

Negligence and responsibility in German Road Traffic Law*

I. The connection between illicit behaviour and result

1. The possibility of avoiding the result by correct behaviour

The outstanding feature of academic research is that it cannot be satisfied with cases of evidence. Even if the correctness of a result seems to be so clear, an academic has to find out with all the methodological care why this result is right. The reason therefore is not only his academic or philosophic interest but the recognition that results can only be gained in order to solve difficult problems by the help of seemingly simple problems. This is also valid for the jurisprudence and the legal practise. Here we will deal with a totally simple case concerning Road Traffic Law. Its solution is evident. But nevertheless the answer to the question why this evident solution is correct is the basis of the method which enables us to solve difficult cases correctly and to avoid misconceptions which have actually been practised in German jurisdiction concerning Road Traffic Law.

This is the above mentioned case: One day before driving to work by car, A notices that the indicator on the left side of his car does not work. Nevertheless, he starts driving without repairing it. At a street crossing he has to stop because of other road users with priority. While standing there car driver B crashes into the back of A's car, because he did not keep the safety distance and moreover did not pay attention. The assistant driver in B's car gets hurt. In this case nobody would doubt that A caused this bodily injury. He also acted without the required care because he was not allowed to drive his car with a defect indicator. Nevertheless, nobody would blame him for the assistant driver's bodily injury. One explanation in German criminal law dogmatics for this result is that the perpetrator would have been unable to avoid the accident even if he had acted in coincidence with the standard of due care. Regarding this opinion, we have to ask: What would have happened if the perpetrator had acted in coincidence with the standard of due care?¹

But this requirement of avoidance is not quite perfect: it calls for too much for the presumption of attribution and it is moreover not definite. Not definite because the

perpetrator has different opportunities to act, he might also act carefully. If, in our case A had gone to work by tram or by foot, he would have avoided the accident. If he had repaired the indicator or if he had taken his wife's car, he would not have avoided it.

The courts take advantage of the possibility of manipulating this requirement of avoidance. A famous example is the case *BGH* 24, 31: A drunken car driver driving exactly within the speed limit of 100 km/h crashed into a motorcyclist who died thereof. There were no witnesses to the accident. The car driver defended himself by saying that the motorcyclist had appeared so unexpectedly, that even if he had not been drunk he would not have been able to avoid the crash with fatal result. Nevertheless, the *BGH* verdicted him for negligent homicide. The judges said that because of his drunkenness he would have had the duty to drive slower. Then he could have avoided the crash. But why does the *BGH* only check this one alternative of due care? The judges explain this verdict by stating that all that counts is the perpetrators' failure in the critical situation and in this situation he could not get sober once in an moment. But it cannot be relevant which opportunities the perpetrator is able take in the situation in question but which opportunities the law offers to him. As a consequence the *BGH* would have had to take into consideration, that the defendant could not avoid the accident when being sober.

And back to our starting case: The driver's responsibility cannot depend on the possibility of repairing the indicator or on his wife giving him her car or on going to work by tram.

But this requirement of avoidance is not only ambiguous, it demands too much for the presumption of attribution. It demands, just like the *conditio-sine-qua-non*-sentence, that a violation of the standard of due care is an indispensable condition to lead to the result. As a consequence, every perpetrator can plead on behalf of not being able to avoid of the result, if there exists a cumulative cause or a substitute cause.² One classic example for such a substitute cause is the so called "Kettenauffahrunfall"-case, *BGH* 30, 228: The victim stopped his car in a fogbank because of unknown reason and left it. The defendant did not follow the rule to drive slowly enough that he could stop in an appropriate distance. He crashed into the first car and pushed it some metres forwards. So the first driver was hit by his own car

and got hurt. Immediately afterwards a third driver crashed into the second driver's car and pushed the two front cars another some metres forwards. In this case the question arises if the second driver can exonerate himself from charge by claiming that the accident of the first driver was unavoidable for him, because, if he had stopped in time, the third driver would have pushed his car on the first one. This is not the way how it took place here. But this development constitutes a substitute cause. Nevertheless, this development should exonerate the perpetrator from a charge, if we took the requirement of avoidance serious.

So we have disproved the requirement of avoidance as well as the *conditio-sine-qua-non*-sentence. The result of this sentence, which is to isolate a single cause out of the total sum of causes, is logically wrong. One single cause does not necessarily have to be a condition of the result. It would be sufficient, if it constituted a necessary part of one of more possible explanations of the result.³ This definition of causation might only consist of verifiable theorems, whereas fictions have to be left completely aside. So substitute causes can be excluded from consideration from the very beginning.⁴ The statement of the second driver, that the third car would have pushed his car on the first one, if he himself had been able to stop his car in time, is irrelevant. This fact did not take place and is a mere substitute cause.

2. The causality of the illicit behaviour

But how do we have to decide in our starting case, if the requirement of avoidance is wrong? Another answer is that what is lacking is the realisation of the illicit danger in the result, because driver A did not need to use his defect indicator in the critical situation. But what does it really mean to say that „the illicit danger was realised“? According to the prevailing opinion in German criminal science this requirement has to be added to the requirement of causation, whereby it is separate to causation.⁵ In accordance with the case of *BGH* 11, 1 we have to deal here with causation, more exactly with the causation of the violation of the standard of care. This is the correct approach because all requirements concerning objective attribution have to meet this requirement, although even if they go further. They must be definitional parts of causation, because causation connects act and result.⁶ As long as the requirements

of objective attribution like for example realisation of the illicit danger or affection of the purpose of a norm are not formulated as specifications to causation, they remain samples of no value which have the intention to correct intuitively the outcome which means that the result is to be attributed to the perpetrator, because his act caused that result.⁷

The expression “causation of the violation of the duty of care” has been rejected in the German dogmatics of criminal law, because a violation of a duty is a contradiction between norm and behaviour. And that could not be the cause of an incident.⁸ This criticism might only be upheld insofar, as it opposes the formulation “causation of the violation of a duty”. This formulation should be corrected insofar that all those characteristics of the act are causal which are incompatible with the standard of due care.

The prevailing opinion in German criminal science proceeded in the assumption that causal for the result could only be acts or movements or incidents,⁹ the so-called *causa efficienz*. Pursuant to this approach - by leaving aside the violating attribute of the act - one had to leave aside the whole act. And, in order to be able to isolate the violation of the standard of care, to replace it afterwards by another act which meets the standard of due care. The consequence is the above mentioned ambiguity of the process which leads to different results. It depends on the fact which act – pursuant to the required standard of care – we replace for the act which violates this standard. The conception of the *causa efficienz* is after all unsuitable for the constitution of legal attribution. And it is unsuitable for the theoretic tasks of natural science and practical tasks of technology. All those tasks are fulfilled by using a definition of causation, which provides that any condition can be causal, the feature of an act or incident as well as the absence of a feature of an act or incident. To refuse the *conditio-sine-qua-non*-sentence and the *causa efficienz* allows me to examine the causation of any quality of the perpetrator's behaviour for the result without any helping fictions, especially fictitious behaviour according to the standard of due care.

As to our formula a fact is causal when it is a necessary component of a sufficient and true explanation of the result. This will be the case if the explanation becomes inconclusive when we cancel this fact. I cancel an item about a quality of a behaviour

by leaving it uncertain and I do not replace it by another item.¹⁰ The error in the leading opinion in our criminal science of the *conditio sine qua non*-sentence is not that something is left aside at all but that something is left aside in order to ask furthermore what would have happened hypothetically without the left-aside part.

The presumed cause is not to be left aside out of the world but only out of a given causal explanation of the damage without adding anything else in order to examine whether the explanation remains conclusive according to causal laws. If the presumable factor is really a cause the explanation becomes inconclusive.¹¹

So once again back to our starting case: The violation of the standard of care for A was to drive with the defect indicator. In Order to explain the accident we need the fact that he drove the car. But I do not have to mention anything about the indicator. I can leave that open without getting an inconclusive explanation. Consequently, the violation of the duty of care by driving the car with a defect indicator is not causal for the result. In other words: The illicit danger was not reflected in the result.

3. Concurring illicit risks and their distinction

In cases of cumulative causation, that means when we have different verifiable and sufficient conditions to explain the result, there is the risk that one of the persons involved gets wrongfully exonerated when using the *conditio-sine-qua-non*-sentence or the principle of avoidance.

This risk is reflected in the cases of *BGH* VRS 25, 262; 36, 36: The defendant car driver had passed a stopping bus and killed a child that came from behind the bus to cross the street. In accordance with the jurisdiction of the *BGH* the driver had to take into consideration that trespassers step on the street from behind the bus in order to be able to overview the street. Actually, they have to wait till the bus has gone. Nevertheless the *BGH* has ruled out that the car driver had to consider this misbehaviour by leaving two metres space to the bus or to pass it keeping a trespassers' velocity, so that he is able to stop at any time. Our car driver who crashed into the child within the two metres protection zone defended himself by stating that the child had run into the street so headlessly that he would have run over it even if he kept the two metres distance. This statement could not be

disproved by the court because the child was dead. So the *BGH* acquitted the defendant by using the *conditio sine qua non*-sentence respectively the principle of avoidance. The judges asked if it had been absolutely sure that the accident would have been avoided by leaving the two metres space to the bus.¹²

It is clear that this result must be wrong when we inspect the child's behaviour as the basis of a possible attribution by leaving out of account that the child was the victim himself and that he was dead after the accident. If he had crossed the street headlessly, as the driver stated, he would have been able to argue as follows: If I had not crossed the street headlessly but in coincidence with the due care for car drivers, which means to step out from behind the bus and to look left and right, I would not have avoided the accident because the car driver drove too fast in the 2-metres zone. The child can reject the attribution of his wrong behaviour to the result as well as the car driver can. This leads to the absurd conclusion that there was no attribution from both sides to the accident. The right solution of this case can only be that the result is attributed to **both**, because each negligent behaviour constitutes a sufficient condition of the accident and is a necessary part of it. This case shows a cumulative causation of violations of the duty of care.

Let us transfer this recognition to the case of *BGH* 24, 31, where the drunken car driver stated, that, after he had crashed into the motorcyclist while observing the speed limit, he would not have been able to avoid the accident even if he had been sober. As the motorcyclist died in this crash, the judges could not disprove this statement. So they had to take it as true in correspondence with the maxim of *in dubio pro reo*. As a consequence this defendant too, defends himself by stating that the negligent behaviour of other persons involved is of such importance that the accident can be explained by itself. So **this** negligent behaviour was not a necessary condition for the result. The same must be true for the negligent behaviour of the deadly injured motorcyclist, if this approach is really to be held true. If he had crossed the roadway keeping a sufficient distance, the accident would have taken place all the same because of the drunken car driver's reduced ability to react.

We now have a method of dividing concurring risks. We do not have to ask if the accident had taken place if the perpetrator had acted in coincidence with the

standard of due care, but it would have taken place, if **both** persons involved would have acted like this. So we can divide the risks of the two mistaken behaviours from each other.¹³ Is each of the driving mistakes sufficient to explain the accident, we deal with concurring conditions of the result. Both violations of the standard of due care establish responsibility of the persons involved in the accident.

The practical importance of this theoretic finding is very high, especially in criminal law concerning road traffic. If we are able to divide the different risks from one another and to realize, that the requirement of avoidance is as wrong as the condition-sine-qua-non-sentence, the perpetrator will not be able to exonerate himself from charge by arguing that the negligent behaviour of the other person involved was the reason for the accident itself. Consequently, we do not face problems in proving evidence in the case, that such a statement cannot be disproved, because one of the persons involved is dead and there are no further witnesses. Therefore, especially in Road Traffic Law this finding is most important, because there are always at least two persons involved and mostly both or more behaved wrongly. But the maxim is valid in general: No one can exonerate himself by claiming that the violation of the standard of due care of another person involved is the only explanation for the accident.¹⁴

4. The requirement of completeness of the offence

So in this case the *BGH* came to the correct result, but with the wrong explanation. But we should not be satisfied with the correctness of the judgement because a wrong explanation creates wrong results in other cases. Here is another example to illustrate this: The defendant drove drunk on a motor highway observing the speed limit of 160 km/h. He adapted himself to the traffic flow. Another driver overtook him keeping an interval that was too small. Thus, the two cars collided. Driving in such high speed means that cars begin to slip by even only punctual touches. Therefore the defendant lost control over his car, moved to the oncoming lane and collided with an oncoming car. His assistant driver was deadly injured in this accident. The defendant upheld the opinion that even a sober driver could not have controlled his car. So the accident would have occurred even if he had been sober. The *BayObLG*

accepted this insofar as the court did not convict him for § 315 c StGB which is “*endangering road traffic by driving even if one is unfit to drive*”. But he convicted him for negligent homicide because as a drunk driver he would not have been allowed to drive 160 km/h but at best 80 km/h. Observing this velocity he as a drunk driver would have had the same capacity to react in the right way like a sober driver at the speed of 160 km/h. Here the judges referred to expert evidence. If the defendant had driven at the speed of 80 km/h, the punctual collision would not have caused such a slippery. In any case the accident would not have been that serious. This violation of the duty of care was supposed to be causal for the accident.¹⁵

The court referred to the case of *BGH* 24, 31. As in this case, the behaviour which violates the standard of due care is replaced arbitrarily by a certain supposedly accurate behaviour. Another accurate behaviour would be driving sober, but in this case the accident would have taken place, too. Who gives the judges the right to choose driving with lower speed and not driving sober as the behaviour corresponding with the standard of due care especially since even driving with the speed of 80 km/h would not have been allowed for a drunken driver?

The only permitted speed limit for a drunken car driver is 0 km km/h. However, if someone reproaches the driver not with the fact that he drove under the influence of alcohol, but with the fact that he did not drive with a speed of 0 km/h, factually having driven at all, and if one then - according to the applied method by the *BGH* - replaces the inattentive behaviour by an attentive one, so it will consist in the fact of not driving at all. The consequence would be that the perpetrator would be held liable for every kind of accident, for example also for the accident of the car that crashes in the back of the car of the perpetrator as he stopped according to the traffic regulations. Herewith however, especially the meaning of the necessity of the causation of the violation of the standard of care would not be met.

But there is still to be another mistake in the argumentation of the Bavarian *ObLG* as well as the *BGH* in volume 27, 31. Both courts did not succeed in holding the defendant liable on the basis of the norm, which is actually valid for him, that says that every car driver who takes part into traffic has to be sober. It seems that the courts behave quite generous towards the defendants by allowing them to drive in a

condition of drunkenness, presupposing that they adjust their speed limit to their ability of reacting, which is reduced by their drunkenness. So to speak they say to the accused, normally you are legally not allowed to drive a car due to your condition of drunkenness. But we do not want to be so strict with you and allow you to drive your car even in a condition of drunkenness, if you will adjust your speed to your condition of drunkenness. And now they suddenly succeed - due to their generosity - in holding the perpetrator liable for the accident.

If we apply our method of the direct examination of the causation of the violation of the standard of care to the case of the Bavarian *ObLG*, so we will see the misconception which made this result possible. Let us now follow the consideration of the *BGH* and the Bavarian *ObLG* in so far, as we presume that a norm which provides that if you are driving in a condition of drunkenness, you will have to reduce the speed insofar that you can almost react on suddenly appearing obstacles as quickly as a sober driver, who drives at the highest admitted speed limit for this certain route. Suppose that, in the case of the Bavarian *ObLG*, this speed limit would be 80 km/h. Then the norm would be: A drunken car driver is allowed - as long as there is no general speed limit - to drive at a speed limit of not more than 80 km/h. The perpetrator's behaviour, which contradicts this norm, does not only consist in the fact that he drove faster than 80 km/h but in the fact firstly that he drove faster than 80 km/h and secondly that he was drunk. Only these two ways of behaviour together result in the violation of the norm, formulated by the Bavarian *ObLG*, which accounts for the perpetrator's liability for the skid accident. If we now examine the causality of the violation of the norm according to the above explained method, the result will be a negative one. Because the causal explanation of the accident contains the fact that the defendant drove faster than 80 km/h, but it does not contain the fact that he was drunk. The reason for his is that even a sober driver could not have managed to get the car of the accused driver under his control after it had started to go into a skid. That proves that the result was incorrectly attributed to the defendant. A weakening of the norm, which is only valid for him, is by no means useful for eliminating the requirement of the causality of the drunkenness for the accident.

So the drunken driver cannot be held responsible for this accident. The fact that the *BayObLG* decided in the above mentioned way is a consequence of the error of *BGH*

24, 31. So it gets clear that the wrong explanation of a judgement produces more wrong judgements, even if the result itself is right because of other reasons.

II. The purpose of the norm

1. The requirement of causality of the definitional elements of the offence

There is agreement among criminal science and jurisdiction in Germany that the causal connection of the act and the causal connection of the violation of the standard of due care are not the only requirements for the attribution of the result to an illicit behaviour. Moreover the causal proceeding which leads to the result has to meet the purpose of the norm. This means that the norm which provides careful behaviour shall prevent the result in question¹⁶ or even intends to do so¹⁷. But how can we ask a norm what it intends to prevent? As long as we do not present a way of how to define the purpose of a norm, it is nothing else than a mere anthropomorphism.¹⁸ One characterizes the norm like a human being that has a will and aims.

One case which for example is discussed under the buzzword "Purpose of the Norm" is the case of the three bicyclists in RG 63, 392: Two bicyclists rode on a dark country lane at night one behind the other. Both did not have their bike lights on. The first of the two cyclists collided with a third cyclist at a crossing who did not have the light on either. This third cyclist would have seen the first cyclist, if at least the second one had used his light in order to illuminate the first one. In any case he would have **stopped** so that he would not have collided with the first driver, because of the light of the second driver. So we have to ask if the behaviour of the second driver is responsible for the collision of the two other drivers because he did not meet the required duty and rode without light. The prevailing opinion in German criminal science negotiates this by saying that it is not the purpose of the norm to avoid accidents between other road users by illuminating one's vehicle at night.¹⁹

This judgement is right in the end but it remains absolutely unclear how the judges come to this conclusion. How do we recognize that it is not the purpose of the norm to illuminate one's car in darkness? In the particular case to comply with the norm

avoids the accident. The prosecutor of the Reich argued as follows in the case of RG 92, 362: One could leave aside the second driver completely without changing the result.²⁰ What does using an illumination when driving in darkness have to do with the protective purpose of a norm? Are there general rules, with which it would be possible to deduct from this norm that its protective purpose is not referred to, in so far as someone, speaking with the words of our prosecutor, can leave aside the whole perpetrator at all without dropping the result?

Even independent if the perpetrator executed the norm of care or not. I called this the requirement of completeness, that though represents an abbreviation of the meant context. This requirement is not identical with the requirement which is dealt with at the end of the last chapter, the requirement that the breach of duty has to succeed not only partly but completely in the course of causality. Thus, two completely independent examinations of causality are necessary in order to find out, if the requirement of completeness is met. Firstly, one has to present the realisation of the elements of an offence of the violated norm of care as a cause, independent from the fact, if the norm has to be executed or not. Secondly, one has to prove that the violation of the duty of care - speaking more precisely - those characteristics of the perpetrator's behaviour, which are not compatible with the norm of care, are causal for the result.

Let's now apply this method to our case with the three cyclists. The obligation to illuminate the bike is only valid under the circumstance that the person concerned drives a vehicle on a public road in darkness. The fact that the second cyclist rides behind the first one, must consequently be causal for the first cyclist's accident, otherwise the accident would not be valid in the area of the purpose of this norm. The prosecutor of the Reich was completely right when he rejected the second cyclist's responsibility of the first cyclist's accident with the argumentation that one could leave aside the second cyclist completely without dropping the result. But during the times of the Court of the Reich, the doctrine of the protective purpose of the norm has not been developed and the main prosecutor of the Reich could not name the general principle, on which basis, according to his words, the second cyclist's responsibility for the accident has been excluded, if one ignores the second cyclist completely without dropping the result. This respective formulation is also not correct in so far as it is based on the doctrine of the necessary condition.

It is not important that one can leave aside the whole behaviour of the perpetrator, but it is important that the definitional elements of an offence of the norm, to which a certain behaviour of the perpetrator belongs to - independent from his breach of duty - has to be causal for the result.

Another example is the case of the landlord who does not care for a sufficient illumination in the entry of his restaurant and, as the street lighting is insufficient too, a passer-by stumbles upon an obstacle on the pavement and gets hurt. This would not have happened if the landlord had illuminated the entry, because then there would have been enough light on the pavement. But we can leave the whole restaurant with its light aside without making the explanation inconclusive. Running the business of the restaurant is a condition for the duty to illumination for the landlord.

But not only this duty to illuminate can involve such reflexive protections of legal interests. The German Road Traffic Regulations request car drivers to stop at a zebra crossing if a pedestrian makes clear that he wants to cross the street. In the case *BGH 20, 215* a pedestrian walked suddenly on the street without showing her intention to cross it. But the car driver had to stop because of another pedestrian who had stepped on the street from the other side. Notwithstanding that, he is not responsible for the accident with the first pedestrian. To explain the accident it is not necessary to say that the second pedestrian had stepped on the street. But this is a requirement for the duty of the car driver to stop at the zebra crossing. We had a different result, if the first pedestrian stepped onto the street relying on the car driver stopping because of the other pedestrian. That is exactly the solution of the case *BGH 17, 299*, where a car driver ignored the priority of another road user and crashed with a third driver, who ignored the priority himself.

2. The principle of continuity

Moreover it is discussed under the buzzword "Purpose of the Norm" how a motorist can be exonerated, who ran over a speed limit or a stop sign, and later on, when driving in correspondence with the road traffic regulations, collides with other road users. It is clear that the accident would have been avoided, if the driver had acted

with due care before. Because when the other road user crossed the street, the driver still would not have passed the place of the accident. Indicating that, this argument is even valid, if he had disregarded the road traffic regulations even more, because then he would have passed the place of the accident before, it is claimed that the accident was not enclosed in the purpose of the norm.²¹ If we took this argumentation seriously, every speed maniac who caused an accident could exonerate himself from charge. However, the result may be correct again, surely, the argumentation is not.

The problem occurred in the case of *BayObLG* in VRS 57, 360. The defendant car driver drove through a village while speeding. Then he passed the traffic sign which removed the speed limit. After having speeded up to 83 km/h a bicyclist crossed the street so close to him that the car driver could not avoid the crash even by braking rapidly. If he had observed the speed limit in the village before, he would not have been at the place where the bicyclist crossed the street. So this speeding in the village is a necessary condition to explain the causality of the accident with the inattentive bicyclist.

But a norm can only aim at preventing such damaging processes which can be prevented generally and not only in an individual case.²² A norm is appropriate to prevent damaging processes, if it reduces its frequency significantly. So we have to withdraw from the individual case because here it is obvious that observing the norm would be appropriate to prevent the result. A norm which provides a certain standard of care is generally inappropriate to prevent processes with an allowed intermediate phase. That means such intermediate phases which can be fulfilled as likely by illicit as by legal behaviour.²³ The car driver was allowed to be located nearby when the bicyclist crossed the street. The perpetrator could as well have brought about this state acting in coincidence with the norm, e.g. by starting earlier or not having a break during the ride, as by acting unlawfully, e.g. by exceeding the speed limit even more.

Nevertheless, we have to prove the above mentioned requirements of attribution even if the perpetrator acted with intent. Hereto the following case: The perpetrator stabs the victim with a knife intending to kill him. Thus the victim is urged to go to

hospital by taxi. On the drive he gets killed in a car accident because of the taxi driver's carelessness. In this case too, there is no doubt about the causal connection of the stabs and the result, because the victim drove in the taxi because of the stabs. But the risk of a taxi drive is not an illicit one. One can be forced to drive with a taxi because of allowed or illicit reason. From the beginning of the taxi drive we do not need the fact any more that the perpetrator had injured the victim in order to explain the following causal process. The fatal result can be explained by other illicit factors which other people involved had caused. This is the principle of continuity. We can formulate that the result must be connected with the perpetrator's illicit behaviour by a chain of illicit circumstances. This requirement would be fulfilled for example if the taxi driver had been forced to drive quite risky because of the injured victim's critical state of health. This risky drive would have been justified by a state of emergency. Here the danger for life and limb of the victim which was caused by the knife stabs would be continuously necessary to explain all intermediate phases of the causal process which lead to his death in the end. The requirements of attribution are applicable for intentional acts as well as for negligent acts. But in the case of the intentional acts it is rather exceptional because the perpetrator who acts with intent acts most of the times in a way that fulfils those requirements.

3. Participation of the victim by deliberate self-endangering

Furthermore we discuss cases under the buzzword „Purpose of the Norm“ in Germany, in which the perpetrator's act became causal for the result. This means that the created undutiful danger was realised in the result, but the victim does not necessarily need to be protected from this danger. One classic example is the case of *BGH 7, 112*: Two young motorcyclists raced in a street. Such races in public road traffic are prohibited because other people could be endangered. In our case one of the motorcyclists overtook the other in a quite risky way, because he wanted to win the race. While overtaking the other one he fell down and got deadly injured. If we want to explain his behaviour it is continuously necessary to say that both ran a race. If a perpetrator had injured a third person in this race, his competitor would be responsible for the fatal result as well. But in our case he is not responsible for the

deadly consequences of the self-endangering of the other motorcyclist, because he could have protected himself sufficiently.²⁴

It is all the same with the assistant driver, who drives with a car driver, knowing that the latter is drunk and gets hurt in an accident because of the driver's drunkenness. An example in German classic literature is the glove of Schiller and the Käthchen von Heilbronn. Surely it was not nice of Miss Kunigunde to throw her gauntlet between the lion and the tiger and then to ask knight de Lourg to bring it back. Apart from a former established code of honour which probably obliged him to act in this way endangering himself, we can say, that he could have rejected her demand. And it is her concern when Käthchen von Heilbronn decides to go back into the burning Strahlenburg to rescue the painting "Bild mit dem Futrale" which's shows the Ritter (which means knight) vom Strahl.

But it is different for a fireman who saves a child from the fire or a relative, who dies because of smoke poisoning while searching for the little brother in the burning house. In such cases the *BGH* held the arsonist responsible for the death of the fireman, *BGH* NStZ 1994, 83. Here the *BGH* is right contrary to one of the most famous German criminal law professors *Roxin*, who wants to apply the maxim of irresponsibility for the causation of self-endangering to every rescuer.²⁵ But if the rescuer – like the fireman in our example - is obliged to endanger himself or if his behaviour appears to be reasonable in view of the danger which was created by a third person, he deserves the protection of the established law for his self-endangering, to which the other person had forced him by creating the danger.²⁶

It is not a counter-argument when *Roxin*²⁷ states that the perpetrator might not hinder the rescuer from acting. The causal process gets attributed to the perpetrator's behaviour even if it steps into a phase before leading to the result, in which the perpetrator can no longer obviate the result because of factual reasons. Thus it is not a reason to exclude attribution, if he might not obviate it because of reasons in law.

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¹ Schröder, § 16 side-notes 188, 190, in Jähnke/Laufhütte/Odersky, ed., *Leipziger Kommentar zum Strafgesetzbuch* Vol. 1 (Heidelberg 1992); Lenckner, Vor §13 side-notes 97, 99, in Schönke/Schröder, ed., *Strafgesetzbuch* (München 2001); Cramer/Sternberg-Lieben, § 15 side-notes 173, 177, in Schönke/Schröder, *op.cit.*; Samson, Anhang zu § 16 side-notes 25, 27a, in

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- Rudolphi/Horn/Samson/Günther/Hoyer, ed., *Systematischer Kommentar zum Strafgesetzbuch*, Vol. 1 (Neuwied-Kriftel-Berlin 1992); Wessels/Beulke, *Strafrecht Allgemeiner Teil* (Heidelberg 2002), side-notes 197 et seq., 688 et seq.; Dencker, 'Die erfolgreiche Fahrerflucht', *Juristische Schulung* (1980), pp. 210, 212; Ulsenheimer, 'Erfolgsrelevante und erfolgsneutrale Pflichtverletzungen im Rahmen der Fahrlässigkeitsdelikte', *Juristenzeitung* (1969), pp. 363-???, (369).
- ² Puppe, Vor § 13 side-note 185, 204, in Neumann/Puppe/Schild, ed., *Nomos-Kommentar zum Strafgesetzbuch*, Vol 1 (Baden-Baden 1999) ;Puppe, 'Erfolgzurechnung im Strafrecht', side-notes 74 et seq., 83 et seq., 90; Puppe, *Strafrecht Allgemeiner Teil - Im Spiegel der Rechtsprechung*, 3/11 et seq., 3/20 et seq., 3/33; Puppe, Die Beziehung zwischen Sorgfaltswidrigkeit und Erfolg bei den Fahrlässigkeitstaten, *99 Zeitschrift für die gesamten Strafrechtswissenschaften* (1987) p. 595-616.
- ³ Puppe, Vor § 13 side-note 96 et seq. in *Nomos-Kommentar*, *op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht' pp. 66 et seq.; Puppe, *Strafrecht Allgemeiner Teil*, *op.cit.*, 2/62 et seq., 2/68 et seq.; Puppe, *99 Zeitschrift für die gesamte Strafrechtswissenschaft* (1987), *loc.cit.*, 599; Puppe, 'Ein Versuch kriminalistisch zu denken', *107 Schweizerische Zeitschrift für Strafrecht* (1990), 141-157, (150 et seq).
- ⁴ Puppe, Vor § 13 side-note 93, in *Nomos-Kommentar*, *op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht' pp 63 et seq.; Puppe, *Strafrecht Allgemeiner Teil*, *op.cit.*, 2/57 et seq.; Puppe, Der Erfolg und seine kausale Erklärung im Strafrecht, *92 Zeitschrift für die gesamte Strafrechtswissenschaft*, (1980) pp. 863-911 (876).
- ⁵ Jescheck, Vor § 13 side-note 64, in *Leipziger Kommentar*, *op.cit.*; Lenckner Vor § 13 side-note 92, in Schönke/Schröder, ed., *op.cit.*; Rudolphi, Vor § 1 57 et seq., in *Systematischer Kommentar*, *op.cit.*; Maurach/Zipf, *Strafrecht Allgemeiner Teil*, Vol 1 (Heidelberg 1983), 18/42, 18/49; Roxin, *Strafrecht Allgemeiner Teil*, Vol 1 (München 1992), 11/39 et seq.
- ⁶ Puppe, Vor § 13 side-note 183, 189 et seq., in *Nomos-Kommentar*, *op.cit.*; Puppe, *99 Zeitschrift für die gesamte Strafrechtswissenschaft*, *loc.cit.*, p. 610; Puppe, 'Erfolgzurechnung im Strafrecht' pp. 8, 75 et seq.; Puppe, *Allgemeiner Teil*, *op.cit.*, 3/4 et seq.; Jakobs, *Strafrecht Allgemeiner Teil* (Berlin-New York 1991) 7/78 and 'Risikokonkurrenz – Schadensverlauf und Verlaufshypothese im Strafrecht', in Küper ed., *Festschrift für Karl Lackner* (Berlin-New York 1987) pp. 53-75, (59 et seq.)
- ⁷ Puppe, Vor § 13 side-note 183, in *Nomos-Kommentar*, *op.cit.*
- ⁸ Lackner/Kühl, *Strafgesetzbuch* (München 2003) § 15 side-note 43; Samson, Anhang zu § 16 side-note 26, in *Systematischer Kommentar*, *op.cit.*; Lenckner, Vor § 13 side-note 81, in Schönke/Schröder, ed., *op.cit.*; Roxin, 'Pflichtwidrigkeit und Erfolg bei fahrlässigen Delikten', *74 Zeitschrift für die gesamte Strafrechtswissenschaft* (1962) pp. 411-444 (421 et seq.); Rudolphi, 'Vorhersehbarkeit und Schutzzweck der Norm in der strafrechtlichen Fahrlässigkeitslehre', *Juristische Schulung* (1969) pp. 549- 557 (553); Honoré, *Responsibility and Fault* (Oxford 1999) p. 100; Erb, 'Die Zurechnung von Erfolgen im Strafrecht', *Juristische Schulung* (1994) pp. 449-457 (455).
- ⁹ See hereto Kahlo, *Das Problem des Pflichtwidrigkeitszusammenhanges bei den unechten Unterlassungsdelikten* (Berlin 1990) p. 310; Seelmann, § 13 side-note 28, in *Nomos-Kommentar*, *op.cit.*; Jakobs, *loc.cit.*, 7/26, 29/15 et seq.
- ¹⁰ Puppe, Vor § 13, side-note 96, in *Nomos-Kommentar*, *op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht' *op.cit.*, pp. 71 et seq.; Puppe, *Strafrecht Allgemeiner Teil*, *op.cit.*, 2/68 et seq.; Puppe, *99 Zeitschrift für die gesamte Strafrechtswissenschaft loc.cit.*, p. 601.
- ¹¹ Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, pp. 71et seq.; Puppe, *Strafrecht Allgemeiner Teil*, *op.cit.*, 2/68 et seq.
- ¹² BGHSt (i.e.: Bundesgerichtshof in Strafsachen), *Verkehrsrechtssammlung*, Vol. 25 (1963) pp. 262-264.

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- ¹³ Puppe, Vor § 13, side-note 198 et seq., in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, p. 89; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 3/29 et seq. Drawing the same conclusion Ranft, 'Berücksichtigung hypothetischer Bedingungen beim fahrlässigen Erfolgsdelikt', *Neue Juristische Wochenschrift* (1984) pp. 1425-1434 (1430, 1433).
- ¹⁴ Puppe, Vor § 13, side-notes 185, 204, in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, p. 90; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 2/33. See Honoré, *op.cit.*, pp. 111-113.
- ¹⁵ BayObLG (i.e. *Bayerisches Oberstes Landesgericht*), Verkehrsrechtssammlung, Vol. 87 (1994) pp. 121-126 (123).
- ¹⁶ BGHSt Vol. 33 (1986) pp. 61-66; OLG (i.e. Oberlandesgericht) Hamm, Verkehrsrechtssammlung, Vol. 60 (1981) pp. 38-41 (38 et seq.); Verkehrsrechtssammlung Vol. 61 (1981) pp. 353-356.; Jescheck, Vor § 13 side-note 167, in *Leipziger Kommentar, op.cit.*; Cramer/Sternberg-Lieben, § 15 side-note 158 in Schönke/Schröder, ed., *op.cit.*; Rudolphi, Vor § 1 side-notes 63 et seq., in *Systematischer Kommentar, op.cit.*; Samson, Anhang zu § 16 side-note 28, in *Systematischer Kommentar, op.cit.*; Roxin, *op.cit.*, 11/72 et seq.; Wessels/Beulke, *op.cit.*, side-notes 182, 673 et seq.; Rudolphi, *loc.cit.*, 553.
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- ¹⁸ Puppe, Vor § 13, side-note 205, in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, pp. 101 et seq.; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 4/1 et seq.; Puppe, 99 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1987), *loc.cit.*, pp. 612 et seq.
- ¹⁹ Cramer, § 95 side-note 175, in Schönke/Schröder, ed., *op.cit.*; Jescheck/Weigend, *Strafrecht Allgemeiner Teil* (Berlin 1995), § 55 II 2 a) bb); Roxin, *op.cit.*, 11/73.
- ²⁰ Puppe, Vor § 13, side-note 209, in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, p. 79; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 3/13 et seq.
- ²¹ Jakobs, *op.cit.*, 7/80; Maurach/Gössel/Zipf, *Strafrecht Allgemeiner Teil*, Vol. 2 (Heidelberg 1989), 43/97; Roxin, *op.cit.*, 11/69; Wessels/Beulke, *op.cit.*, side-note 674.
- ²² Puppe, Vor § 13, side-note 216 et seq. in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, p. 112; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 4/22 et seq.; Puppe, Die adäquate Kausalität und der Schutzzweck der Sorgfaltsnorm' in Schulz/Vormbaum, ed., *Festschrift für G. Bemann* (Baden-Baden 1997) pp. 227 et seq.; v. Kries, Über die Begriffe der Wahrscheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrechte, 9 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1889) pp. 528-537 (532).
- ²³ Puppe, Vor § 13, side-note 220, in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, p. 113; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 4/24 et seq.; Puppe, 99 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1987), *loc.cit.*, pp. 610 et seq.. See Jakobs, *op.cit.*, 7/80 foot-note 131j – hereto Puppe, Die adäquate Kausalität und der Schutzzweck der Norm, in Schulz/Vormbaum, ed., *Festschrift für Bemann* (Baden-Baden 1997) pp. 227.246 (p. 234 foot-note 18).
- ²⁴ Puppe, Vor § 13, side-note 181, in *Nomos-Kommentar, op.cit.*; Puppe, 'Erfolgzurechnung im Strafrecht', *op.cit.*, pp. 157 et seq.; Puppe, *Strafrecht Allgemeiner Teil, op.cit.*, 6/8 et seq.
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fremde Selbstgefährdung', *Neue Juristische Wochenschrift* (1995) pp. 240-241; Frisch, 'Selbstgefährdung im Strafrecht – 2. Teil – Grundlinien einer opferorientierten Lehre vom tatbestandsmäßigen Verhalten', *Neue Zeitschrift für Strafrecht* (1992) pp. 62-68 (65); Jakobs, 'Regreßverbot beim Erfolgsdelikt – zugleich eine Untersuchung zum Grund der strafrechtlichen Haftung für Begehung', 89 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1977) pp. 1-35 (32); Rudolphi, *loc.cit.*, p. 557.

²⁷ Roxin, *op.cit.*, 11/112; Roxin, *Festschrift für Gallas, op.cit.*, pp. 247 et seq.