The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by

Vernon Valentine Palmer

CAMBRIDGE
UNIVERSITY PRESS

6.11 An invalid's anxieties

Connie was examined by her insurer's doctors and was declared to be a permanent invalid. The insurer began to make monthly payments to her, which were in fact Connie's only source of income. After making monthly payments for one year, the insurer hired a private investigator who made a surveillance video in which Connie was seen shopping, driving her car, taking walks, and talking with neighbors, though in a previous questionnaire she stated she could rarely engage in those kind of activities. After reviewing this video, the insurer promptly cut off her payments, believing that her invalidity was simulated. Since it did not meet with Connie or order a new medical examination prior to taking this step, however, Connie's condition was not conclusively established, and the company's action constituted a clear violation of the insurance contract. After two years Connie sued the insurer for breach of contract and all back payments owed to her, as well as for the distress and anxiety she experienced during that period.

France
Solène Rowan

Operative rules

Connie would be able to obtain from the insurer all the back payments owed to her, as well as damages for her distress and anxiety under Article L113–5 of the Insurance Code, Article 1147 of the Civil Code and possibly Article 1382 of the Civil Code.

Descriptive formants

Connie would base her claim on Article L113–5 of the Insurance Code and Article 1147 of the Civil Code. Article L113–5 of the Insurance Code states, among other things, that when the insured risk has materialized, the insurer must perform its obligation under the insurance contract within the agreed time. Article 1147 provides that the promisor should be ordered to pay damages to the promisee where he fails to perform or performs late, unless his non-performance results from *force majeure*. It is not confined to insurance contracts but applies to contracts generally.

The insurer in the hypothetical stopped making payments to Connie in breach of the insurance contract. Its liability is therefore clear.

The damages that are recoverable for such a breach can in principle cover non-pecuniary loss. French courts have, on many occasions, awarded damages for non-pecuniary loss against insurance companies that stop making payments to their insured in breach of contract. In one case, for instance, an insurance company was ordered to make back payments and pay damages in the sum of 4,573.40 euros for the anxiety and trouble caused to the insured by the wrongful withdrawal of monies that were due to her. The court took into account that she had encountered serious financial difficulties as a result of the breach committed by the insurer.[659] In another case, the insured was awarded 60,000 FF (around 9,000 euros) when the insurer stopped making payments in breach of contract.[660]

French courts have generally been unsympathetic to insurers that employ private detectives to undertake surveillance of claimants under insurance contracts.[661] They have gone as far as to characterise the practice as disloyal (*pratiques déloyales*). In one case,[662] the Cour de Cassation criticized an insurance company, which hired private detectives to investigate their insured and alleged that she was fraudulent, despite medical opinion to the contrary. It held that while an insurance company could be expected to be vigilant against fraud, its suspicion of the insured and use of disloyal practices were abusive. On this basis, it approved the award by the lower court of damages for the non-pecuniary loss suffered by the insured. It based its decision on Article 1382 of the Civil Code, which is the cornerstone of the law of delict, and which provides that "every act whatsoever of man which causes damage to another obliges him by whose fault the damage occurred to repair it." Following this reasoning, Connie might also frame her claim by reference to Article 1382.

[659] Civ (2) 21 Dec 2006, Numéro JurisData : 2006–036725.
[660] Civ (1) 17 March 1998, No 96–16.511.
[661] CA Paris 21 Jan 1998, Numéro JurisData : 1998–024409.
[662] Civ (2) 30 June 2004, NoT02–19.758.

Italy
Marta Infantino

Operative rules

Under Italian law, Connie could recover damages for the distress and anxiety she experienced during the period in which the insurer cut off the payments. However, her claim would face some difficulties.

Descriptive formants

From the circumstances of the case, it is clear that the insurer breached the contract. The insurance company not only misapplied the procedures provided by the contract for checking the insured's health, but also infringed Connie's constitutional right of privacy protected by Articles 2 and 13 of the Italian Constitution. Making a video of Connie's day-to-day activities without her consent and without reason

constitutes an infringement of her privacy. Moreover, stopping payments to a disabled person who is entitled to them can also be viewed as an infringement of the constitutional right to health protected by Article 32 of the Italian Constitution.

It is nevertheless true that some factors may reduce Connie's chances of recovery. First, it is reasonable to assume that Connie was in breach of contract as well. Insurance contracts usually bind the insured to communicate any modification of the insured person's health status, and it is clear from the facts of the case that Connie failed to communicate such information promptly. Under Italian law, the general rule set forth in Article 1460 of the Civil Code, is:

> In contracts with corresponding obligations, each of the contracting parties can refuse to perform their own obligation, if the other party fails to perform or does not offer to perform simultaneously their own obligation, except where different terms for the performance are adopted by the parties or result from the nature of the contract. 2. Nevertheless, no party can refuse to perform if, with regard to the circumstances, the refusal is contrary to good faith.

There is no doubt that such a rule is applicable to insurance contracts.[665] This means that, in principle, the insurer could argue that he cut off the payments as a response to Connie's breach. Yet the fact that the insurer had been able to discover Connie's breach through an unlawful interference with Connie's private sphere, which constituted a breach of contract, would probably prevent the insurer from invoking Article 1460(1). Also, the insurer's refusal to perform is likely to be judged as contrary to good faith, according to Article 1460(2). Indeed, courts often refuse – even if the insured has breached the contract – to justify an insurers' refusal to pay premiums, if this refusal appears to be in contrast with the standard of good faith, which is binding in insurance contracts as well.[666]

Leaving aside Connie's breach, there is another defense that the insurer may raise regarding to limitation. As to insurance contracts, Article 2952(1) and (2) of the Italian Civil Code (as amended by law 27 October 2008, no. 166) sets forth that:

> An action for the payment of insurance premium shall not be brought after the expiration of one year from the dates of the payment of each premium. 2. Any

[665] Cass., 24 March 1997, no. 2576, in *Giust. Civ. Mass.*, 1997, 445.

[666] Cass., 19 December 2006, no. 27132, in *Resp. civ. e prev.*, 2007, 6, 1465; Cass., 26 January 2006, no. 1698, in *Riv. It. Medicina Legale*, 1223; Cass., Sez. Lav. 2 December 2000, no. 15407, in *Giust. Civ. Mass.*, 2000, 2536.

other action related to an insurance or a re-insurance contract shall not be brought after the expiration of two years from the date on which the cause of action accrued.

In light of this article, the insurer may argue that Connie's claim for the unpaid premiums is time-barred. A counter-objection could be that the claim is barred, but only as far as the premium for the first month of suspension is concerned. In the case of a contract involving monthly payments, the general rule is that the limitation period runs separately on each monthly payment due under the contract. Therefore, in the event that Connie brings her claim two years after the cut-off, her request would fall within the limitation period only with regard to the payment for the first month. She could recover all the other twenty-three payments.

As far as non-pecuniary damages are concerned, one may assume that Connie's distress has arisen shortly and incrementally month after month. This would indicate that Connie is barred from seeking compensation for any damage she experienced more than two years before filing the lawsuit. The precise amount of damages to be awarded to Connie is hard to predict. The elements Italian courts are likely to take into consideration are, on the one hand, the insurer's breach and the interests infringed by the breach itself (personality rights/health), and, on the other hand, Connie's own breach and (if proved) her bad faith in keeping silent about her health improvements.

Clearly the short limitation period that, according to the Civil Code, applies to insurance claims is a measure that favors the insurers. In the absence of this rule, the limitation period would be ten years, as set forth by Article 2946. What should be noted, however, is that Italian courts are very sensitive to harmful insurance practices, and are usually prone to sanction any conduct that aims to avoid payments due under a contract.

Germany
Florian Wagner-von Papp

Operative rules

Connie can make a claim for the back payments, unless the insurer can discharge its burden of proof that Connie is not entitled to the payments. Connie can only claim damages for non-pecuniary loss if the non-payment caused a deterioration of her state of health. While it is possible that a court will consider the video surveillance an infringement of Connie's general personality right, it is extremely unlikely that a court would consider the surveillance a sufficiently serious infringement to require the payment of just compensation.

Descriptive formants

Claim under the insurance contract for the back payments

Connie can claim the back payments if she was entitled to these payments under the insurance contract. Provided the insurance was one for accident insurance, this result will be obtained under the Versicherungsvertragsgesetz ("VVG," Insurance Contract Act) §§ 178, 180. The insurer has a right, however, to demand reassessment of Connie's invalidity status within the first three years under VVG § 188. The determination by the insurer's doctor that Connie is an invalid is not conclusive under VVG §§ 189, 84(1), provided that the determination "evidently diverges substantially from the actual facts." Given that the insurer had initially acknowledged its duty to pay under the insurance contract and that its own expert determined the underlying facts, the burden of proof is on the insurer to show that Connie is not an invalid. If the insurer does not discharge this burden, Connie can claim the back payments.

Claim for interest and incidental loss for the back payments, BGB §§ 280(1), (2), 286

If the insurer does not establish that Connie's invalidity was simulated, Connie can also claim interest on the back payments and any incidental losses she may have incurred because of the insurer's default in payment, BGB §§ 280(1), (2), 286. Where Connie cannot show that she has incurred a higher loss, she can at least claim 5 percent interest above the base interest rate under BGB § 288.

Claim for non-pecuniary loss because of the non-payment, BGB §§ 280(1), (2), 286, 253(2)

If (and only if) Connie can show that her health situation deteriorated because of the late payments will she have a claim for non-pecuniary loss under BGB § 253(1)–(2).

(1) Where there is a claim for damages for non-pecuniary loss, courts increase the amount of the award if an insurer protracts payments of an evidently justified claim.[669] Here, however, Connie has no pre-existing claim for non-pecuniary damages, but only for contractual payments, so the aforementioned case law does not assist her.

(2) If, however, the insurance's refusal to pay has caused a deterioration of her health, she has a claim for damages for her non-pecuniary loss under BGB §§ 280(1)–(2), 286, 253(2). In a case in which a travel insurance provider refused to arrange the return trip of the insured person, who was HIV positive and had fallen ill during his trip to Reno, a Munich regional court awarded 2,000 euros, because the insured had to arrange his own trip while being nearly unable to speak or drive a car.[670]

Just compensation because of the surveillance?

A separate question is whether Connie has a claim for just compensation for an infringement of her general personality right.[671]

a. The production of video footage potentially infringes the general personality right of the filmed person, even if the filmed person is moving – as here – in a public space,[672] and even if the filming person does not intend to distribute the video.[673] Whether or not the filming

[669] Schiemann in Staudinger, § 253 [33]; Markesinis et al., *Compensation for Personal Injury* p 81.

[670] LG Munich I 16 May 2007, Case 6 S 20960/06, 2008 BeckRS 13561.

[671] For the principles governing the "just compensation" for infringements of the "general personality right," see above Case 6.8. The most analogous case: observation by an insurance company of the insured, OLG Cologne 3 August 2012, 20 U 98/12, 2013 NJW-RR 740 (but: observation only, no filming, possibly photos).

[672] Had Connie been filmed in her apartment or a space that was protected against viewing from the outside, the insurer would be criminally liable (Strafgesetzbuch § 201a). Here, however, the filming appears to have been restricted to public spaces.

[673] See BGH 16 March 2010, Case VI ZR 176/09, 2010 NJW 1533, 1534 [11]; BGH 25 April 1995, Case VI ZR 272/94, 1995 NJW 1955, 1956–1957 (both cases concerned plaintiffs complaining about their neighbors' security cameras); OLG Hamm 2 April 1987, Case 4 U 296/86, 1988 JZ 308 (neighbors taking photographs of each other); LG Cologne 21 August 2013, Case 34 T 179/13, 2014 NJW-RR 537–39 (observation of a medical malpractice claimant lasting several days was considered illegal after interest

itself infringes personality rights depends on a balancing process, taking into account all the circumstances of the case. On the one hand, the fact that the filming was surreptitious is usually an aggravating factor.[674] On the other hand, the detection and documentation of criminal acts (or serious infringement of the law) is widely perceived to be a legitimate "defense."[675] However, the question whether the interest in creating evidence of an infringement of law legitimizes the production of photographs or videos is not uncontroversial; the case law is inconsistent.[676]

A number of courts have handled the justification of producing evidence of criminal behavior extremely restrictively. The OLG Karlsruhe held that security cameras infringed the general personality rights of the persons caught on tape in a case where the cameras were installed in a parking lot to identify a perpetrator who had vandalized a car. The Court was mainly concerned with the general personality rights of innocent third parties who were caught on the tape.[677] The OLG Cologne followed this decision and considered a surveillance videotape that showed the defendant vandalizing washing machines to be inadmissible evidence.[678] Similarly, the OLG Düsseldorf considered video surveillance of the defendant's parking lot unlawful, even though the defendant's car had been damaged twice shortly before the defendant installed the video camera.[679] The OLG Hamm decided in one case that the "mere interest in establishing evidence for a violation of the law" was insufficient to outweigh the interest of the photographed person,

balancing). In contrast to the general personality right, the specific personality right to one's picture under Kunsturhebergesetz § 22 only deals with the *distribution or publication* of pictures. See, e.g., S. Ernst, "Gleichklang des Persönlichkeitsschutzes im Bild- und Tonbereich?" 2004 NJW 1278–1279.

674 See BGH 10 May 1957, Case I ZR 234/55, 24 BGHZ 200, 208 = 1957 NJW 1315, 1316; Ehmann in Erman, Anh § 12 [141]. *But* see Helle, Note on BGH Case VI ZR 272/94, 1995 JZ 1117, 1118 in fn. 20 (pointing out the counter-argument that open surveillance may create even greater psychological pressure on the depicted person).

675 For possible justifications of video surveillance of publicly accessible spaces, see the special provision Bundesdatenschutzgesetz (BDSG) § 6b (for an application of this provision, see AG Berlin-Mitte 18 December 2003, Case 16 C 427/02, 2004 NJW-RR 531).

676 See Helle, Die heimliche Videoüberwachung – zivilrechtlich betrachtet, 2004 JZ 340–347; idem, Note on OLG Hamm Case 4 U 296/86, 1988 JZ 309–311; see also idem, Note on BGH Case VI ZR 272/94, 1995 JZ 1117, 1118; Ehmann in Erman, Anh § 12 [142].

677 OLG Karlsruhe 8 November 2001, Case 12 U 180/01, 2002 NJW 2799.

678 OLG Cologne 5 July 2005, Case 24 U 12/05, 2005 NJW 2997, 2998–2999.

679 OLG Düsseldorf 5 January 2007, Case 3 Wx 199/06, 2007 NJW 780. The Court also considered it irrelevant that the defendant's husband had been attacked and injured on the parking lot two years previously.

despite the fact that no third parties' rights were involved.[680] These decisions have, however, been criticized. They do not sufficiently take into account the interests of the person who could otherwise not prove the tort or crime committed by the depicted person, whereas *both* parties' interests have to be balanced in order to determine whether or not there is an infringement of the depicted person's personality right.[681]

The Federal Court of Justice explicitly left undecided whether the production of video footage could be justified where the purpose of the video was to produce evidence for specific criminal conduct.[682]

The Federal Court for Employment and Labour Law established three requirements before an employer may use video surveillance against the employees. First, there must be a substantiated specific suspicion of a criminal offense or serious misconduct. Second, the surveillance must be the last resort for proving the violation. Third, the surveillance must not be disproportionate in nature.[683] If these requirements are met, the Court allows surveillance even where innocent third parties are necessarily also caught on tape. Other courts have considered video surveillance to be permissible under similar conditions.[684]

[680] OLG Hamm 2 April 1987, Case 4 U 296/86, 1988 JZ 308. In another case, the OLG Frankfurt left open the question whether the production of a video could be justified by the interest in securing evidence of the drunkenness of a builder, because this justification would not have covered the defendant's behavior, who had made several copies and shown the video to third parties (OLG Frankfurt 21 January 1987, Case 21 U 164/86, 1987 NJW 1087).

[681] See Helle, Note on OLG Hamm Case 4 U 296/86, 1988 JZ 309–311; Ehmann in Erman, Anh § 12 [142].

[682] BGH 25 April 1995, Case VI ZR 272/94, 1995 NJW 1955, 1957 = 1995 JZ 1114, 1116.

[683] BAG 27 March 2003, Case 2 AZR 51/02, 2003 NJW 3436, 3437; see also BAG 26 August 2008, Case 1 ABR 16/07, 2008 BeckRS 56591; BAG 29 June 2004, Case 1 ABR 21/03, 2005 NJW 313.

[684] E.g., LG Zweibrücken 3 November 2003, Cases Qs 10/03 and Qs 11/03, 2004 NJW 85–86 (video of the theft by an employee was admissible in the criminal trial against the employee); see also OLG Düsseldorf 5 May 1997, 5 U 82–96, 1998 NJW-RR 241 (a surreptitiously produced video tape showing assault with bodily harm is admissible evidence in the ensuing tort litigation); KG Berlin 5 July 1979, Case 12 U 1277/79, 1980 NJW 894 (defendant did not have to surrender the photograph of a playing child where the photo was made as evidence for property damage); OLG Schleswig 3 October 1979, Case 1 Ss 313/79, 1980 NJW 352 (video tape of theft by an employee of a casino was admissible evidence in the criminal trial); LG Gießen 15 November 1995, Case 1 S 297/95, 1996 MDR 266 (defendant had videotaped his wife and her lover coming out of the bedroom of the married couple's apartment in a state of undress; the Regional Court considered the videotaping to be justified because the video could be used and was meant to be used as evidence supporting an application for an injunction); AG Zerbst 31 March

Here, the insurer suspected that Connie had fraudulently misrepresented the extent of her invalidity and so committed a criminal offence under the Criminal Code, Strafgesetzbuch ("StGB") § 263.[685] The insurer focused the video exclusively on the one potential culprit, so that the danger emphasized by some courts that innocent third persons would be videotaped without their knowledge did not arise. Arguably, Connie's general personality rights were not infringed if the insurer had sufficiently specific grounds for suspecting that she had misrepresented her state of health to benefit from higher insurance payments.

b. While it is nevertheless possible that German courts would find an infringement of Connie's general personality right despite the insurer's interest in creating evidence for her allegedly fraudulent misrepresentations, it is unlikely that this infringement would be considered sufficiently serious to award just compensation for non-pecuniary loss.[686] One court has awarded just compensation to a plaintiff who was persistently videotaped.[687] However, the defendant in that case had installed a second camera even though the plaintiff had previously successfully applied for a court injunction against the erection of the first camera, and the only reason for installing the camera in the first place was to annoy the neighbor.[688] In another case, a court awarded "damages for non-pecuniary loss" where the defendant had made a video of the drunken plaintiff and had distributed this video to acquaintances.[689] There appear to be no cases in which a court awarded just compensation

2003, Case 6 C 614/02, 2003 NJW-RR 1595 (videos of the tenant urinating into the cellar on a daily basis was admissible evidence in the landlord's action for possession).

685 In OLG Cologne (fn 678), the Court dealt with circumstances similar to Connie's case. The Court held that where there is a suspicion of insurance fraud based on specific facts (and not only a general suspicion), the observation of the insured is legal if the extent of the observation is proportionate to the claim (it was unclear if any photos had been taken). In a 1935 decision, the OLG Düsseldorf considered to be illegal the taking of photographs of a person suspected of insurance fraud; but the persistent surveillance did not take place in public spaces (as was the case here), but on the depicted person's property. OLG Düsseldorf 9 October 1935, 1936 HRR No. 416.

686 See Ehmann in Erman, Anh § 12 [140]. The remedies in the cases above were usually an injunction against further infringements, the inadmissibility in evidence, and occasionally the destruction or surrender of the infringing tapes or photos.

687 OLG Cologne 13 October 1988, Case 18 U 37/88, 1989 NJW 720–721.

688 The Court awarded DM5,000 (approximately 2,500 euros), based on the defendant's persistent, obstinate, and spiteful behavior, the long duration of the observation, and the absence of any justification.

689 OLG Frankfurt 21 January 1987, Case 21 U 164/86, 1987 NJW 1087 (awarding DM3,000, *i.e.* approximately 1,500 euros); the Court left undecided whether the production of the video in itself had been unlawful, because the distribution certainly was.

for the infringement of the general personality rights even though the defendant had pleaded a *bona fide* interest in securing evidence.

Austria
Ernst Karner and Barbara C. Steininger

Operative rules

Under Austrian law, Connie's claim will probably fail.

Descriptive formants

In a 1961 case,[695] a plaintiff claimed to have suffered mental shock because a (state) pension, which rightfully should have been awarded to him, was denied so that he was left in a situation of financial emergency. Even though the encroachment suffered amounted to an injury to health, the OGH denied the claim arguing that developing severe health and mental problems was not an adequate cause of a denial of a pension. Although this was not a contract case and although attitudes towards non-pecuniary loss have changed since the 1960s, Connie's claim is very unlikely to succeed. Her only chance would be to argue that the contract was also aimed at a very important non-pecuniary interest, namely, the vital interest in having a secured livelihood, and that therefore her non-pecuniary loss should be recoverable on the basis of §§ 1323 f ABGB in the case of gross negligence or intent. But the chances of success are very low, although they might be slightly higher in the case of wantonness on the part of the insurer.

Consequently, Connie will probably not be able to recover compensation for her non-pecuniary loss.

[695] OGH 1 Ob 247/61 = JBl 1962, 151.