responsibility for its condition. This is enough to support a claim for the cost of the repairs. The case is akin to those where a tenant or lessee is contractually liable to the landlord or lessor for damage done to the thing by a third party. The tenant and lessee have been granted a claim for damages against the third party based on their possession [references]. Those are admittedly cases of "liability-harm" [reference], whereas here it is by reason of his duty of performance *vis-à-vis* the site owner that the possessor suffers. Nevertheless, this is equally a consequential loss attributable to invasion of a legally protected interest, and it is irrelevant that it is purely economic in nature [reference]. The Court of Appeal was in error to suppose that in NJW 1970, 38 ff. the Sixth Civil Senate had held that a building contractor had no claim based on possession against another contractor for damaging work done by the first contractor and not yet accepted. On the contrary, the judgment expressly left this question open, the first contractor in that case being no longer in possession of the work. . . .

Case 17

BUNDESGERICHTSHOF (SEVENTH CIVIL SENATE) 23 APRIL 1981
NJW 1981, 1779 = WM 1981, 773

In 1973 as the general building contractor for the District of M the plaintiff built a centre for the disabled. The plaintiff delegated to the defendant the tiling operation of the proposed structure. For this purpose they agreed that the standard contract VOB\B (1952) should apply, but they made special provision concerning delivery and conditions and warranties in respect of legal or physical defects. According to the list of work to be done,