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## **New Developments in Distinguishing Between Intent and Negligence<sup>2</sup>**

Nowe ujęcie rozróżnienia pomiędzy zamiarem a nieumyślnością

### **1. Car accident cases**

#### **1.1. Facts and judgements**

In February 2016, two car drivers agreed spontaneously to a private street race in the very centre of Berlin. They accelerated to over 160 km/h and passed several red light junctions at this speed. Finally, one car, ignoring the red light, crashed into a regularly driving car and killed its driver. Both participants in the private street race were convicted of murder by a German court (§ 211 German Criminal Code<sup>3</sup>) and sentenced to life imprisonment (which is the only possible punishment for murder according to § 211 German Criminal Code)<sup>4</sup>. It was the first murder

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<sup>3</sup> Vorschlag: Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), original version BGBl. Nr. 60/1974, latest amendment BGBl. I Nr. 242/2021, hereinafter: ACC. Text available at <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296>>. Announcement of the new version of the Criminal Code, Bundesgesetzblatt I 1998, p. 3322.

<sup>4</sup> The first conviction for murder was reversed by the German Supreme Court. Although the Supreme Court recognised the possibility of intentional killing in such cases, the perpetrator's intent in this particular judgement was not sufficiently substantiated; BGH

sentence in case of a car accident. A one year earlier, another car driver accelerated his rented car within the city area of Frankfurt to over 140 km/h, also disregarded a red traffic light, and consequently killed another legally behaving car driver. The first conviction for the negligent killing was reversed by the German Supreme Court, which instructed a closer examination of intent. In the second sentence, the driver was convicted for intentional killing (§ 212 German Criminal Code) and sentenced to five years imprisonment<sup>5</sup>.

A similar scenario happened in Austria: a car driver, who was on the way to a planned suicide, accelerated to well over 100 km/h in the very centre of Vienna, crashed with a regularly driving motor scooter, and killed the two persons riding it. He was also convicted of murder and sentenced to ten years imprisonment<sup>6</sup>.

Also in Switzerland, severe car accidents led to convictions for intentional killing<sup>7</sup>.

This recent development of court decisions triggered a vivid discussion in all three countries about whether the car drivers in such extreme car crash situations really kill intentionally<sup>8</sup>.

## 1.2. The dogmatic problem

The dogmatic problem in these cases seems to be as follows.

On the one hand, with no doubt, a person who drives in such a dare-devil way – especially at speeds over 100 or even 150 km/h through the

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„Neue Juristische Wochenschrift“ 2018, 1621 = „JuristenZeitung“ 2018, 574 = „Juristische Rundschau“ 2018, 340 = „Neue Zeitschrift für Strafrecht“ 2018, 409 = „Zeitschrift für Lebensrecht“ 2018, 169 = „Strafverteidiger“ 2018, 419 = „Strafverteidiger Forum“ 2018, 200. Subsequently, a second court convicted the two car drivers again for murder to life imprisonment; cf. ZEIT ONLINE 26.3.2019 („Ku-Damm-Raser erneut wegen Mordes zu lebenslanger Haft verurteilt“).

<sup>5</sup> Cf. Frankfurter Rundschau FR.de 1.4.2019 („Prozess gegen Yassine A. Härteres Urteil für Todesraser“).

<sup>6</sup> The conviction was confirmed by the Austrian Supreme Court: OGH 12.12.2018, 15 Os 141/18a.

<sup>7</sup> Cf. Swiss Supreme Court: BGE 130 IV 58.

<sup>8</sup> Cf. the remarks on the sentence of the German Supreme Court by T. Walter, *Praxis-kommentar...*, p. 412 and H. Schneider, *Anmerkung...*, p. 528. Furthermore: J. Eisele, *Bedingter...*, p. 549; C. Jäger, *Too Fast...*, p. 786; M. Kubiciel, E. Hoven, *Die Strafbarkeit...*, p. 439; I. Puppe, *Rasen...*, p. 323; K. Schwaighofer, *Autoraser...*, p. 320; S. Stübinger, *Bedingter...*, p. 515; T. Walter, *Der vermeintliche...*, p. 1350. In a more general context: H. Frister, *Vorsatzdogmatik...*, p. 387.

city centre, and even runs a red light at this speed – is certainly aware of the risk of causing a car accident; at the same time, he knows that a car accident under such conditions may very likely result in bodily injury and, in some cases, even the death of a person. Thus, the driver is also aware of the substantial risk of hurting or even killing people.

On the other hand, it is hardly possible to prove in such cases an additional voluntary decision of the driver as to whether or not he was willing to accept the possibility of an accident and its consequences in terms of bodily injury or even the death of a person. Actually, in most of these car driver cases, the driver does not decide whether or not to accept the possible results of his hazardous driving. The reason is that his thoughts are fully occupied with concentrating on driving extremely fast, keeping the car control and – in cases of private street races – trying to win the race<sup>9</sup>.

Can this mental situation of a car driver – being aware of the risk but making no further (voluntary) decision on the possible consequences – be regarded as intent?

## 2. Requirements for intent

### 2.1. As to the law

According to Austrian law<sup>10</sup>, which is similar to German law, intent may take different forms; each form of intent may lead to a conviction for bodily injury or intentional killing (including murder).

The “strongest” form of intent is acting with a purpose when the perpetrator means to bring about the criminal result; thus, the desire for a criminal result is even a motivation for the perpetrator’s behaviour

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<sup>9</sup> K. Schmoller, *Vorsatzdogmatik...*, p. 389; cf. also K. Schwaighofer, *Autoraser...*, p. 320; T. Hörnle, *Plädoyer...*, p. 440, 442.

<sup>10</sup> § 5 Austrian Criminal Court („Intention”) reads as follows – translation by *Strafgesetzbuch...*: „(1) A person acts with intention if the person means to complete the elements of an offence; to prove intention, it is enough to show that the person is aware of a substantial risk that the offence will occur and, having regard to the circumstances, takes the risk. (2) A person acts with purpose if the person means to bring about the circumstance or result for which the law requires proof of purpose or direct intention. (3) A person acts with knowledge if the person considers the existence or occurrence of a circumstance or result for which the law requires proof of knowledge to be certain, and not merely considers the existence or occurrence to be possible”.

(§ 5/2 Austrian Criminal Code<sup>11</sup>). This form of intent, of course, does not apply to accidents involving car drivers.

The second “strong” form of intent is to act with the definite knowledge of a certain circumstance or result (§ 5/3 Austrian Criminal Code), meaning that the perpetrator considers the existence or occurrence of a circumstance or result to be certain. If the perpetrator acts with such definite knowledge, no additional (voluntary) decision of acceptance is required. If someone, for example, knows that his conduct will surely kill another person, and yet performs this conduct, he, in any case, kills intentionally without the need of any additional mental acceptance of death. Acting with the definite knowledge of the result meets the requirements of intent without any additional precondition. The intent in the form of the definite knowledge, however, is obviously also not relevant for accidents involving car drivers.

However, if the perpetrator acts neither with direct intention nor with definite knowledge of the result, he may nevertheless act with intent if two elements apply: a cognitive and a voluntary element. This third, „less strong” form of intent, called *dolus eventualis*, depends on the following preconditions (§ 5/1 Austrian Criminal Code). It is necessary that the perpetrator:

- a) is aware of a substantial risk that a circumstance or result will occur (cognitive element), and
- b) decides to take the risk, that is, to accept the consequences (voluntary element).

If the perpetrator is aware of a substantial risk, then there are consequently two possibilities: either he takes the risk and accepts the result (a case of intent) or confidently believes that the risk will not materialize (a case of mere negligence). Since car drivers were certainly aware of a substantial risk of an accident involving bodily injury or even the death of a person, it is, therefore, to be established whether they took the risk and accepted the consequences, or confidently believed that the risk will not materialize.

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<sup>11</sup> Bundesgesetzblatt nr. 60/1974.

## 2.2. Different interpretations

In Austrian literature, however, there are two different opinions in interpreting the requirements of *dolus eventualis* regarding the relationship between the cognitive and the voluntary element:

- 1) The prevailing opinion requires for the intent, in addition to being aware of a substantial risk, the demonstration of a further positive mental statement, which means that a voluntary decision to accept explicitly the impending result must be proven<sup>12</sup>.
- 2) Another opinion assumes that, if a perpetrator is aware of a substantial risk, intent can only be excluded by an additional mental statement in form of a negative voluntary decision, namely that he confidently believes that the risk will not materialize. Otherwise, if the perpetrator is aware of a substantial risk and is nevertheless acting (without a negative voluntary decision), he „automatically” accepts the result and therefore acts intentionally<sup>13</sup>.

These different interpretations of the requirements of *dolus eventualis* lead to different judgements in the car accident cases. As already described, the car driver is obviously aware of a substantial risk of an accident, including bodily injury or even the death of someone during his hazardous driving. An additional mental statement (a voluntary decision), however, cannot normally be proven, neither in the one nor in the other direction (because the mental capacities of the driver were occupied anyway with focussing on driving with the extremely high speed and thereby retaining control over his car). In this situation:

- 1) According to the prevailing opinion, the requirements of intent are not fulfilled, because of the lack of a voluntary decision.
- 2) According to the opposite opinion, the intent is generally assumed to exist unless there is an additional mental statement that the driver confidently believed that the accident will not materialize. If he is acting in this situation without such a negative voluntary decision, he „automatically” takes the risk and accepts the consequences. Therefore, he acts intentionally.

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<sup>12</sup> Cf. A. Birklbauer, *Wiener...*, § 75 nr. 21; O. Leukauf, H. Steininger, M. Stricker, *Strafgesetzbuch...*, § 5 nr. 17; R. Moos, *Wiener...*, § 75 nr. 14; S. Reindl-Krauskopf, *Wiener...*, § 5 nr. 37; K. Schwaighofer, *Autoraser...*, p. 325; E. Steininger, *Salzburger...*, § 5 nr. 85; detailed P. Velten, *Salzburger...*, § 75 nr. 34.

<sup>13</sup> H. Fuchs, I. Zerbes, *Strafrecht...*, chapter 14 nr. 53.

### 3. Suggested solution

#### 3.1. A compromise in interpreting *dolus eventualis*

In my opinion, in order to find a proper interpretation of the legal regulation of *dolus eventualis* a compromise between the two aforementioned opinions should be considered<sup>14</sup>. It seems reasonable that the requirements of the voluntary element of *dolus eventualis* should not always be the same, but should differ depending on the likelihood of the impending result. The proposal is to differentiate between two situations. The first situation is characterized by the perpetrator's awareness of (only) a substantial risk (not more). In the second situation, however, the perpetrator believes the result is not only possible but very likely to happen (in the sense of highly probable or an extreme danger).

Considering the two different situations, both of the aforementioned interpretations of *dolus eventualis* seem to have a substantial core that should be applied to one of the different situations:

- 1) If the perpetrator is only aware of a substantial risk, we should stay with the prevailing opinion that the intent requires an additional mental statement (a positive voluntary decision) of acceptance.
- 2) However, if the perpetrator considers a circumstance or result to be very likely to happen (highly probable in the sense of an extreme danger) and still acts, the intent should only be ruled out by an additional mental statement (voluntary decision) of confidence in not materializing the result. This means that whoever considers a circumstance or result to be very likely to happen (highly probable) and acts anyway without confidence that the risk will not materialize, accept the circumstance or result „automatically“; in this situation, it is not necessary to prove explicit acceptance.

The advantage of this compromise is that it allows for a smooth transition between the cases of *dolus eventualis* and definite knowledge as follows:

- 1) In cases where the perpetrator is *only aware of a substantial risk*, the intent can be approved only if there is an additional mental statement to accept the result (positive voluntary decision).

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<sup>14</sup> This compromise was also proposed in K. Schmoller, *Vorsatzdogmatik...*, p. 390 f, and K. Schmoller, *Neues...*, p. 5 ff.

- 2) In cases where the perpetrator is aware of the *extreme danger* (he considers the result highly probable / very likely to happen), the intent can be confirmed “automatically”, as long as there is no additional mental statement considering the confidence that the risk will not materialize (negative voluntary decision).
- 3) In cases where the perpetrator has definite knowledge of the circumstance or result, he is acting intentionally anyway; in this situation, the intent does not depend on any additional mental statement at all (no negative voluntary decision possible).

### 3.2. Solution in the car accident cases

What does this compromise proposal mean for the car accident cases?

Looking carefully at the situation of the car driver cases, the proposed compromise leads to the distinction that has not yet been considered:

- 1) With regard to their breakneck speed in the city centre, the drivers were certainly aware of the fact that their behaviour was extremely dangerous and therefore an accident was very likely to happen (highly probable). They undoubtedly also knew that any car accident will probably cause bodily injury to the involved persons. Therefore, they were also certainly aware of a high probability of causing bodily injury to a person involved in an accident. Since there is no indication of an explicit mental statement (negative voluntary decision) that they believed confidently in the failure to achieve such results<sup>15</sup>, they acted intentionally in this respect.
- 2) On the other hand, most car accidents end without human death. Also, in the car driver cases, there are various constellations conceivable in which the hazardous way of car driving, even if it leads to an accident and bodily injury, ends without the death of a person. The killing of a person is therefore much less likely than causing an accident or hurting somebody. Therefore, the breakneck car drivers might have been also aware of a substantial risk of killing a person, but they did not consider such a fatal result as very probable (highly possible) as the accident itself or the bodily injury of an involved

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<sup>15</sup> This believe might also arise from irrational considerations, e.g. an emotional identification of the car driver with idols from action movies; cf. the considerations of T. Walter, *Der vermeintliche...*, p. 1350 f and T. Walter, *Praxiskommentar...*, p. 413.

person. Moreover, there is no indication, that they explicitly (with a positive voluntary decision) accepted the death of a person.

This differentiation regarding the mental element between (on the one hand) causing an accident and bodily injury, and (on the other hand) causing a fatal result leads to a perhaps surprising, but, in my opinion, satisfying solution. It was not proofed that the car drivers explicitly accepted the death of a person and therefore they do not bear responsibility for the intentional killing. Nevertheless, they were not just acting negligently. Instead, they obviously considered an accident and thus a bodily injury of a person to be very likely to happen (highly probable). By acting anyway (without explicit confidence that they would avoid an accident), their intent covered the result of a bodily injury to a person after all.

Therefore, I would finally recommend a judgement that convicts the car driver of „bodily injury causing death” according to § 86/2 Austrian Criminal Code, which means intentionally causing bodily injury to a person and thus negligently causing this person’s death<sup>16</sup>. This crime is punishable by imprisonment from one to fifteen years in Austria, which is much more than for negligent killing, but much less than for intentional killing (including murder).

## Summary

This paper focuses on the substantive law problem of whether certain types of car accidents, namely those caused due to extremely extensive speed (i.a. „daredevil” street races) may be qualified by using not the provisions typically describing traffic offences, but the general provisions related to i.a. murder (or attempted murder). The prevailing opinion of Austrian jurisprudence and legal doctrine requires for the intent that, in addition to being aware of a substantial risk, a further positive mental statement must be demonstrated, which means a voluntary decision to accept explicitly the impending result has to be proven. Is this the only possible interpretation?

## Keywords

intent, intentional killing, negligence, *dolus eventualis*, street race, car accident

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<sup>16</sup> § 86/2 Austrian Criminal Code („Assault causing death”) reads as follows, translation by *Strafgesetzbuch...*: „Any person who does physical injury or damage to the health of another thus negligently causing that persons death is liable to imprisonment for one to 15 years”.



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