



CRITTERS AND BLASTING AND TORTS, OH DEAR!

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THE UNITED STATES IS COMMONLY SEEN as the primary habitat of tort folly. We are virtually alone in allowing juries to decide tort liability; we permit punitive damages; we don't force losing plaintiffs to pay vindicated defendants' attorneys fees; and we grant vast plaintiffs' lawyers' fees for class action suits that result in meaningless coupons for "victims." As a result we are a magnet for tort suits of all kinds. From suits by burglars who fall through the roofs of the homes of their intended victims to suits by judges who claim millions for a pair of trousers allegedly lost by the cleaners, if you can imagine a tort suit, it has likely already been filed stateside.

But we are not the only ones whose courts consider "unusual" torts. Where exotic animals and loud noises are concerned, we are being flattered, i.e., imitated. For a judge in Germany recently struggled with *In re: Gustav*,¹ the sad case of an ostrich who lost his libido – a cockamamie tale to some, to be sure.

According to plaintiff ostrich farm owner Rico Gabel, Gustav's

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¹ BBC News, *Court Hears Celibate Ostrich Case* (Mar. 13, 2007), at news.bbc.co.uk/2/hi/europe/6447295.stm.

performance problems are the result of New Year's Eve fireworks that three teenagers set off not far from the ostrich's pen in the eastern town of Bautzen. The fireworks didn't damage the ostrich's hearing or set its wings ablaze. In fact, the bird suffered no physical injury at all. But for six months following the wild New Year's Eve party, Gustav lost interest in his two female companions. As a "breeder bird," this was Gustav's job – Mr. Gabel claimed that Gustav should have sired fourteen chicks (worth €350 (\$500) each) during those six months. Every time he stepped up to the plate, though, Gustav struck out swinging.

And so Gustav's owner sued the teenagers, demanding that they pay damages as well as provide free farm labor (no Thirteenth Amendment in Germany). The learned trial judge (there are no Teutonic lay fact-finders) enlisted the help of an ostrich expert to determine why Gustav had lost his groove.² For proof of causation can be a tricky thing. Are there studies on ostrich reactions to loud bangs and bright lights? Is it foreseeable that fireworks will frighten the fancy out of flightless birds – for six months? Who knew? As we are constantly reminded on TV, males regularly suffer from "E.D." – and this is caused, we learn, by "a wide range of organic, psychological, psychiatric, interpersonal, and pharmacological factors."³ Was this struthio anxious because of the squibs? Might Gustav have simply lost the joy of sex? Finally, what about the ages-old legal rule according to which pure economic losses (the value of the never-conceived chicks) are not recoverable in tort absent physical damage?

As in all things tort-related, America can provide help to our Euro brethren. One of us teaches his students about a case decided sixty-five years ago in Utah, *Madsen v. East Jordan Irrigation Co.* A company working on an irrigation canal had routinely set off explo-

² Associated Press, *Teens Spared In Impotent Ostrich Case* (June 4, 2007), available at www.boston.com/news/odd/articles/2007/06/04/teens_spared_in_impotent_ostrich_case/.

³ Keith Hawton, *Integration of Treatments for Male Erectile Dysfunction*, *The Lancet*, Vol. 351, No. 9095, at 7 (Jan. 3, 1998).

sives, the sounds of which could be heard on neighboring farms. But plaintiff Edgar Madsen's farm was a *mink* farm, and it turns out that mother minks are sensitive and excitable creatures whose "natural" response to explosive sounds is to eat their offspring. Edgar sued the irrigation company for the loss of over 200 "infanticide" victims.⁴

Note that here, unlike Gustav's case, the plaintiff could point to physical damages – the skeletons of mink kittens. As with the German lawsuit, however, the legal question concerned "proximate causation." The Utah court could have (in our view should have) ruled that a mink farmer with privileged access to knowledge of his livestock's infanticidal tendencies was in the best position to minimize risk by asking neighbors to warn him (so that he could separate moms from kids) before they made loud but "normal" noises. Madsen's failure to "equalize information" could have been seen as the legal, or proximate, cause of the death of the kittens. The Utah court proceeded down a slightly different, and extremely weird, causal path to reach the same result (no liability for the blaster): the Beehive State supremes declared that the 'decisions' of the mother minks to consume their kittens constituted a *novus actus interveniens*,⁵ a new event that broke the causal chain and relieved the irrigation company of liability. One wonders if the case would have turned out differently had plaintiff Madsen benefited from the advice of a "mink expert" as in Gustav's case. Were the mothers' decisions free and noncoerced? If so, why were they not tried for their crimes?

Gustav's case is far removed from Madsen's. Gustav did not kill any baby ostriches; he merely declined to make them. That is nonfeasance, not misfeasance, and all know there can be no legal liability for nonfeasance! Perhaps Gustav enjoyed the sounds of fireworks going off (literally, if alas not figuratively) in his bedroom that New Year's Eve – indeed, perhaps Gustav was on strike, holding out for more pyrotechnics, which might have aroused him far before six

⁴ See *Madsen v. East Jordan IRR Co.*, 125 P.2d 794 (1942).

⁵ [An intervening cause] "An event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury." *Black's Law Dictionary* (8th ed. 2004).

months had elapsed. A six-month sex strike might not sound rational to readers – but ostriches' eyes are larger than their brains, and who knows what kind of syllogisms float their boats? If human sex workers can strike in France,⁶ surely ostriches (no species-ism, please) also have this privilege in Bautzen.

On the other hand, an argument might be made that the festive teenage defendants committed the tort of intentional infliction of emotional distress, setting off their firecrackers near poor Gustav just to see what his tormented reaction might be. In IIED cases *non-economic damages* are fully recoverable. How 'bout hedonic damages – compensation for loss of enjoyment of life? Male readers will likely agree that Gustav had it *made* – he was in stud ostrich *heaven* – then he lost it for six months (which, given their slightly shorter life spans, is fully six and one half months in “ostrich years”). If the German judge has a Y chromosome he will surely understand that the disgrace of impotence exceeds even the heartbreak of psoriasis.

Ah, but if Mr. Gabel had sued under this theory he would have to be wary of a new line of argument from defendants. It could come down to a battle of the experts, with the teenagers' animal psychologist arguing that rather than losing enjoyment, Gustav actually *gained a benefit* from the New Year's Eve fireworks. After all, poor Gustav was a sex slave. He may well have enjoyed his six-month “vacation.” Maybe the most recent clutches of Gustav-fathered chicks are of a higher, more prized, more valuable quality than pre-fireworks progeny – a direct result of Gustav's sabbatically induced happy sperm.

Gustav's case pattered out. The court-appointed expert, Christoph Kistner, told the court that he saw no connection between the noise and the lack of offspring. He said that, while ostriches react to noise with stress, that does not affect the production of sperm. (So what, sez us – impotence is not the same thing as sterility!) Perhaps

⁶ See Amalia Cabezos, *Hookers in the House of the Lord*, Santa Monica Mirror, Vol. 1, Iss. 6 (July 28 - Aug. 4, 1999), at www.smmirror.com/Volume1/issue6/hooker.html (discussing the 1975 week-long strike that led to the organization of sex workers unions).

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intimidated by this setback, farmer Gabel agreed to a settlement of €140, a mere 3% of his initial demand. As this was a settlement, European “loser-pays” rules did not apply – and we could find no news on how much plaintiffs’ and defendants’ attorneys were paid.

All revolutions begin with a little bang, so we are not fazed by the modest settlement of Gustav’s lawsuit. We think the case might give rise to another niche employment opportunity for attorneys. If our bar can support “Spring Break Specialists”⁷ surely there is room in Europe for an “Animal Rights (loud noises) Advocate.” Let’s not stick our heads in the sand over this, folks.



⁷ Susan Warren, *Spring Break Is A Legal Specialty For Ben Bollinger; Florida Lawyer Enjoys A Spike in His Business; Defendants in Flip-Flops*, Wall Street J., Mar. 17, 2007, at A1, available at online.wsj.com/article/SB117407617454939751.html.