

THE PRINCIPLE OF SELF-RESPONSIBILITY AS A LIABILITY-LIMITING CRITERION

Margareth Helfer, Assoz-Prof. Dr. iur.*

Institute for Italian Law/Criminal Law, University of Innsbruck, Innsbruck, Austria

ABSTRACT: Legally assessing the criminal responsibility in the case of accidents occurred in the alpine environment means to deal with the unpredictability of nature and the rigidity of law. In this regard, the scholarship and jurisprudence in Austria and Germany increasingly recognise a greater role to the principle of self-responsibility. If the victim has consciously and autonomously decided to take a certain risk, no other person may subsequently be criminally blamed for the damage occurred to them. Self-responsibility could therefore constitute a principle to limit third parties' liability. However, a distinction may be drawn between the victim's autonomous self-endangerment and the case where the victim allows a third party to put themselves in danger. Substantive criteria to determine criminal liability have been developed as well, relying on the victim's active participation in the execution of the action. Situations may nevertheless arise, in which similar distinctions may be hardly made. This is the case where the people involved had the same role, or one of them possessed clearly superior expertise. In any case, self-responsibility could not be invoked to limit one's liability where a guarantor's position existed. Generally, the author argues in favour of a greater consideration of self-responsibility. The protective scope of legal norms ends where one's area of responsibility begins, provided that the person is able to protect themselves.

KEYWORDS: Criminal law, self-responsibility, ski tours, tour guide, Austria, Germany.

1. INTRODUCTION

To deal with the topics of avalanche and law, in particular avalanche and criminal law, requires making nature tangible for the interests of the law in order to be able to answer (punish) legal liability issues as precisely and safely as possible. How difficult this task is, however, is shown by the contrariness of the couple nature and law: nature is more unpredictable than many other areas of daily life, the law in its normativity rigid and awkward. A conflation of these two realities, however, is inevitable when it comes to natural events that lead to legal liability issues.

In order to keep the drama of squaring the circle as low as possible and thus to be able to offer acceptable solutions, a mutual approximation of the two components is unavoidable. For the purposes of nature, this means allowing as much as possible predictability and, in the absence of mandatory traffic standards, agreeing on parameters that can be reliably used for a legal assessment of an accident. For avalanches, these are consolidated alpine experience and state-of-the-art knowledge from avalanche and snow science. They serve as valuable indicators for the legally relevant reconstruction of the dynamics of anthropogenic (man-made) avalanches.

In the area of law, too, there is a positive direction in this respect. In addition to classic legal categories, more recent and more flexible thinking patterns are now being sought for the legal assessment of natural accidents in order to arrive at more coherent decisions. Central importance in this context gains the increased consideration of the personal responsibility of people, according to which the following principle applies: If a person (eg a tour operator) under its own responsibility, ie consciously and autonomously, puts herself at risk (eg avalanche risk), so she is basically responsible even for the offense that occurs in the course of the realization of the risk (eg avalanche). If this consists in the violation of one's own legal interests (eg one's own bodily integrity or one's own life), the person herself is responsible for this as the "perpetrator/victim". Consenting in the dangerous act entails the consent to the criminal offense. Any third parties, who are involved in the process, even if they have allowed or caused the dangerous act (eg tour guides as a courtesy), remain unpunished.

While this conclusion is largely shared in doctrine and jurisprudence - self-responsibility of the victim justifies the impunity of the offender - there is still disagreement over when concrete ownership can be spoken of. This issue, which remains unre-

* Margareth Helfer, Institute for Italian Law/Criminal Law, University of Innsbruck, Innrain 52, 6020 Innsbruck
tel: +43 (0)512 507 80210
email: margareth.helfer@uibk.ac.at

solved, is particularly explosive, especially in connection with a wide variety of perpetrator-victim involvement on the mountain.

2. SELF-RESPONSIBILITY AS A RECOGNIZED LEGAL PRINCIPLE

In Austria, the self-responsibility of the victim in sporting activities, especially on the mountain, was discussed relatively early as a possible principle limiting liability (Bertel, 1977; Gidl, 1978; Hörburger, 1971; Burgstaller, 1974; Steininger, 1985; Lewisch, 1989; Kienapfel, 1984), also taking into account the development of the discussion in Germany (Dölling, 1984; Walther, 1991; Fiedler, 1990; Frisch, 1992; Zaczyk, 1993; Murrmann, 2005; Fischer, 2012).

Astonishingly quickly, part of the doctrine started considering the voluntary self-endangerment of a person as an expression of her right to self-determination or self-expression. This aspect should have a relieving role in evaluating the criminal responsibility of the perpetrator. A voluntary and conscious self-endangerment of the victim should therefore leave the perpetrator unpunished, as long as, in principle, it was objectively not careless (Burgstaller & Schütz). However, such a restriction on the perpetrator's liability was initially only recognized in principle, provided that the victim participated in a de facto dominant manner.

On the basis of the rule that either the perpetrator or the victim has control over the action, one went on to finally distinguish, as in Germany, between two case groups: 1) "self-responsible self-endangerment" (*eigenverantwortliche Selbstgefährdung*) and 2) "agreed third-party danger" (*einverständliche Fremdgefährdung*). The classification in one or the other category, always dependent on whether victim or perpetrator de facto dominated the happening, automatically decided the solution of the liability question of the offender (Dölling, 1984; Steininger, 1985). In the case of a (victim) self-endangerment, the perpetrator was generally considered not responsible, while a (victim) third-party danger was considered as a punishable offense. This clear distinction between impunity and criminal liability of the perpetrator, depending on the classification of the case in one group or another, has not changed much according to the traditional view. The nature of the interplay between offender and victim, and in particular the nature of the victim's contribution to the offense, is still recognized as the key criterion for assessing the offender's criminal liability.

2.1 The de facto control over the act as a decisive criterion

In detail, the two case groups are as follows: There is 1) self-responsible self-endangerment

(eg participation in a guided ski tour in the open, alpine terrain) when the victim (tour participant) carries out the risky action for the own legally protected right which subsequently leads to its violation. Certainly, the perpetrator (for example, the tour guide) is source of the damage of the protected right, in so far as he makes possible, encourages or causes the self-endangering behaviour of the victim. However, the decisive factor is that the victim retains control of what is happening and can stop it at any time on his own. With regard to the legal assessment of this case dynamics, it follows that the legal damage deficit is not attributed to the perpetrator, if the offense saw a self-responsible decision and the victim consciously assumed the risk for his legal rights (Roxin, 1984; Kienapfel, 1984; Otto, 1984; Weber, 1992). The victim as a mature and self-determined legal entity has to take responsibility for the crime (Steininger, 1985; Burgstaller & Schütz).

In the case of the 2) agreed third-party danger (for example, tandem jump with paraglider), not the victim, but the perpetrator dominates the act. The act is not dominated by the victim (Mitfliegender), but by the perpetrator (pilot). The victim exposes himself consciously to the dangerous actions of the perpetrator. It cannot escape from the perpetrator-controlled danger by their own efforts. The perpetrator thus assumes the dominant role. From a criminal point of view, a liability exclusion of the perpetrator is, according to the opinion of a large part of the doctrine (also in Germany), usually not given (Steininger, 1985; Hellmann, 2001; Hinterhofer, 1998; Geppert, 1971; Otto, 1995; Sternberg-Lieben, 1997; Zaczyk, 1993; Zipf, 1970). The fact that the perpetrator sets the dangerous act itself and the victim cannot escape from it, excludes the liability-limiting effectiveness of the victim's self-responsibility (Helfer, 2016).

However, the interaction between perpetrator and victim is not always exhausted in the constellations of these two groups of cases (Kienapfel et al., 2016). As it turns out in practice, there exist also forms of joint coendangering, in which perpetrators and victims jointly carry out the dangerous act collectively and thus the domination of the action is not clearly attributable to one or the other (eg driving on a double-seater sledge (Birklbauer, 2004; Fuchs, 2004), rafting tour with equal participants (Messner, 2005)).

The need to find a solution for such cases, which cannot be clearly classified neither in the category of self-responsible self-endangerment, nor in those of the agreed third-party endangerment, has finally led 1) to put a question mark over the classical, case-by-case assessment and its value as general criterion for resolving the question of criminal liability and 2) to look for alternative criteria for a final legal qualification of the act as a self-

responsible impunity or as a criminal injustice (Birklbauer, 2004; Messner, 2009; Lasson, 2009; Schünemann).

2.2 New evaluation parameters

Following the German doctrine, an approach was chosen whereby the criterion of the execution rule is replaced by "substantive" criteria such as: 1) the victim's self-determination (full ability to see and judge, full awareness of the risk assumed for the own legal rights and possible harmful consequences) and 2) an active (self-determined) influence of the victim on the act. This presupposes that the victim either carries out the dangerous act himself or actively participates in setting the act of execution by the offender (for example, the offender sets the act at the request, desire or advice of the victim). If these criteria are fulfilled, it is to be assumed that the offender is punishable because of the risk connection between the offender's inadvertent negligence and the victim's injury.

2.3 Perpetrator-victim-intertwining on the mountain

The central question that arises in connection with the exercise of mountain sports on the basis of these alternative criteria is: Do these parameters apply even if the perpetrator has superior expertise and precisely because of this, as a mountain or ski guide in the context of a guided mountain or ski tour, has a guarantor position towards the later victim? And subsequently: Can the victim's own responsibility, in this case, limit the responsibility of the offender and in extreme cases even exclude his responsibility?

Although there is still some controversial discussion, the question must be answered in the affirmative, always on the condition that it is actually possible to speak of personal responsibility of the victim, understood as voluntary and deliberate risk-taking of the victim in cooperation with other persons.

Self-responsibility is convincingly present when the self-determination exercised by the victim has been carried out without defects, ie the victim was fully insightful and capable of judgment and carries out the risky actions himself, fully aware of the risk taken for his own legal interests (Steininger, 1985). If these conditions are met, the legally protected right's impairment has to fall in the area of responsibility only of the victim. Through his autonomous, self-responsible action, he has realized the inherent risk (Steininger, 1985). Autonomous acts are only those which do not suffer from shock, panic, error, deception, youthful immaturity or drunkenness and thus has no serious assessment deficiencies that exclude just his own responsibility (Messner, 2005).

Superior expertise on the side of the perpetrator can only be used to establish his criminal liability (and to exclude the self-responsibility on the side of the victim), if the victim was so inferior in the expertise that in this situation he was clearly unable to act on his own responsibility, because he could not fully recognize and grasp the risk to his own legal rights and the possible harmful consequences.

Responsible behaviour of the legal entity limits the objective duty of care of the person who creates the conditions for the performance of the dangerous act and in this context has a guarantor position. The injustice of the act is excluded on the level of objective facts (Frisch, 1992; Jakobs, 1993). The self-reliant decision of the victim excludes the need for protection (and finally the worthiness of protection) and thus the basis for the legal obligation of the guarantor to avoid the harm.

If there is a guarantor's position on the side of the perpetrator with special duty of care and protection, a limitation of the same by self-responsible action of the person in charge should be excluded, since in this case self-responsibility is ruled out. Special duties of guardianship (special guardianship) are justified by the fact that those in need of protection rely on the support and help of others due to a lack of insight or will in coping with daily life (Steininger, 1985; Messner, 2005).

3. CONCLUSION

The initial question regarding self-responsibility can be answered as follows: If the victim acts freely and in full awareness and thus aware of the danger (full insight and judgment, full awareness of the risk taken for one's own legal rights) to which it directly or indirectly exposes its own interests, the offense that has occurred cannot be objectively attributed to the cooperating third party as it is not covered by the protective purpose of the legal norm. The scope of protection of the legal norm ends where the area of responsibility of the individual begins for himself, always under the condition that he is in a position to provide for his own protection (Otto, 2009; Messner, 2005; Helfer, 2016).

Considering that risk sports (eg ski touring, free riding, variant skiing) increasingly develop to grassroots sports or to sports that are increasingly exercised by athletic inexperienced and untrained people, a deliberate consideration of the legal relevance of self-responsibility as a liability-limiting criterion from the beginning makes sense. Thus, full and comprehensive information and education about risks in the mountain by the mountain guide can attain central importance in critical cases, in order to avoid an undesirable extension of the

criminal liability in this already highly complex area.

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