

# Liability of Professional Advisors under Swiss and German Law

*Heinrich Honsell*

## I. Introduction

Questions concerning liability for professional advice, expert opinions and information play an increasingly important role in a world which has become more complex and difficult and which is also marked by the specialization of professions<sup>1</sup>. These questions form part of the problem of

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<sup>1</sup> The following is a summary of the existing (German) literature, which has become too extensive to survey: ABEGGLEN, Die Aufklärungspflichten in Dienstleistungsbeziehungen, insbesondere im Bankgeschäft [Duty to inform in service relationships, particularly in the banking business] (Diss. Bern 1995); BAYER, Vertraglicher Drittschutz [Contractual protection of third parties], JuS 1996, 473 ff.; BERTSCHINGER, Sorgfaltspflichten der Bank bei Anlageberatung und Verwaltungsaufträgen [Bank's duty of care in investment consulting and management contracts] (Diss. St. Gallen 1991); CANARIS, Schutzgesetze - Verkehrspflichten [Protection statutes - customary duties], 2nd FS Larenz (1983) 28 ff.; CANARIS, Bankvertragsrecht [Bank contract law] (2nd ed. 1981; 3rd ed. 1988); DERENDINGER, Die Nicht- und nichtrichtige Erfüllung des einfachen Auftrags [Failure to perform and failure to properly perform under a mandate agreement] (2nd ed. 1990); DRUEY, Verträge auf Informationsleistung [Contracts for information service], Festgabe Schlupe (1988) 147 ff.; FELLMANN, Die vermögensrechtliche Verantwortlichkeit des Notars [Liability of the notary], ZBGR 1986, 129 ff.; W. HSCHER, Dritthaftung für falsche freiwillige Auskünfte [Third party liability for incorrect voluntary information], ZvglRw 1984, 1 ff.; GAUCH/SWEET, Deliktshaftung für reinen Vermögensschaden [Tortious liability for pure pecuniary damages], FS Keller (1989) 117 ff.; GRAF, Anwaltshaftung [Attorney liability] (1994); HARRER, Die zivilrechtliche Haftung des Sachverständigen [Civil liability of the expert], in: Der Sachverständige im Wirtschaftsleben [The expert in business] (publ. by Aicher/Funk/Korinek/Krejci/Ruppe 1990) 177 ff.; HENSSLER, Haftungsrisiken anwaltlicher Tätigkeit [Liability risks of attorney activity], JZ 1994, 178 ff.; HIRTE, Berufshaftung [Professional liability] (1996); HONSELL, Probleme der Haftung für Auskunft und Gutachten [Problems of liability for information and expert opinions], JuS 1976, 621 ff.; HOPT, Rechtsprobleme der Anlageberatung und der Vermögensverwaltung der Schweizer Banken [Legal problems of investment consulting and asset management by Swiss banks], in: Beiträge zum schweizerischen Bankenrecht [Contributions to Swiss banking law] (publ. by Graffenried 1987); HOPT, Nichtvertragliche Haftung ausserhalb von Schadens- und Bereicherungsausgleich [Non-contractual liability other than damage and enrichment compensation], AcP 183 (1983) 578 ff.; HÜBNER, Die Berufshaftung - ein zumutbares Berufsrisiko? [Professional liability - a reasonable professional risk?] NJW 1989, 5 ff.; KAISER, Die zivilrechtliche Haftung für Rat, Auskunft, Empfehlung und Gutachten [Civil liability arising from advice, information, recommendation and expert opinion] (Diss. Bern 1987); JOST, Vertragslose Auskunfts- und Beratungshaftung [Non-contractual information and consulting liability] (1991); KELLERHALS, Die zivilrechtliche Haftung des Rechtsanwaltes aus Auftrag [Civil liability of the attorney arising from contract] (Diss. Bern 1952); M. KUHN, Die Haftung aus falscher Auskunft und falscher Raterteilung [Liability arising from incorrect information and from providing incorrect information], SJZ 1986, 345 ff.; LITTBARSKI, Strenge Haftung des Sachverständigen - Sicherheit für den Auftraggeber? [Stringent liability of the expert - security for the principal?], ZIP 1996, 812 ff.; LORENZ, Das Problem der Haftung für primäre Vermögensschäden bei der Erteilung einer unrichtigen Auskunft [The problem of primary pecuniary damages arising from providing incorrect information], FS Larenz (1973) 618 ff.; MEIER-SCHATZ, Über die privatrechtliche Haftung für Rat und Anlagerat, Mélanges Piotet [Liability for advice and investment advice] (1990) 151 ff.; MERZ, Die privatrechtliche Rechtsprechung des Bundesgerichts im Jahre 1986 [Decisions of the Swiss Supreme Court in 1986], ZBJV 1988, 190 ff.; F. MÜLLER, Auskunftshaftung nach deutschem und englischem Recht [Liability for information under German and English law] (1995); NIGG, Die zivilrechtliche Aufklärungspflicht des Rechtsanwalts [The civil duty to inform on the part of the attorney], SVZ 1994, 202 ff.; ODEFSKY, Die Berufshaftung - ein zumutbares Berufsrisiko? [Professional liability - a reasonable professional risk?] NJW 1989, 1 ff.; RINSCHKE, Die Haftung

specific professional liability which is often discussed today<sup>2</sup>. The point discussed above all is the „proper systematic classification in a field which is defined by two poles: contractual liability on the one hand and tort liability on the other“<sup>3</sup>. Compared with general professional liability, liability for professional advice, expert opinions and information, etc., is distinguished from the outset by a specific feature: It typically does not involve an immediate physical infliction of harm, such as, for example, in the case of physician's liability for a faulty operation or in the case of the faulty performance of e.g. repair work etc. which results in damage. Instead, it involves harm which arises solely as a result of the fact that the contracting party or a third party follows faulty advice. As a rule, this involves pecuniary damage, but property damage and health injury are also possible in exceptional cases; consider however the damage to a computer or a computer file resulting from incorrect advice; consider also the prescription of a counter-indicated medication by a physician or an incorrect forensic psychiatric report which results in the loss of liberty<sup>4</sup>. To this regard the German Federal High Court of Justice [BGH] has even rejected liability on the part of an expert for gross negligence. The German Federal Constitutional Court correctly vacated this judgment on the ground of violation of Art. 2 of the German Constitution dealing with Personal Liberty<sup>5</sup>. Faulty statements with the context of the rendering of advice or an information contract offer no problems with regard to the ground for liability. The same is true when consultation is owed as an ancillary duty. In both cases the focal point of the problem lies in making the duties or care concrete. On the other hand, the basis for liability is doubtful in the non-contractual area. Swiss law of tort which is contained in a general clause in OR 41 [Swiss Code of Obligations], has adopted the German principle of restricting tortious liability to absolutely protected property. This means that mere pecuniary property (total of pecuniary assets or fortune<sup>6</sup>) - unlike the absolute legal rights (health, ownership, etc.) - is not protected against negligent impairment but rather is, in principle, only protected in the case of intentionally inflicted harm. This plays a particular role in our context, i.e., the negligent giving of incorrect advice or incorrect information as well as negligently conducted litigation, etc. Since only ownership and comparable absolute rights rare protected against negligent damage, a liability restriction arises. Only contract law (not tort law) provides protection against negligent interferences with fortune. This arises from the interpretation of OR 41 I and II. Protection against negligent interference only exists in the case of injury to life, body, liberty and ownership and also in the case of violation of protection statutes. Fortune is protected only under OR 41 II, which requires an intentional immoral damage. In German and Austrian law, § 676 BGB [German Civil Code] and § 1300 ABGB [Austrian Civil Code] provide that giving advice or

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des Rechtsanwalts und des Notars [Liability of the attorney and notary] (5th ed. 1995); SCHIEMANN, Wandlungen der Berufshaftung [Changes in professional liability], FS Gernhuber (1993) 387 ff.; SIEG, Internationale Anwaltshaftung [International attorney liability] (1996); SPÄTH, Die zivilrechtliche Haftung des Steuerberaters [Civil liability of the tax adviser] (4th ed. 1994); H. P. WALTER, Vertrauenshaftung im Umfeld des Vertrags [Liability based on principles of reliance in connection with the contract], ZBJV 1996, 273 ff.; WIEGAND, Zur Haftung für Dienstleistungen [Liability for services], recht 1990, 142 ff.; ZEUNER, Haftung für Gutachten und sachverständigen Rat [Liability for expert opinions and expert advice], in: Karlsruher Forum (1988) 3 ff.; ZIMMERMANN, Die Haftung der Bank aus Verwaltungsvertrag [Bank liability for management contract], SJZ 1985, 137 ff. With regard to attorney's liability vis-à-vis third parties in English law see MIDDLETON VersR 1996,1027 ff. and KESSEL NJW 1996, 30 ff.

<sup>2</sup> HOPT AcP 183 (1983) 578 ff., 608 ff.; see also SCHIEMANN FS Gernhuber (1993) 387 ff.

<sup>3</sup> ZEUNER, Haftung für Gutachten und sachverständigen Rat [Liability for expert opinion and expert advice] 3.

<sup>4</sup> See BGHZ 62, 54.

<sup>5</sup> BVfGE 49, 304 = JZ 1979, 63 with comment by STARCK.

<sup>6</sup> In the following I use the term „fortune“ instead of pecuniary property, referring to financial advantages which do not include ownership and similar positions, such as so-called intellectual property.

a recommendation does not establish liability for resulting damages unless there is a contract or a tort. This recalls Roman *mandatum tua gratia*<sup>7</sup>. No corresponding norm exists in Swiss law, although this would not result in a different legal situation, because there is, in principle, no liability for negligent damage to the fortune as such.

There have been extensive discussions on whether one should nevertheless attempt to escape this situation by construing an implied contract<sup>8</sup> in certain cases, **which usually remains anemic fiction**. There is also a discussion on whether tort law should be extended<sup>9</sup>, thus refuting the invention of new protective norms<sup>10</sup>, the application of which is however only permissible in the case of intentional conduct. A third often suggested approach is the presumption of quasi contractual relationships or even statutory contractual relationships. This is the theory of *culpa in contrahendo*<sup>11</sup>. For the proponents of this doctrine, a social contact, usually a business contact, and the resulting trust are sufficient to take the place of the contract. Finally, a fourth view wishes to introduce specific professional liability according to the Anglo-American model<sup>12</sup>, which requires no more **than** the existence of an expert-client relationship.

Before advocating any generalized solutions, it should be kept in mind that the cases which are involved are quite different. An art expert's opinion which results in the purchase of an inauthentic picture is something quite different from a physician's incorrect consultation. An expert report by a building expert has little in common with credit information. Incorrect banking information which leads to losses differs, in turn, from a faulty prospectus intended to attract investors.

For the time being, EC-law or regulations play no role with regard to liability of professional advisors, firstly because the Commission draft of a service guideline failed, and secondly, the draft was limited to personal injury and property damage - the pecuniary damage typical of professional liability was excluded. U.S. professional malpractice law, like professional liability law in general, has led to developments causing an outright crisis of liability law in the U.S. especially in the area of punitive damages. U.S. law is thus not suitable as a model and will therefore be excluded from further consideration.

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<sup>7</sup> Gaius Dig. 17.1.2.: *quod si tua tantum gratia tibi mandem, supervacuum est mandatum et ob id nula ex eo obligatio nascitur.*

<sup>8</sup> This path is primarily taken by the courts; see references to German law in JOST, *Vertragslose Auskunft- und Beratungshaftung* [Non-contractual information and consulting] (1991) 105 ff.; concerning Swiss law, see, for example, BGE 112 II 258; 112 II 347.

<sup>9</sup> Specifically, the German judiciary also subsumes cases of gross negligence under the elements of intentional immoral infliction of harm; see the citations in HONSELL *JuS* 1976, 621 ff.; likewise in the result of BGE 116 II 695 ff., in which, however, OR 41 II is not invoked.

<sup>10</sup> See, for example, KELLER/GABI, *Haftpflichtrecht* [Liability law] (2nd ed. 1988) 37, 50, who surprisingly see a tort protective norm in Art. 2 ZGB [Swiss Civil Code]; also CANARIS, 2nd FS Larenz (1980) 28 ff., who advocates the codification of business practice obligations to protect third-party property.

<sup>11</sup> LORENZ FS Larenz (1973) 618; CANARIS, *Die Vertrauenshaftung im deutschen Privatrecht* [Liability based on confidence in German private law] (1971) 539 fn 75; CANARIS 2nd FS Larenz (1983) 28 ff.; KÖNDGEN, *Selbstbindung ohne Vertrag* [Binding oneself without a contract] (1981); JOST 116 ff., 267 ff.; for Swiss law KAISER, *Die zivilrechtliche Haftung für Rat, Auskunft, Empfehlung und Gutachten* [Civil liability arising from advice, information, recommendation and expert opinion] (Diss. Bern 1987); BK-KRAMER *Allg. Einl. [Gen. Intro.]* note 142 ff.; see also GAUCH/SWEET FS Keller (1989) 117 ff.; M. KUHN *SJZ* 1986, 345 ff.; W. FISCHER *ZvgIRw* 1983, 19 ff.; distinguishing: MEIER-SCHATZ *Mél. Piotet* (1990) 151 ff.; obiter now also BGE 120 11 331 [„Swissair“-case]; rejecting: AMSTUTZ/WATTER *AJP* 1995, 502 ff.; GONZENBACH *recht* 1995, 117 ff.; WICK *AJP* 1995, 1280 ff.; concurring: H. P. WALTER *ZBJV* 1996, 273 ff.; cautious: DRUEY *SZW* 1995, 93 ff.

<sup>12</sup> See in particular HOPT *AcP* 183 (1983) 578 ff.

## II. Contractual liability

### 1. Consulting contract

At first glance, the cases in which the information provided or the expert opinion rendered are made the subject matter or a contract concluded directly in connection therewith and are provided solely for this purpose do not appear to be problematical. This also applies with regard to advice given by an attorney or notary, certified public accountant or tax adviser, a management consultant or the activity of auditors and trust companies, if they are hired to perform a company analysis and are required to make suggestions e.g. concerning the reorganization; finally it further includes the hiring of experts from the various professional branches.

Such activities are generally qualified mandate [*Auftrag*]. However, the law governing contracts or contracts to manufacture or repair goods [*Werkvertrag*] should also be considered in cases involving the answering of a particular question or the solution of a very specific problem. For example, the German courts classify the expert report of an engineer or attorney as such a contract [*Werkvertrag*]<sup>13</sup>, which is also true for matters such as a composition or a theater play. One should however uniformly apply the law governing mandates in the case of the consultative activities. In addition, the material deficiency right under Art. 368 ff. is tailored for tangible works.

Like OR 364 I (concerning the *Werkvertrag*), OR 398 I (concerning mandates) refers to the standard of care which applies to the employee under the employment contract (OR 321a I, 321e). According to OR 321e, the employee (as well as the principal, by reference) is liable „on the basis of the professional risk, degree of education or technical knowledge demanded by the work...“. Thus, this provision deviates from the principle of liability for each objective fault and leaves room for the consideration of individual circumstance. The universal reference which OR 364, 398 make to the employment contract has been described as a failure of the legislature<sup>14</sup>. It is problematical from three perspectives: Firstly, it does not reflect the need for different liability standards for compensated and uncompensated activities. Thus, it is necessary to observe OR 99 II, which provides for a reduce of liability in the case of uncompensated activity. Secondly, reference fails to consider the differences between dependent and independent work, as well as the much greater intensity of direction in the case of an employment contract. Finally, the reference provision was in existence prior to the amendment of OR 321e in the statute. Thus, it is a so-called dynamic reference, in which the referring norm participates in modifications of the norm to which<sup>15</sup> reference is made.

The flexible standard of liability of OR 321e however also permits proper solutions in mandate law. The prevailing doctrine generally places higher requirements on the independent contractor than on

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<sup>13</sup> BGH NJW 1967, 719; 1965, 106; likewise for Swiss law, for example, OR-ZINDEL/PULVER, introductory comment to Art. 363-379 note 2; along these lines, see also DRUEY FS Schluemp (1988) 147, 164.

<sup>14</sup> BK-FELLMANN OR 398 note 480.

<sup>15</sup> A statutory (**Vorlage: static**) reference could only be accepted in the case of an obvious oversight on the part of the legislature.

the employee. In support of this, reference is made to the expectations of the principal who employs a specialist.

The independent contractor is responsible for exercising the degree of care which is necessary for the job which has been accepted. Thus, he must possess the average abilities of an attorney or physician, etc. If he does not have them, fault exists at the time of accepting such work in the absence of the appropriate abilities: *imperitia culpa adnumeratur* (acceptance fault). Otherwise, everything depends upon the respective activity and the circumstances of the individual case.

The prevailing doctrine separates fault and breach of contract. In light of the generally acknowledged conceptualizing of fault as an objective concept, this division is no longer relevant. It must be noted, however, that the shifting of the burden of proof pursuant to OR 97 relates only to fault and not to violation of the duty of care. That is the prevailing doctrine, in full set out in the case law and in the relevant legal writing today. The fact that fault and breach of contract practically coincide due to the objective concept of fault should not mislead one into also burdening the independent contractor with the burden of proof concerning the non-existence of a breach of contract. Stated differently: as far as the presumption of fault under OR 97 I is concerned, it is necessary to stay with the subjective concept of fault, i.e., the clear separation of and distinction between illegality and fault, which was assumed by the legislature when adopting OR<sup>16</sup>. **[Vorlage: by the legislature which created the OR]**

The question of waivers and disclaimers plays a major role in professional liability cases in general and liability of professional adviser in particular. It is inherent in the nature of the matter at hand waivers and disclaimers are only possible. **[Vorlage: It is inherent in the nature of the matter at hand that contracting out is only possible in the contractual area.]** From the outset, no such possibility exists in the case of tort liability in the absence of a contract. Disclaiming liability for simple negligence pursuant to OR 100 is permissible. However, there is a limitation for attorneys: Under the professional rules of the various cantons, attorneys cannot contract out of liability for simple negligence. Although cantonal professional law is not directly relevant to civil law, these norms are often adopted into civil law by the courts. However, this appears to be too expansive. The attorney has professional liability insurance. Potential damage which exceeds the coverage amount can be contracted away, provided that gross negligence is not involved. Since mistakes can happen, it would be ruinous for the attorney's business if he always had to bear, personally, the damage not covered by his professional liability insurance. In practice, it is recommendable in the case of amounts in controversy and transaction values which are in excess of the coverage amount, that it be left to the discretion of the client to have the coverage (to the extent available) increased on an *ad hoc* basis at the client's expense. If the client declines, contractual exclusion of the excess liability must be permissible in the case of simple negligence.

In the case of assistants, it is also possible to contract gross negligence away (OR 101 II). It must be borne in mind, however, that contractual exoneration for assistants (office personnel, for example) is of no use if organizational or supervisory fault is presumed. However, to the extent that a „commercial operation which is officially licensed“ is involved, only a contractual disclaimer of

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<sup>16</sup> As to the conclusions concurring BGE 115 Ib 181 f.; GAUCH/SCHLUEP, *Obligationenrecht Allg. Teil II* [Law of Obligations, Gen. Part II] (6th ed. 1995) note 2775.

simple negligence is possible<sup>17</sup>, subject to discretion of the judge (OR 100 II, 101 III). After a long period of vacillation, the Swiss Federal Court classified banking as an officially licensed business operation<sup>18</sup>.

The often fluid and difficult to discern border line between simple and gross negligence is of major importance under the current statutory system.

## 2. *Providing advice and information as ancillary contractual duties*

More important than the consulting contract from a practical standpoint is the providing of advice as an ancillary duty, particularly in the case of service contracts.

No difficulties arise in connection with the ancillary duty to advise which often arises in the course of a purchase, a work contract or mandate. If advice or information is given in connection with an existing contract - consider, for example, statements concerning the functioning or usability of a machine which is sold or concerning the sales and earnings of the company which is sold - the theory of *culpa in contrahendo* or the theory of the so-called *positive breach* of contract are applied if a breach of duty can be confirmed.

The bank which manages a custodianship account, the accountant who prepares a balance sheet and the broker who brokers derivatives all have advisory duties. Rather atypical is a recent decision by the Swiss Federal Court concerning the duty to inform of a physician. The duty to inform on the part of the physician follows specific rules (not discussed here) which are marked by the askew presumption that a treatment undertaken without complete information is a bodily injury which is subject to criminal punishment and civil liability because true consent is lacking. However, the Federal Court also demands an economic disclosure concerning the financial coverage of a treatment by the public health care system. A surgeon had recommended the surgical removal of body fat to the patient and stated that, in his opinion, the health insurance would pay for the operation<sup>19</sup>. However, the woman in that case narrowly missed the indication threshold of 180% of normal weight which was imposed by the public health care system. The Federal Court assumed, „on the basis of general life experience“, that the woman would not have decided in favor of the operation in the absence of the incorrect information. This is dubiously close to a presumption of causality. The result was that the physician received no fee for an indicated and successful operation and also had to pay hospital costs.

In general, it can be stated that declarations and information given during consultation or information sessions must be complete and correct, i.e., true<sup>20</sup>.

It is often impossible to precisely separate the duty to advice from other duties of care; there is at best an incremental difference. For example, the attorney who files a time-barred claim violates the

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<sup>17</sup> Contractual exoneration is also possible in standard form contracts.

<sup>18</sup> BGE 112 II 450, 455.

<sup>19</sup> BGE 119 II 456 = SJZ 1994, 146; in this regard ABEGGLEN ZBJV 1994, 178 ff.; WIEGAND ZBJV 1995, 360.

<sup>20</sup> Thus, BGE 57 II 81, 86; see also HOPT, *Rechtprobleme der Anlageberatung und der Vermögensverwaltung der Schweizer Banken* [Legal problems of investment advice and asset management at Swiss banks] 153 f.

duty of care for attorneys. However, this can also represent a violation of the duty to properly advise or inform if he fails to advise against filing a time-barred claim. Likewise, it makes no difference whether the bank gives incorrect information to the customer who holds a custodianship account with the bank or whether it manages the account poorly.

Cases involving missed deadlines are at the top of the statistics relating to *attorney liability*. But there are also cases of incorrect advice. The attorney is specifically obliged to inform his client with regard to the prospects of success and risk involved in a legal dispute. The question which is in dispute is the extent to which the attorney is liable for knowing statutes and decisions. On the one hand, the Zurich District Court held that an incorrect but plausible interpretation of the substantive or procedural law does not establish liability<sup>21</sup>. On the other hand, the lack of knowledge of important decisions which are published in professional periodicals and which affect the procedural law of the district in which the profession is practiced are viewed as satisfying the elements of liability<sup>22</sup>.

There is very little case law concerning attorney liability, which indicates that either very few actions are brought or all claims made are settled out of court by the liability insurance.

German case law concerning attorney liability is much stricter. It demands knowledge of all relevant provisions and holds the attorney liable for an incorrect legal opinion, even if the said opinion has been followed by a three-person panel of professional judges (State Courts)<sup>23</sup>. Nor is the invocation of an expert legal opinion of an university professor sufficient to release the attorney from liability<sup>24</sup>. The attorney must look through the decisions of the highest courts which are published in a general legal periodical immediately after the periodical appears<sup>25</sup>. Recently, the German Federal High Court (BGH) went so far as to hold that an attorney may not even just rely on the older case law of the Court, but must consider the possibility of a change in such court's jurisprudence<sup>26</sup>. This view must be rejected. As long as there is no evidence of a shift in the case law, the attorney can rely on the jurisprudence of a court to continue<sup>27</sup>. The attorney must advise the client comprehensively and as exhaustively as possible and inform him with regard to all litigation risk<sup>28</sup>.

The official doctrine assumes that even the citizens must know the law. This is all the more true of the attorney. In truth, however, the maxim with regard to knowledge of the law is pure fiction in light of the current flood of statutes and of overflowing and often low-quality legislation.

When they engage in giving advice, banks, certified public accountants, etc., must also know the relevant statutes<sup>29</sup>. This jurisprudence is criticized in some scholarly writing, and a less stringent line

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<sup>21</sup> SJZ 1945, 89 and 107.

<sup>22</sup> SemJud 1943, 23.

<sup>23</sup> BGH NJW 1983, 820, 822.

<sup>24</sup> BGH NJW 1993, 1779.

<sup>25</sup> BGH NJW 1979, 877; critical toward the decision: H. KOHLER, *Üb' immer Treu und Redlichkeit* [Always practice loyalty and honesty] (2nd ed. 1987) 124 f.; additional examples of exaggerated liability in BGH NJW 1985, 42 and NJW 1988, 706.

<sup>26</sup> BGH NJW 1993, 3323.

<sup>27</sup> HENSSLER JZ 1994, 178, 182.

<sup>28</sup> BGH NJW 1992, 1159, 1160; NJW 1984, 791, 792 f.

<sup>29</sup> See, for example, BGE 110 II 360, 372.

is advocated<sup>30</sup>. Informational and consultatory duties play a major role in the banking sector, especially with regard to investment advice<sup>31</sup> which is usually not given in connection with an independent contract, but rather in conjunction with a portfolio or asset management. Banks do not demand separate compensation for investment advice and it is not a separate banking service. Asset management differs from an ordinary custodianship order in that the bank not only collects interest and dividends and obtains coupons or interim certificates, but rather it dynamically manages the securities deposited with the bank. Thus, the bank engages in speculation for the customer, often not just only on the stock exchange, but on the markets for derivatives as well.

With regard to liability, the guidelines for the exercise of management contracts of the Swiss Bankers' Association from the year 1990 must be observed. These guidelines set the standards which define the duty of conduct of banks in this area.

According to the prevailing doctrine, restraint vis-à-vis the presumption of duties to inform is generally appropriate in the case of *speculative transactions*, in order to prevent the speculation risk from being shifted to the bank<sup>32</sup>. A certain contradiction to the foregoing is involved when strict duties to advise and inform are required for trading on the Soffex (Swiss Options and Financial Futures Exchange) in light of the complexity of the transactions and the leverage effect<sup>33</sup>. Here as well, however, the scope of the duty to advise depends on the knowledge and experience of the principal.

In BGE 101 II 121, 124 the Swiss Federal Supreme Court has rejected the existence of liability on the part of a bank for imprudent asset management if the risks stayed within a certain range. Another decision<sup>34</sup>, on the other hand, affirmed liability on the part of a trust company for losses arising from securities speculation, of which a large portion was financed by **[Lombard]** credits. Although the trust company was supposed to receive a commission of 25% from the profits according to the verbal contract, the court assumed that the goal of the contract was not asset growth, but rather asset maintenance. A further decision<sup>35</sup> rejected the existence of a duty on the part of the bank arising from OR 398 to inform an inexperienced investor concerning risks of currency future trading if no asset management contract exists and stock market orders are only executed on a case by case basis.

The German case law appears to be stricter. This is true, for example, of the *broker's* duty to inform, which the court has consistently elevated to such an extent that not a single informational or disclosure document concerning the risks of speculation in *derivatives* has been validated before the BGH to date<sup>36</sup>. It is also necessary to reject the BGH's approach when it ignores the lack of

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<sup>30</sup> See HONSELL JuS 1976, 621, 628; since then, for example: EBKE/SCHEEL WM 1991, 389, 390; RINSCHKE, Die Haftung des Rechtsanwalts und des Notars [Liability of the attorney and the notary] (5th ed. 1995) note I 73, 97; HENSSLER JZ 1994, 178, 182; LITTBARSKI ZIP 1996, 812, 813 f.

<sup>31</sup> See, for example, HOPT FS Gernhuber (1993) 169 ff.

<sup>32</sup> CANARIS, Bankvertragsrecht [Bank contract law] note 1883; BGH WM 1987, 531; BERTSCHINGER, Sorgfaltspflichten der Bank bei Anlageberatung und Verwaltungsaufträgen [Bank's duty of care in investment consulting and management contracts], 105.

<sup>33</sup> BERTSCHINGER 108; FORSTMOSER/PULVER WM 1988 Special appendix no. 6.

<sup>34</sup> BGE 115 II 62; in this regard, see WIEGAND recht 1990, 134 ff.

<sup>35</sup> BGE 119 II 333, 335 f.; concurring: WIEGAND ZBJV 1995, 367 ff.

<sup>36</sup> See only BGH VersR [German Federal Court of Justice, Insurance Law] 1994, 555 and 723.

causality: For example, it supposedly does not matter that incorrect information in a balance sheet from the annual financial statements were not causative of a subsequent loss in value<sup>37</sup>.

An additional area to be considered is that of *banking information*.

In spite of banking secrecy (Art. 47 BankG [Banking Act]), it has become customary for banks to give information to third parties concerning the creditworthiness of the bank's customers. On the one hand one questions the relevance of banking information regarding the checking account contract or other contractual relationship. The necessary point of reference between the information and the subject matter of the contract is always present in the case of check or draft inquiries. On the other hand, this point of reference is lacking in the case of information requests of a bank customer concerning the financial situation and creditworthiness of a (future) business partner. Since the link to the existing contractual relationship between the customer and the bank is purely superficial, only tort liability is possible, in the absence of a contractual relationship.

In a rule established back in 1895, the Federal Court has consistently affirmed the existence of contractual liability in the case of advice or information given only if the said consultation or information are given in the exercise of a business operation focused thereon or if consideration is given in exchange therefor. In other cases, there remains only tort liability.

There has been criticism, above all, of the excessively narrow interpretation that banking information and advice are „not given on a commercial basis“, because giving information and advice is part of the banking business<sup>38</sup>.

The German courts have always affirmed the existence of contractual claims on the part of the customer against the bank in the case of incorrect credit information.

Giving such information is in accordance with general business custom. Today banks provide information concerning their customers as well as third parties. In the latter case, the bank obtains the information from the third party's banking institution. The inquiring party must always contact his bank. The information is given on a confidential basis. „Confidential“ means confidentiality with regard to the source; i.e., neither the bank nor the customer may name the source. This method is intended to prevent the party providing information from being exposed to compensatory damage claims, but also (in an attempt) to prevent banking secrecy from being broken (more than necessary). The conflict between *information practice* and *banking secrecy* has often been discussed. The practice of giving information concerning the customer's financial situation - even without the customer's knowledge or consent - is dubious per se; indeed, it is hard to justify in light of the special emphasis on the duty of loyalty in agency law (OR 398). Nevertheless, no one, to the extent that is apparent, has called for the abolition of banking information. Rather everybody appears to be satisfied with the reference to the general business custom. The problem ceases to exist if the permissibility of the distribution of information is conditional up on the bank having the consent of the customer or the ability to count on the said consent. However, restraint is appropriate in presuming consent by silence.

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<sup>37</sup> BGH NJW 1993, 2865.

<sup>38</sup> See, in lieu of all, HOPT, Rechtsprobleme der Anlageberatung und der Vermögensverwaltung der Schweizer Banken [Legal problems of investment consulting and asset management by Swiss banks] 148.

The banks attempt to navigate their way through the Scylla of liability vis-à-vis the inquiring party on the grounds of information which is too favorable and the Charybdis of liability vis-à-vis the customers on the grounds of excessively bad, credit-damaging information. They do so by giving out information which is schematic, sometimes tightly hedged with clauses, and at the same time as puzzling as the Delphic oracle. Information tends to be drafted so cautiously that it is worth paying particular attention to what is *not* stated therein. Naturally, the art of uninformative information can also be overdone. It is said that a situation once occurred in which instance courts had different opinions concerning whether the information recommended or advised against granting credit. A clear case of liability exists if the bank gives rosy information in order to be able to feather its own nest.

Actions brought against the bank by the customer concerning whom information was given play absolutely no role in judicial practice. On the other hand, the courts often have to deal with the inquiring parties' compensatory damage claims against the bank.

In the case of banking information, there is a reasonable interest in *excluding liability* on three grounds: The information is given at no charge, though not always for altruistic reasons. The bank usually does not know the inquiring party's plans and therefore cannot survey the risks and the amount of an impending damage. Finally, it is typical of banking information that a disproportionately high damage can arise from a relatively small error.

The parallel to the labor law concept of „an activity tending to result in damage“ cannot be overlooked. The lack of payment and tendency toward danger each, in and of themselves, justify release from liability for ordinary or very slight negligence without the need for contractual exoneration. In this context, contractual exoneration is actually unnecessary, but completely unobjectionable. According to case law, contractual exoneration is invalid if an organizational fault makes obtaining reliable information completely impossible. Finally, contractual exoneration is invalid if the bank personally derives benefits from the incorrect information.

### **III. The inclusion of third parties into the advisory agreement**

Once embarked upon, the path of contractual fiction has produced another development in Germany which explores the boundaries between contract and tort. The prevailing doctrine has developed an „*information contract with whom it may concern*“ or an „*information contract with protective effect for third parties*“<sup>39</sup>. This is specifically intended to apply if the information may be designated for any desired third party and it is apparent to the party providing information that said information can be disseminated. The following typical cases belong to this group:

A certified public accountant or tax consultant prepares an incorrect balance sheet on behalf of a company and said balance sheet gives an impression which is too favorable - due to over-valuation

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<sup>39</sup> See JOST 166 ff. Concerning contracts with protective effect for third parties generally, see: ZIEGLTRUM, Der Vertrag mit Schutzwirkung für Dritte [The contract with protective effect for third parties] (1992); MARTINY JZ 1996, 19 ff.

of assets, for example. The owner uses the balance sheet for credit purposes and presents it to an interested buyer. A real estate expert prepares an expert report on the value of a piece of real property. The expert report is submitted to a bank, which grants a mortgage loan which is canceled in a forced auction sale. An art expert forms an expert opinion. The buyer purchases a purportedly authentic picture. One bank gives another bank incorrect information which is forwarded to third parties. A municipality gives a building contractor certification that it has awarded him a contract which entitles him to draw a larger sum as payment under a construction contract. The owner submits this document to a bank and to a construction material supplier in order to obtain credit.

A peculiar feature which is always present is that a third party suffers damages and the said third party now entitled under a contract or a social contact vis-à-vis the party providing information. **[Vorlage: ...a third party suffers damage and said third party is not bound by contract or social contact to the party providing information.]** If the information is given in an intentionally incorrect manner, any and all third parties have claims arising from OR 41 II. If one adopts the contract construction, liability takes effect upon the slightest negligence.

The result which is achieved with the „contract with whom it may concern“ can also be achieved with the „contract with protective effect for third parties“. Since a contractual relationship usually already exists (for example, between the informing and inquiring bank, between the owner and the accountant), it appears to be a simple solution to incorporate the damaged third parties into the scope of protection of this contract<sup>40</sup>.

A case from the German Federal Court of Justice offers a typical example<sup>41</sup>: Some time after a known expert had prepared a valuation report concerning a piece of real property, a foreign consul asked him by telephone whether the report was still accurate. The consul indicated that the requested information was necessary with regard to a third party's decision to grant a loan. The expert confirmed the correctness of his report and, at the request of the consul, stated this in writing in a letter addressed to the consul. In reality, however, the report was incorrect. The lender in whose interest the consul had requested the information suffered substantial losses as a result; he subsequently demanded compensation therefor from the expert.

The expert had not expressed clearly enough in his report that the assumed market value (prospective market value at that time) presupposed the development of the area with a vacation village. Aside from this lack of clarity, the expert's error lay in the fact that he did not satisfy himself once again concerning the status of the planning and approval procedure when he gave the consul the information. But the question arises as to whether making an inquiry with the authority itself should have been more logical to the lender. The lender was aware that the construction permit was still pending. Instead of protecting his own interests in the appropriate manner, he had the consul call the expert. It seems dubious to reward such a negligent manner of conducting business by means of a compensatory damage claim against a third party who acted without a contract and thus without compensation and who can probably only be accused of simple negligence. This aspect comes to

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<sup>40</sup> In the case of delay on the part of attorneys or notaries in executing wills, BGH NJW 1965, 1955 affirmed a claim on the part of the heirs arising from a contract with protective effect for third parties (in combination with *culpa in contrahendo* as well).

<sup>41</sup> BGH JZ 1985, 951 with dissenting comment by HONSELL.

light even more clearly in another decision by the German Federal Court of Justice<sup>42</sup>. In this case the expert had submitted a report concerning the achievable earnings from a rental house without knowing that it was a rent-controlled social apartment. A third party who was aware of the report had purchased the house. The question arises firstly as to how conceivable it is for a buyer of a rental house not to inquire about the rents which are actually paid and the legal character of the lease contracts. Summing up German case law for the time being is a judgment<sup>43</sup>, according to which the buyer of a piece of real property was able to demand compensatory damages from an expert hired by the seller on the grounds of a culpably incorrect expert opinion, even though the seller maliciously caused the incorrectness of the report. The expert failed to notice the defective nature of the roof frame which the seller had maliciously concealed. In the view of the BGH, it is sufficient for purposes of finding liability on the part of the expert „that he had to have been aware that, in light of the special trust which potential buyers place in the reliability and expertise of a recognized expert, his report was given greater weight than the statements of the seller, and therefore his report is capable of destroying any distrust on the part of the potential buyer against the statements made by the seller“.

A substantial minority opinion in the relevant legal writing rejects contractual constructions with regard to third parties. It is obvious that the expert had no intent to enter into a legal transaction. Such intent is assumed by legal fiction in order to achieve contractual liability. The German courts have long exploded the boundaries of § 676 BGB, which denies liability for incorrect information if no contract or tort exists. Here, as it is often the case, the constructive intent of the party is the vehicle for a constant expansion of compensatory damage liability. [Wiederholung, vgl. unten] To find such liability, it is apparently sufficient if uncompensated professionally-based information is clearly of importance to the recipient because he wishes to base fortune dispositions thereon.

Construing an „information contract with whom it may concern“ or an „information contract with protective effect for third parties“ leads to a dangerous erosion of basic structures of the law of obligations. It will result in boundless, unpredictable and no longer calculable or insurable liability risks. If, for example, several creditors are harmed by an incorrect balance sheet, there is nevertheless only one insurance event, and the coverage amount can be quickly exhausted in such cases.

#### IV. Unpaid consulting, giving advice and information

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<sup>42</sup> BGH NJW 1984, 356; crit. LITTBARSKI 1667 ff.

<sup>43</sup> BGHZ 127, 378 = BGH BB 1995, 170 = JZ 1995, 306 with concurring comment by MEDICUS; also concurring: BAYER JuS 1996, 473, 477; critical concerning the construction of a contract with protective effect for third parties in the case of contrary interests: CANARIS JZ 1995, 441, 442, who holds the architect liable on the grounds of *culpa in contrahendo* of the purchase contract (444 f.).

There are particular cases in which the information or advice is provided outside of an existing contract or with no contract at all *at no charge*. Since a contract is lacking and fortune is only protected to a limited extent under tort law, liability would have to be absent as a rule in this case.

As explained, the Swiss Federal Supreme Court has decided, in a consistent line of cases established in 1895, that contractual liability is only possible in the case of advice and information given in the exercise of a business operation focused thereon or if consideration is given in exchange therefor. This is criticized in the Swiss legal writing<sup>44</sup> as too narrow. The following are identified as additional criteria for a construed contract: an economic interest on the part of the party giving advice, the business relationship prior to the giving of advice and the economic importance which the advice has for the recipient.

German case law has long worked with the fiction of an *information contract by silence*. Here, as it is often the case, a constructive intent of the party is the vehicle for constant expansion of compensatory damage liability. [**Wiederholung**] In the first decision of the Supreme Court of the German Reich [Reichsgericht]<sup>45</sup> a notary gave a client's bank *incorrect information* at the client's request concerning the mortgage encumbrance on a piece of real property of the client. The bank granted a loan secured by a mortgage. The claim was later canceled in a forced auction sale. The Supreme Court of the German Reich affirmed the existence of a contractual relationship between the notary and the bank. The judgment met with criticism: it was argued that the presumption of a contract concluded by silence is an arbitrary fiction and a poor piece of make-shift judicial construction<sup>46</sup>. A contract, it was asserted, which provided solely and exclusively for the liability for the correctness of information or advice given, could not exist. Indeed, a contract whose subject matter is nothing more than compensatory damages arising from liability would be unique. Nevertheless, the German courts, particularly the BGH, further expanded this approach. Usually it involves incorrect information by tax consultants, certified public accounts or attorneys provided to creditors of clients or to potential purchasers, i.e., third parties with whom no contractual relations exist.

An information contract with the sole content of the assumption of liability for negligence is presumed in the German courts, even in the case of banking information which is given to non-customers. The only prerequisite therefor is that the recipient wishes to base asset dispositions on the information and such desire is apparent to the expert. In this connection, the lack of consideration will play no more of a role than the fact that the party given the information generally has a contractual relationship with the (presumptive) contracting partner.

Thus far, the Swiss Federal Supreme Court has only gone down this road in exceptional cases: BGE 112 II 347 presumed the existence of a mandate in the case of the free appraisal of a Jugendstil lamp by the Zurich branch office of the Sotheby's auction house. The lamp - which was far more valuable - was appraised at Fr. 8,000.00 to Fr. 12,000.00 with the help of a telephone description and then sold for Fr. 16,500.00. The seller demanded compensatory damages from the gallery in the amount of Fr. 233,500.00, the actual value of the lamp. The Swiss Federal Supreme Court affirmed liability. It saw no reason to deal with its older cases which held that information which is given neither in a

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<sup>44</sup> See, in lieu of many: M. KUHN SJZ 1986, 345, 348.

<sup>45</sup> RGZ 52, 365.

<sup>46</sup> LABAND DJZ 1903, 259, 262.

professional context nor for compensation does not constitute a (breach of) contract. This is because, according to the court, contractual liability is based on the circumstances of the individual case, particularly from the fact of the appraisal of a valuable item. That is not very persuasive. Above all, one notes the absence of a reference to the liability reduction pursuant to Art. 99 II OR<sup>47</sup>.

An auditor's liability to the shareholders under agency law was also affirmed in BGE 112 II 258 where the creation of a faulty balance sheet documentation was the topic. Corporate law liability pursuant to what was before Art. 754 OR was rejected because, according to the court, it involved a special job outside of the functions of the auditor which were prescribed by statute or the articles of incorporation.

The need for a contractual fiction also ceases to exist if, by adopting a growing doctrine, one recognizes the existence of *protection obligations* outside of the contractual relationship with the primary obligation to perform. Thus, the legal writers affirm liability based on Art. 2 Swiss Civil Code arising from business contact, which is the *culpa in contrahendo*<sup>48</sup>. Unless it is merely intended to serve to circumvent OR 41 ff., the presumption of a protective duty relationship must involve a contact of *contract-like intensity*. Liability arising from *culpa in contrahendo*, which is oriented toward the idea of confidence and good faith, must be carefully limited, contrary to a tendency of the courts and of current scholarly writing<sup>49</sup>. *Culpa in contrahendo* had previously been limited to contracts which were void or which had not made it past the negotiation stage<sup>50</sup>. The Swiss Federal Supreme Court also used the theory of *culpa in contrahendo* in the so-called „Swissair decision“ with regard to the non-contractual area<sup>51</sup> and, citing the literature in an *obiter dictum*, affirms non-contractual liability for advice given arising from *culpa in contrahendo*.

Above all, it appears necessary to limit liability to gross negligence if advice or information are given at no charge. This can be supported by the statutory standards set forth in Art. 99 II, 248 OR. In light of the often disproportionately high damages that may be incurred, the idea of „work tending to result in danger“ also plays a role. Only in this way it is possible to prevent the tax consultant who creates an incorrect balance sheet or the attorney who gives false information from being held liable to the principal's contracting partner for simple negligence. This solution attempts to hold middle ground between the provision of the OR, which, in the absence of a contract, only recognizes liability for intentional conduct (OR 41 II) and the rash presumption of a contract or quasi-contractual liability for *culpa in contrahendo*, which leads to liability for any and all negligence.

## V. Non-contractual liability for advice or information given

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<sup>47</sup> See in this regard MERZ ZBJV 1988, 215 ff.

<sup>48</sup> See, for example, BK-KRAMER Allg. Einl. [Gen. Intro.] note 142 ff.; H. P. WALTER ZBJV 1996, 273 ff.; see also GAUCH/SWEET FS Keller (1989) 117 ff.; M. KUHN SJZ 1986, 345 ff.; W. FISCHER ZvglRw 1984, 19 ff.; distinguishing: MEIER-SCHATZ, Mél. Piotet (1990) 151 ff.

<sup>49</sup> See fn 10 and 48.

<sup>50</sup> See JHERING, Die Haftung für culpa in contrahendo bei nichtigen oder nicht zur Perfektion gelangten Verträgen [Liability for culpa in contrahendo in contracts which are void or not concluded], Jahrbücher für Dogmatik 4 (1861) 1 ff.

<sup>51</sup> BGE 120 II 331; see above, fn 10.

1. *Principle: No liability for advice, recommendation or information*

According to prevailing doctrine, fortune (meaning pecuniary property) does not enjoy absolute protection, despite the fact that such protection would not be precluded by the language of Art. 41 I OR. Mere pecuniary harm will only be compensated if the cause of such harm involves a violation of a norm which is specifically intended to protect fortune against harm of this type (fraud, for example). The fact that mere pecuniary harm is, in principle, not compensated under tort law, is a dogmatic premise which has one purpose: Otherwise, danger of a boundless duty to compensate would exist even for negligently incorrect statements, suggestions, information or expert opinions, etc., particularly vis-à-vis third parties with whom no contractual contact exists.

2. *Violation of protective norms (OR 41 I)*

Protective norms against negligent fortune damage are rare. In the 2nd Title of the Penal Code, „criminal acts against fortune“, for example, one finds predominantly only intentional acts<sup>52</sup>. Only in the case of Art. 158 of the former Swiss Penal Code (inducing to speculate) negligence was sufficient. However, the provision had hardly any practical significance and was abolished in the most recent revision of the Swiss Penal Code.

Some legal writers have attempted to classify Art. 2 Swiss Civil Code as a protective norm<sup>53</sup> or codify business obligations to protect third-party fortune<sup>54</sup> with very limited success. A violation of Art. 2 I Swiss Civil Code results in a duty to compensate under the law of obligations, but not under tort law. Liability for *culpa in contrahendo* only appears to represent an exception to this

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<sup>52</sup> An absurd innovation, which, however, does not affect our topic, is liability for negligent mismanagement pursuant to Art. 165 StGB [Swiss Penal Code], which threatens a debtor with up to five years in prison if, among other things, he brings about his overindebtedness or insolvency through inadequate capital endowment or improvident use of credit. The mere lack of clarity of the term overindebtedness in the context of bankruptcy (going concern or liquidation values?), which cannot even be ascertained without an expert report, is a violation of the criminal law requirement of specifically defined elements. **[Hier wurde folgendes gekürzt: (and thus makes a mockery of a country governed by the rule of law). Moreover, nearly every bankruptcy is based on inadequate capital endowment or improvident use of credit. As if bankruptcy - the final consequence of a lack of commercial fortune - were not bad enough, private autonomy is turned into a farce through senseless punishments. For some time, the criminal law has been developing in a manner at which civil lawyers can only be astounded. Aside from the postulate of the unity of a sensible legal system, the civil lawyer is struck by the ramifications of protective statute violation. If Art. 165 StGB were applied to the delegates or management board presidents of a corporation, it would open the door to responsibility complaints and personal liability through the piercing of the corporate veil to an extent previously unimagined. Frightening examples can be found in the Austrian civil law cases on the element of negligently faked bankruptcy pursuant to § 157 StGB [Austrian Penal Code]; see, for example, HONSELL, Bankenhaftung bei Unternehmens-sanierung [Bank liability in the course of company reorganization], öJBI 1987, 146.]**

<sup>53</sup> See OFTINGER, Schweizerisches Haftpflichtrecht [Swiss liability law] (4th ed. 1975) 130, KELLER/GABI 37 and 50.

<sup>54</sup> See, for example, CANARIS 2nd FS Larenz (1980) 28 ff.

principle, since this form of liability presupposes a contract-like special contact. From a systematic standpoint, it is not part of tort law, but rather the law of quasi contract.

### 3. *Intentional immoral harm (OR 41 II)*

According to the prevailing doctrine, Art. 41 II OR is only applicable if the intentional and immoral harm does not already violate another statutory rule<sup>55</sup>. Under this narrow interpretation, all that the provision still covers from a practical standpoint is vexation, i.e., cases in which the injuring party is exclusively or primarily interested in injuring the other party; which is rather rare.

According to the German case law, incorrect information, expert opinion, etc., may also establish compensatory damage liability if they are given „frivolously, without conscience and in an arbitrary manner“<sup>56</sup>.

In a case decided by the Federal Court<sup>57</sup>, a house owner had a heating system installed without bringing in an architect. When it became apparent that the installation did not work, he wanted to place responsibility on his friend, a heating installer who had assisted in the coordination of the work. Contractual liability was ruled out due to the lack of intent to enter into a legal obligation, since the heating installer neither demanded nor received compensation, nor did he have a personal legal or economic interest in the help which was extended. Tortious liability was also rejected.

Case law has established the principle „that a person shall be liable for compensatory damages arising from OR 41 if, when called upon on the basis of his professional knowledge, such person is providing the requested information, but in the process, makes frivolously incorrect statements against his better knowledge or fails to state substantial facts which are known to him“.

This principle also applies to banking information<sup>58</sup> or information which a chairman of a board of directors gives to a shareholder. The Federal Court stated in this regard in 1931: „It must be considered to be a rule that a person who has special insight thanks to his position gives true information if it is apparent to him that it can be anticipated that such information is or could be of serious importance to the questioner“<sup>59</sup>.

In these cases, however, the Federal Court speaks simply of illegality and thus does not invoke Art. 41 II OR, but instead 41 I. Admittedly, the result is substantially the same.

## VI. Outlook

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<sup>55</sup> See BK-BREHM OR 41 note 235 ff. with additional citations of authority.

<sup>56</sup> For example, BGH NJW 1991, 3282.

<sup>57</sup> BGE 116 II 695 ff. = ZBJV 1992, 203 f. with comment by MERZ.

<sup>58</sup> BGE 111 II 474 E. 3; 68 II 302 E. 5.

<sup>59</sup> BGE 57 II 81, 86.

The liability for advice or information given raises numerous practically relevant and theoretically interesting questions. The varied nature of the cases prevents generalized statements. Instead, the individual professional standards must be ascertained taking into account the circumstances of the individual case.

If no contracts exist, contractual fictions appear problematic, because they undermine the legislative evaluation that fortune is not protected against negligent interference under tort law, but rather is only protected against intentional interference.

The existence of liability for non-contractual basis, regardless of whether it is based on tort law or *culpa in contrahendo*, should only be affirmed in the case of gross negligence.