

# **AUSTRIA**

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## **Compensation for massive psychological strain of an unsettled family ('The Lost Child')**

Austrian Supreme Court (OGH) 22 March 2018,  
4 Ob 208/17t

## **Facts**

- family discovered after 22 years that daughter is biologically not related to her parents
- the parents' biological daughter had been switched in hospital right after birth
- the parents as well as their (now adopted) daughter suffer massive psychological strain, for which they sued the hospital operator for damages

## Decision

- Court found the defendant had neglected its duties:
  - breach of contractual duties
  - infringement of claimants' personality rights pursuant to § 16 ABGB, art 8 ECHR (*right to family life and right to know one's origins*)

**→ compensability of the non-material harm?**

## **Decision**

- OGH refers to court practice for bereavement damages
  - harm in the present case was a 'most massive impairment, which was comparable to the death or severest injury of a close relative'
- OGH: Claimants to be compensated in accordance with the requirements for bereavement damages

## **Compensation of non-material harm**

- Austrian private law differentiates between impairments of (mental) health, which amount to a medical condition, and mere emotional distress
- compensation for mere bereavement accepted since 2001 (*OGH 16.5.2001, 2 Ob 84/01v*)
- further expansion ...?

## **Compensation of non-material harm from an academic perspective**

- infringement of personality rights ( § 16 ABGB )
- breach of contracts specifically protecting non-material interests
- ...

## **Required degree of negligence**

- OGH requires gross negligence
- reconfirmed despite recent critique  
*(M Hinteregger in FS Danzl 2017)*
  - e.g. OGH 28.11.2017, 2 Ob 189/16g
- change of established court practice would require an enlarged panel of judges