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ARTICLE

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Developments in German Criminal Law: Speed Merchant or Murderer? The Ku'Damm Road Race Case and the New Criminal Legislation Regulating Illegal Motor Racing

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Abstract
The Regional Court of Berlin (*Landgericht (LG) Berlin*) was the first court in Germany to mete out a life sentence for murder—pursuant to § 211 German Criminal Code (StGB)—to two men convicted of killing an uninvolved driver whose car they hit while they were participating in an illegal car race on a public highway. Upon their convictions, the defendants appealed to the German Federal Court of Justice (*Bundesgerichtshof*; BGH) claiming that they did not intend to kill the person and were thus acting without the necessary mens rea for murder. The question whether or not the case could be qualified as murder, and thus whether or not the existence of a killing with intent had been sufficiently proven by the LG Berlin, was the subject of several appeals and retrials. In its latest decision, the BGH confirmed the murder conviction of one of the defendants, while quashing the other defendant's conviction and issuing a retrial. This case caused ripples amongst legal scholars as it called for the toughest possible sanctions to be imposed. However, whether the conduct qualifies as murder remains questionable. As a reaction to several similar cases of illegal car races in recent years, the German parliament subsequently passed a new law—§ 315d StGB—proscribing illegal vehicle races, thereby penalizing the participation, organization, or carrying out of an illegal vehicle race. Until that point there had been no provision criminalizing illegal racing.

Keywords Illegal car races; German Criminal Code; Section 315d; Assumption of intent; Raserurteil

A. Introduction

In February 2017, the criminal case against two men who participated in an illegal car race on Berlin's busy *Kurfürstendamm*[1] ended before the LG Berlin. The LG Berlin found the men guilty of the murder of another driver who was in no way involved in the race, and sentenced the defendants to life imprisonment—the mandatory sentence for murder. The decision of the LG Berlin was particularly noteworthy because in previous trials involving "illegal car racing," the courts had always accepted negligent manslaughter and imposed short prison sentences—some of which

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[1]The major four-lane thoroughfare which passes directly through the city center of Berlin and is often referred to informally as *Ku'damm*.

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had even been suspended. This ruling by the LG Berlin is frequently referred to, somewhat informally, in the press as the *Raserurteil*.[2] The *Raserurteil* triggered vigorous debates among legal scholars—especially with regard to the intent possessed by the defendants in relation to the killing of the victim—and also among the general public. Many people demanded more severe punishments for such acts, fully supporting the verdict rendered and the sanctions imposed by the LG Berlin, whereas others deemed the sentence to be legally problematic, too harsh, and even a possible violation of the law as it stood.

In the wake of this case, the German parliament ultimately decided to introduce a new law—§ 315d StGB[3]—to cater to similar cases in the future as there had, until then, not been suitable laws dealing with such situations. Before the introduction of § 315d StGB, illegal car races could only be categorized as an administrative offense (*Ordnungswidrigkeit*) in accordance with a previous version of §§ 29 (I), 49 (II) No. 5 a.F.[4] German Road Traffic Regulations (*Straßenverkehrsordnung*; StVO).[5]

In the course of this Article, we will explain the notion of intent under German law, why the assumption of a conditional killing intent (*dolus eventualis*) is questionable, and—furthermore—briefly present the salient elements of the initial appellate judgments of the BGH as well as the ensuing judgments of the LG Berlin and the BGH. Additionally, we will explain how the new statutory provision—§ 315d StGB—came into force, what this new law encompasses, and its significance within the German legal system.

B. Facts of the Case

On the evening of January 31, 2016, the defendant, *N*—who had *K* sitting in his passenger seat—came to a standstill at a red traffic light in his Mercedes, with his side window lowered. The second defendant, *H*, stopped at the same red traffic light right next to *N*'s car, also with his side window wound down. When both defendants made eye contact through their open windows, they realized that they were both members of the so-called *Raserszene*.[6] A short conversation occurred between both defendants through the open windows of their vehicles, and both parties implicitly agreed—through the use of gestures and the repeated revving up of the cars' engines—to hold an illegal road race along the *Kurfürstendamm*. Although it was late at night and the volume of traffic had abated considerably, traffic was still moderately high.

During the race—at extremely high speeds over a distance of about 3.4 km—the cars crossed several red traffic lights. In the further course of their race, *N* and *H* approached the intersection of *Tauentzienstraße* and *Nürnberger Straße* at a speed of at least 160 km/h, but possibly even 170 km/h. The speed limit on this stretch of road was 50 km/h.

Due to the structured layout of an advertising column and a right-angled building close to the road, the accused, *H*, did not have a clear view of the intersection. This, in conjunction with the speed of the vehicle, led to *H*—who entered the intersection when the traffic light was displaying red for him—not being able to react. This ultimately caused him to collide with the vehicle of the victim, *W*, who—in accordance with the road traffic regulations—had entered the intersection at a green light. Immediately thereafter, *H*'s vehicle collided with *N*'s car. As a result of the collisions, *W* died at the scene of the accident. *K*, *N*'s passenger, suffered severe injuries.[7]

[2] A compound noun: *Raser* means a person who gets a thrill from driving at an extremely unsafe speed, and *urteil* is the German word for judgment.

[3] Strafgesetzbuch [StGB] [Criminal Code].

[4] The aF (*alte Fassung*) signifies that this refers to a previous version of the StVO—in this case, the version issued on June 30, 2016.

[5] No official English translation is available. For an unofficial translation, see *Road Traffic Regulations (Straßenverkehrs-Ordnung, StVO) with Annexes*, Ger. Law Archive, https://germanlawarchive.iuscomp.org/?p=1290 (last visited Jan. 23, 2021).

[6] *Raserszene* is a German word for a group of people who get a thrill from driving at extremely unsafe speeds.

[7] *See* Landgericht Berlin [LG Berlin] [Regional Court of Berlin] Feb. 27, 2017, 37 Neue Zeitschrift für Strafrecht [NStZ] 471 (471–72), 2017 (Ger.).

C. Initial Decision of the LG Berlin

On February 27, 2017, the LG Berlin convicted the two defendants of complicity in murder (*mittäterschaftlicher Mord*) in accordance with § 211, 25 II StGB—and grievous bodily harm (*gefährliche Körperverletzung*) inflicted on *K* pursuant to §§ 223 (I) and 224 (II) Nos. 2, 5 StGB—as well as intentionally endangering road traffic (*vorsätzliche Gefährdung des Straßenverkehrs*) pursuant to § 315c (I) Nos. 2(a), 2(d) StGB, by affirming a conditional killing intent (*dolus eventualis*) and rejecting deliberate negligence.[8]

The LG Berlin justified its decision by stating that in extremely dangerous acts of violence, it is obvious that the perpetrator expects the possibility that the victim could die and by continuing with his actions, he approvingly accepts this risk.[9] The judges also deemed it proven that *H* had, from the outset, already made the decision to drive as fast as possible and to ignore all traffic regulations in order to reach the destination—the finish line of their race—before *N* did.[10] Both drivers were thereby indifferent to the physical damage inflicted upon others by any accident which might occur, and left it to chance whether there would be a collision with one or more vehicles at the intersection.[11] They approvingly accepted the injury or death of other road users, as well as bystanders close to the area of the crossing who were also at risk of injury from the flying debris of the vehicles involved.[12]

At the very least, when they entered the intersection where the accident occurred, both defendants knew that if a driver authorized by a green traffic light drove into the crossroads, an accident could occur.[13] They also knew that any such accident caused by the crash of the oncoming vehicle and the cars that both defendants were driving would result not only in the injury of all passengers involved, but could—with a high degree of certainty—also lead to their own deaths due to the excessively high speeds the vehicles had attained during the race.[14] The defendants were therefore indifferent to the consequences of the race and accepted the possibility of death or injury of others. The judges considered this proven, as well as the fact that that the two men acted in the illegal car race "with collaborative and conditional intent"[15] using their powerful cars, which at such high speeds were uncontrollable, as murder weapons. The LG Berlin was not, however, able to affirm that the defendants acted with base motives (*niedrige Beweggründe*).[16]

The decision by the judges—that due to their excessive speed, the defendants' cars were uncontrollable and therefore constituted a danger to the public—is a key element to their murder conviction. This is due to the way intentional killings are criminalized in German law.

The StGB contains two sections that deal with homicide: § 211 Murder Under Specific Aggravating Circumstances (*Mord*) and § 212 Murder (*Totschlag*). Both require an intentional killing, but § 211 enumerates certain specific murder criteria (*Mordmerkmale*)[17] which qualify the killing as generally more heinous. The existence of one of these murder criteria alone is sufficient for a murder conviction. The murder criteria can be divided into three groups: The motive of the killing, the manner of the killing, and the purpose of the killing. The motive behind a killing can be for pleasure, for sexual gratification, out of greed, or otherwise out of base motives. The second group deals with the manner of the killing; for example, killing someone by stealth, cruelly, or a means constituting a public danger. The last group deals with the purpose behind the killing; for example, killing someone in order to either facilitate or to cover up another offense.

[8] *Id.* at 473.
[9] *Id.*
[10] *Id.* at 471.
[11] *Id.* at 475.
[12] *Id.* at 472.
[13] *Id.*
[14] *Id.* at 475.
[15] *Id.* at 473. The German phrase is *mittäterschaftlich und bedingt vorsätzlich*.
[16] *Id.* at 477–78.
[17] See StGB § 211 (II) for a full list of these murder criteria.

D. Analysis and Evaluation of the LG Berlin's Decision

I. Intent According to German Law

For a better understanding of this ruling, especially the ensuing controversy surrounding it, it is crucial to first be familiar with German criminal law with regard to the mens rea element of an offense. German criminal law distinguishes merely between intent and negligence, an intermediate stage such as recklessness,[18] which is a well-established notion in common-law-based legal systems, does not exist. The distinction between an offender acting with intent and one acting negligently is essential in German criminal law because, pursuant to § 15 StGB, only intentional conduct leads to criminal liability—unless the law explicitly states otherwise.

The definition of intent is not codified in German law. However, according to the prevailing opinion, intent consists of two elements: The element of "will" or "volition" (*Wollen*) and the element of "knowledge" (*Wissen*). German law differentiates between three forms of intent: first-degree (*dolus directus 1. Grades*; *Absicht*), second-degree (*dolus directus 2. Grades*; *direkter Vorsatz/Wissentlichkeit*), and conditional intent (*dolus eventualis*; *Eventual or bedingter Vorsatz*).

With regard to first-degree *dolus directus*, the element of volition dominates; the offender's main purpose is to bring about the desired result of the crime. With second-degree *dolus directus*, the element of knowledge preponderates and the offender knows or foresees that his actions will almost certainly lead to the fulfillment of the actus reus of an offense.[19] With conditional intent, so-called *dolus eventualis*, neither the element of volition nor the element of knowledge prevails. Rather, it covers situations where the offender seriously contemplates the possibility that his actions *may* bring about the result of a crime but resigns themselves to that fact.[20] Conditional intent, when proven, has the same legal consequences as any other form of intent. A clear separation between conditional intent and deliberate negligence (*bewusste Fahrlässigkeit*, the more aggravated form of negligence) is difficult to demarcate, and the boundary is blurred because the offender anticipates the possibility of committing the offense in both cases. Generally, the courts assume deliberate negligence when the offender has reasonable faith in the fact that the legally proscribed result will not occur, whereas conditional intent is assumed when the offender accepts that the said result will or *could* occur and nevertheless proceeds.[21]

Comparing the German system of dealing with mens rea to the one used in most common law jurisdictions, the most striking difference is—as noted above—the lack of an intermediate stage of recklessness between intent and negligence. For the purpose of this brief comparative view, the definition of recklessness as stated in the American Model Penal Code shall be used. The Code defines recklessness as when a person "consciously disregards a substantial and unjustifiable risk . . . [involving] a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[22] Because this definition does not include an element of volition, but rather only requires the offender to disregard the risk of harm their actions pose to a legally protected interest, both the German concepts of conditional intent and deliberate negligence would fall into the scope of recklessness in the Anglo-American system.[23] This has the advantage of eliminating the need to establish the offender's attitude towards the risk he creates—something which is difficult to determine with a reasonable degree of certainty.[24] Because the distinction between intent and negligence

[18] *See* Dan W. Morkel, *Abgrenzung zwischen vorsätzlicher und fahrlässiger Straftat*, 1 NEUE ZEITSCHRIFT FÜR STRAFRECHT 176, 178 (1981).

[19] For a more detailed explanation, see Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD J. LEGAL STUD. 99, 106–08 (2004).

[20] *See* GEORG FREUND & FRAUKE ROSTALSKI, STRAFRECHT ALLGEMEINER TEIL 290 (3d ed. 2019).

[21] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. IV StR 84/15, para. 12, (Jan. 14, 2016), Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. II StR 50/08, para. 4, (Mar. 5,2008), JÖRG EISELE & BERND HEINRICH, STRAFRECHT ALLGEMEINER TEIL FÜR STUDIENANFÄNGER 76 (1st ed. 2017).

[22] Tatjana Hörnle, *Plädoyer für die Aufgabe der Kategorie "bedingter Vorsatz"*, 74 JURISTENZEITUNG 440, 446 (2019).

[23] *See* Robin Antony Duff, *Two Models of Criminal Fault*, 13 CRIM. L. & PHIL. 643, 650 (2019).

[24] For details, see Hörnle, *supra* note 22, at 441–43.

is so problematic and its consequences are so significant—unless otherwise stated, only intent leads to criminal liability—several scholars in Germany have long argued for the adoption of a category of mens rea similar to common law recklessness.[25]

With regard to the cases at hand—which were decided by the LG Berlin—due to the fact that § 211 StGB does not explicitly state that negligence is punishable, pursuant to § 15 StGB, an intention to kill by the offender is required for a murder conviction.

II. Arguments For and Against the Assumption of Intent

The LG Berlin's decision to affirm a conditional killing intent and to refute deliberate negligence was—and still is—a highly polarizing issue, with as many legal scholars approving of the decision as those disapproving. Hereinafter, the main arguments put forward by both sides will be presented.

The controversial question of whether or not the defendants acted with conditional intent raises two questions: Whether they realized that their behavior posed a possibly lethal threat to themselves and others, and whether they resigned themselves to that fact. Scholars in favor of the court's decision argue that the defendants realized that they had created an objective danger to others with their excessive speed and their flouting of several red traffic lights in an area of Berlin that is bustling, even at night. Furthermore, they did not take any steps to minimize that danger, nor were they in an intoxicated-like state of mind where it is impossible to make rational considerations. This can be established by the fact that at least one of the defendants initially stopped at red traffic lights before continuing the race without further interruptions[26]—an act which shows that they did not heedlessly commence their race. Additionally, both defendants were driving their respective vehicles safely in demanding traffic and driving situations, which would rebut any argument that they were in an intoxicated-like state of mind.[27]

Because both drivers were aware of the fact that their behavior was extremely dangerous to others—yet, they nevertheless continued with their race—they also accepted that the outcome of the race could be fatal. There are no evident special circumstances which would substantiate the idea that the defendants did not have any reason to believe that an accident would *not* happen. A person driving at speeds of up to 170 km/h—three times more than the permitted speed limit of 50 km/h—and crossing several red traffic lights along the way on a major inner-city road, even late at night, cannot seriously dismiss the occurrence of an accident; they can only hope and leave it to chance.[28] Kubiciel and Hoven compare that situation to playing Russian roulette: Even when one pulls the trigger for the first time, it is up to chance whether or not a shot is fired—and with every pull of the trigger, chance not only decides whether, but also when, a shot is fired. [29] Due to the fact that the defendants could not see whether or not another vehicle had entered the intersection they were crossing, that is essentially what they did; they played Russian roulette with themselves and others. The risk of an accident increased with every red traffic light they ignored, and due to their excessive speed, they would—in any event—not have been able to react in time had another vehicle entered the intersection.

These are the reasons why, according to the ruling of the court itself and those in favor of the court's decision, the defendants *did* realize that their actions posed a possibly lethal threat to others and—at the very latest, upon entering the intersection of *Tauentzienstraße* and *Nürnberger Straße*, when, due to their excessive speed, they could not have been in the position

[25]*See, e.g.*, *id.* at 445–48; Thomas Weigend, *Zwischen Vorsatz und Fahrlässigkeit*, 93 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 657, 687–90 (1981).

[26]*See* 37 NSTZ 471 (471) (Ger.).

[27]Michael Kubiciel & Elisa Hoven, *Die Strafbarkeit illegaler Straßenrennen mit Todesfolge*, 37 NEUE ZEITSCHRIFT FÜR STRAFRECHT 439, 441 (2017).

[28]*Id.* at 440.

[29]*Id.* at 442.

to be able to react to other vehicles—they did resign themselves to that fact and therefore acted with conditional intent.

Scholars opposing the ruling, however, argue that the defendants did not act with conditional intent and that they neither realized nor accepted the danger they were posing to themselves and others. While from an objective point of view they displayed extremely dangerous behavior, this fact alone cannot substantiate the claim that they accepted this danger. Special circumstances—in this case, the defendants' intoxicated-like state of mind during the race—can lead to them not understanding that this could culminate in a possibly fatal accident.[30]

Due to the adrenaline, speed, and danger of the situation, participants in car races like the one in Berlin experience a state of elation, which is comparable to driving under the influence of alcohol or narcotics. These emotions—this "thrill of the race"—rendered the defendants bereft of any ability to think critically about their actions and, thus, they were unaware of the danger that they had created to other road users. In his case comment, Walter proposes a helpful analogy to comprehend the effects of this state of elation: He compares it to the attempt to form a reasonable thought while in the middle of looping the loop on a roller coaster ride.[31] Furthermore, assuming that the defendants did realize the possibility of an accident also implies that the defendants realized the possibility of an accident which could lead to serious damage to their vehicles and even their own deaths. If that were the case, one would have to assume that they acted with conditional suicidal intent too.[32] But even the LG Berlin stated in its decision that "in the adrenaline rush, possible thoughts towards the damage or the destruction of their own vehicles had been put aside."[33] However, if the defendants did indeed disregard any thoughts towards the damage or destruction of their own vehicles, then one must ask why they did not do the same with regard to the damage or destruction of other vehicles or the death of other road users?

Moreover, even if they were aware of their dangerous actions, they had confidence in the fact that no accidents would occur. The aim of the contestants in an illegal car race is to win the said race. However, a person who seriously believes that they can win a race also believes that they will cross the finish line as the winner. Therefore, that person has the utmost faith in everything going well and no fatal collisions occurring en route. This is one reason why the majority of participants in such races do not fasten their seat belts, do not carry first aid kits in their cars, and do not contact their family or close friends before they start a race.[34]

The defendants' firm belief that nothing could and would happen to them or others was further emphasized by the fact that the defendants had already jumped several red traffic lights at excessively high speeds without any consequences. Thus, they had no reason to believe that this would change. Additionally, they assumed that the higher their speed, the less likely they were to collide with other road users. This may very well appear absolutely ludicrous. However, stupidity itself is not punishable—as much as everyone from time to time wishes it were—and each of the offender's own ability—or, in this case, inability—to comprehend the possible consequences of their actions has to be taken into consideration when establishing whether or not this person, as an individual, acted with conditional intent.[35]

Another factor that has to be assessed is the offender's behavior subsequent to the commission of the offense. After the accident had brought the race to an abrupt and premature end, the defendant *H*—the driver who had collided with the victim—repeatedly uttered the sentence:

[30]*See* Tonio Walter, *Der vermeintliche Tötungsvorsatz von "Rasern"*, 70 Neue Juristische Wochenschrift 1350, 1351 (2017).

[31]*Id.*

[32]Christian Jäger, *Too Fast and Furious—Die Todesraser vom Kurfürstendamm*, 49 Juristische Arbeitsblätter 786, 788 (2017).

[33]37 NStZ 471 (476) (Ger.).

[34]Walter, *supra* note 30, at 1351.

[35]Jäger, *supra* note 32, at 787.

"How could this happen, how could this happen?"[36] This is a clear sign that he did not believe that such an accident could occur; he may not have even foreseen the possibility that this could indeed happen.

The final argument against the LG Berlin's decision is that by affirming a conditional intent to kill—and thereby convicting the defendants of murder in this case—in other similar cases where these races do not result in the death of another person, the offenders would need to be prosecuted for attempted murder.[37] This is due to the fact that under German law, the intent in a completed offense equals the decision to commit the offense as an attempt. This decision to commit the offense is the key part of the mens rea when an offender is to be convicted of an attempt. However, if the race had not ended with an accident—but, for example, with the police stopping the defendants—it is highly unlikely that this whole incident would have been treated as more than merely an administrative offense. In fact, every single case with similar circumstances would have to be treated in the same way, even if nothing happened and the race participants were able to finish their race. The courts would always have to adjudge whether or not the offenders could be convicted of attempted murder—something which is also highly unlikely to happen. In addition, the LG Berlin did not even assess the possibility of convicting the defendants for the attempted murder of *K*, the girlfriend in the passenger seat of *N*'s car, who suffered severe injuries. Following its arguments on why the defendants had acted with conditional intent, the LG Berlin should have done precisely that. Instead, they were only convicted of the lesser offense of inflicting grievous bodily harm for *K*'s injuries.[38]

III. Possible Motives Behind the Court's Judgment

In the authors' opinion, the main motive behind the LG Berlin deciding to affirm a conditional intent to kill was, arguably, that the alternative sentence for a charge of negligent manslaughter would have resulted in a term of imprisonment not exceeding five years. This sentence—given the facts of the case and the behavior of the defendants—intuitively appears to be too short. A further factor that may have exerted some influence on the ruling was that this case had attracted a great deal of media attention and many people had been demanding a harsh sentence, feeling that the numbers of highly dangerous car races had increased over the past few years and that a strong signal needed to be sent to these notorious speed merchants. This, however, cannot be the cause for convicting someone of murder based upon rather dubious reasoning, especially considering the fact that the sanction for a murder conviction in Germany is a mandatory life sentence—a punishment which might appear to be too high. However, at that time, those were the two options available to the LG Berlin, and it selected the one that—in the authors' opinion—was the less favorable. Unsurprisingly, the defendants appealed this decision on points of law[39] and the case was referred to Germany's highest court of ordinary jurisdiction, the BGH, which quashed the convictions and handed the case back to a different chamber of the LG Berlin for a retrial.

E. Further Developments in the Case

I. First Decision of the BGH

The BGH announced its ruling on March 1, 2018. Hereinafter, the main points of the judgment will be presented. The Fourth Criminal Senate of the BGH, the only senate at a federal level hearing criminal cases involving road traffic incidents, overturned the ruling of the LG Berlin. The

[36] *Id.* at 788.
[37] *Id.*
[38] *Id.*
[39] German criminal procedure distinguishes between two different kinds of appeal: The appeal on points of fact and law (*Berufung*), and the appeal on points of law only (*Revision*).

judges opined that the course of events, as determined by the LG Berlin, did not support the assumption of an intentional murder. According to the verdict of the LG Berlin, the defendants had recognized the possibility of a fatal outcome of their race for other road users and had accepted it approvingly when they entered the intersection where the accident took place.[40] However, the LG Berlin determined that, at the same time, the defendants had no possibility of preventing the accident because they were "completely unable to react."[41] According to these findings, the events leading up to the fatal accident had already been irreversibly set in motion before the requisite intent to kill had occurred among the defendants.[42]

The BGH reiterated that in cases of homicide and offenses occasioning bodily harm, the decision of whether the offender acted with conditional intent or with deliberate negligence requires a complete overview of all the objective and subjective elements of the offense.[43] The objective danger of the act and the probability of it successfully fulfilling the actus reus of a criminal offense alone are not the crucial criteria for assuming conditional intent, but rather the circumstances of the individual case need to be considered when dealing with highly dangerous acts.[44] The BGH's judgment stated that the behavior that caused the accident which resulted in the death of another road user was not based upon an intention to kill.[45]

Besides this, the evaluation of the evidence by the LG Berlin also suffered far-reaching legal deficiencies with regard to the subjective elements of the offense. These related to the question of whether or not a possible risk of self-endangerment of the defendants in the event of an accident could contradict the existence of an intention to kill.[46] The LG Berlin denied this on the grounds that the defendants felt absolutely safe in their vehicles and that they had dismissed their own risk of self-endangerment.[47]

However, this is somewhat difficult to reconcile, considering that it is questionable whether or not the defendants—as the LG Berlin had further assumed—had accepted the actual, serious, and even fatal injuries suffered by the passenger as a result of an accident.[48]

The LG Berlin did not solve this contradiction with regard to the defendants' estimation of danger to persons who were in the same vehicle. In addition, the court did not prove its belief that the defendants felt completely safe in their own vehicles. The LG Berlin had based its assumption on the fact that drivers such as the defendants regularly felt safe—"like in a tank or in a castle"—in their heavy-duty, high-acceleration vehicles equipped with comprehensive safety technology.[49] However, there is no empirical evidence to support this claim.

A further legal error concerns the conviction of the other defendant, whose vehicle did not collide with that of the victim. His conviction for complicity in murder could not—without legal errors—be upheld, even if the LG Berlin had been able to prove an intent to kill during the accident.[50] It does not follow from the findings of the judgment that the defendants committed murder as a joint criminal act. For this to be the case, it would be necessary for the defendants to have made a joint decision to commit the killing of another human being and to have executed this jointly by division of labor.[51] The agreement to jointly carry out an illegal car race—upon which

[40]Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. 4 StR 399/17, para. 14, (Mar. 1, 2018).
[41]*Id.* at para. 14.
[42]*Id.* at para. 15.
[43]*Id.* at para. 19.
[44]*Id.*
[45]*Id.* at para. 16.
[46]*Id.* at para. 25.
[47]*Id.*
[48]*Id.*
[49]*Id.* at para. 24.
[50]BGH, Case No. 4 StR 399/17 at para. 25.
[51]*Id.* at para. 28.

the LG Berlin based its decision—has a different context and is not sufficient for the assumption of a joint homicidal offense.[52]

As a consequence of the said deficiencies, the federal judges referred the case back to the LG Berlin. Nevertheless, in doing so, they made it clear that they were not stating that the defendants could *not* in theory be convicted of murder, but merely that the reasons that the LG Berlin had given in its ruling to affirm a conditional intent to kill were legally flawed.

II. Second Decision of the LG Berlin

The retrial began on August 14, 2018 at the LG Berlin.[53] At the first hearing, the defendant *N* filed an application for the exclusion of the three professional judges on the grounds of possible bias. The defendant *H* endorsed the application. On August 27, 2018, the application was granted with the LG Berlin explicitly stating that there was no actual bias of the judges per se. Nevertheless, in accordance with the German Criminal Procedural Code (*Strafprozessordnung*; StPO), the judges were excluded for possible bias because they had relied heavily on the reasoning of the quashed conviction from the first trial when deciding whether the defendants should remain in custody pending trial.[54] Subsequently, the retrial was properly conducted in front of a different chamber of the LG Berlin, and started on November 19, 2018.[55]

On March 26, 2019, the three professional judges and two lay judges of the Thirty-Second Grand Criminal Chamber of the LG Berlin once again convicted *H* and *N* of murder in conjunction with inflicting grievous bodily harm and intentionally endangering road traffic—pursuant to §§ 211 (II), 224 (I) No. 4, and 315c (I) Nos. 2(a), 2(d) StGB—and sentenced them to life imprisonment. Their driving licenses were also revoked for five years.[56]

The LG Berlin took the decision of the BGH into account and—contrary to the first judgment—focused its reasoning for affirming a conditional killing intent on an earlier point in time: That being when *H* and *N* still had control over their vehicles and the events were not already irreversibly set in motion. According to the court, the defendants had recognized the risk their behavior posed to the lives of other road users but nonetheless carried on with their race in complete disregard of this. Thereby, they showed that they had resigned themselves to the potential death of others, and they did so at a time when they still had their vehicles under control and could have applied the brakes. Yet, the defendants did not remove their feet from the accelerator pedals and, thus, they acted with a conditional intent to kill.[57]

The LG Berlin also reestablished that the fact that the defendants had put themselves at risk of death did not in any way contradict the assumption of a conditional killing intent. This time, the court reasoned that *H* and *N* did in fact recognize the risk they were putting themselves in, but that they estimated the risk to be low and were willing to accept it for the sake of continuing with their race. [58]

The court again stated that the defendants' powerful, fast cars constituted a danger to the public (*gemeingefährliche Mittel*). Contrary to the first judgment, however, the LG Berlin did confirm that the defendants acted with base motives. Their aim to win the car race at any price was,

[52] *Id.*

[53] Landegericht Berlin Press Release PM 18/2019, Landgericht Berlin verurteilt Angeklagte nach tödlichem Zusammenstoß bei illegalem Autorennen auf dem Kurfürstendamm erneut wegen Mordes (Mar. 26, 2019), para. 8, https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2019/pressemitteilung.796501.php.

[54] Landgericht Berlin Press Release PM 34/2018, Landgericht Berlin: Hauptverhandlung wegen des Vorwurfs des Mordes nach tödlichem Unfall bei einem mutmaßlichen Straßenrennen auf dem Kurfürstendamm ausgesetzt (Aug. 28, 2018), paras. 1–2, https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2018/pressemitteilung.733260.php.

[55] Landgericht Berlin Press Release PM 42/2018, Landgericht Berlin: Beginn der Hauptverhandlung wegen des Vorwurfs des Mordes nach tödlichem Unfall bei einem mutmaßlichen Straßenrennen auf dem Berliner Kurfürstendamm (Nov. 6, 2018), para. 1, https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2018/pressemitteilung.755096.php.

[56] Press Release, PM 18/2019, *supra* note 53, at para. 1.

[57] *Id.* at para. 3.

[58] *Id.* at para. 5.

morally speaking, at the lowest possible level. Therefore, the court saw fit to classify it as a base motive in accordance with § 211 (II) StGB. Additionally, *H* and *N* fulfilled the murder criterion of acting perfidiously (*heimtückisch*)[59] because the victim *W* was unaware of any danger and, therefore, completely defenseless as he had understandably assumed that there would be no danger if he passed through the intersection at a green light.[60]

The defendants once again appealed this verdict on points of law and the case was referred to the BGH for a second time.

III. Second Decision of the BGH

On June 18, 2020, the Fourth Criminal Senate of the BGH decided on the appeal of the two defendants against the second judgment of the LG Berlin.

The BGH rejected the appeal lodged by H, the defendant directly involved in the accident, and his renewed conviction of murder by the LG Berlin was upheld. However, the BGH corrected a part of the verdict from inflicting grievous bodily harm to inflicting negligent bodily harm (*fahrlässige Körperverletzung*), pursuant to § 229 StGB.[61] This correction of the verdict (*Schuldspruchkorrektur*) does not, however, influence *H*'s sentence, which remains life imprisonment.[62]

In the reasoning for its decision, the BGH largely followed the conclusions of the LG Berlin. It stated that the defendant had realized that the race could only be won by increasing the risk to the maximum and setting aside all doubts, and that the extraordinary dangerousness of the defendant's driving behavior and his awareness of the inherent risk of a serious traffic accident indicated that he would accept such an accident with potentially fatal consequences for the other party.[63] Therefore, the strict requirements for the existence of a conditional intent to kill were met. The BGH also confirmed that the LG Berlin's deliberations on the contradiction between the assumption of conditional intent and the risk of self-endangerment sufficiently justified the LG Berlin's decision that self-endangerment does not exclude intent.[64] The assessment of the evidence by the LG Berlin regarding the mens rea of the murder criterion of "utilizing means constituting a public danger," however, displayed serious legal errors—according to the BGH. Nevertheless, because the LG Berlin had—in the BGH's opinion—additionally affirmed the murder criteria of "acting perfidiously" and "with base motives" without legal error, this did not affect *H*'s conviction or the sentence.[65] This judgment is now final and cannot be appealed.

With regard to the appeal filed by the co-accused *N*, whose vehicle did not collide with that of the victim, the BGH overturned the conviction rendered by the LG Berlin. The conviction for jointly committed murder was quashed, as the assessment of evidence once again did not support the determination of a joint intent aimed at killing a person. In the context of the assessment of evidence, the LG Berlin only dealt with the question of the conditional killing intent of *N* in relation to a hypothetical fatal accident caused by himself, but not with a decision aimed at a joint execution of the crime with the defendant *H*. It was, however, not proven that this conditional killing intent could be attributed to *N* as well. It is far-fetched that the accused implicitly extended the car race plan to the killing of another person while driving towards the intersection—as the LG Berlin suggested—given their intense focus on the race.[66]

[59] Acting perfidiously is defined as exploiting the victims' defenselessness resulting from them being unaware of any danger.
[60] Press Release, PM 18/2019, *supra* note 53, at para. 6.
[61] Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. 4 StR 482/19, para. 60, (June 18, 2020).
[62] *Id.* at para. 61.
[63] *Id.* at para. 43.
[64] *Id.* at paras. 40–41.
[65] *Id.* at para. 47.
[66] *Id.* at para. 15.

As such, the case concerning the defendant *N* has been handed back to the LG Berlin, once again, for another trial.

F. The New § 315d StGB

I. Background of § 315d StGB and the Legal Situation Before Its Implementation

Section 315d StGB was implemented in 2017 after several cases of illegal car races were reported in the media—the most notorious and infamous one being the "*Ku'damm Raser*" case assessed above.

Before the introduction of § 315d StGB, the participation in or the organization of an illegal car race was categorized as a mere administrative offense—in accordance with §§ 29 (I), 49 (II) No. 5 StVO a.F.[67]—resulting in fines up to 500€ and, in especially severe cases, a driving ban not exceeding three months.

The Bundesrat—the upper house of the German parliament—stated in its draft law that the existing sanctions had proven to be insufficient in practice and, therefore, more severe sanctions were required.[68] This was because illegal motor races endanger the lives and limbs of other people, especially with regard to the speed that can be attained and the danger of losing control over one's vehicle. The Bundesrat also deemed it insufficient that the criminal code could only be applied in severe cases: When the life or limb of another person has already been harmed, or when a specific danger has arisen as a result of a legally specified traffic violation in relation to one of the so-called "seven deadly sins of driving" ("*Sieben Todsünden des Straßenverkehrs*")[69] under § 315c StGB, the provision which deals with the endangerment of road traffic.

The purpose of the new § 315d StGB is to penalize illegal motor races—even if no one was harmed—and to achieve a lasting impact on participants or organizers of illegal car races by upgrading the act from a mere administrative offense to a criminal one. The distinction between an administrative offense and a criminal offense is severe. Administrative offenses are legal violations that have no criminal content and, therefore, are only punishable with fines and/or driving bans. Whether an administrative offense is actually sanctioned lies within the discretion of the responsible administrative authorities.[70] In contrast, the violation of a criminal offense is punishable with either a fine or a term of imprisonment which is determined by the courts.[71] Its prosecution lies within the discretion of the responsible public prosecution office.[72]

II. Wording of the New Law—§ 315d StGB—Illegal Motor Racing (Verbotene Kraftfahrzeugrennen)[73]

(1) Whoever in road traffic
   1. organizes or conducts an illegal motor race,
   2. participates in an illegal motor race as the driver of a motor vehicle or

[67] *See StVO*, *supra* note 4 (discussing what the term aF (*alte Fassung*) signifies).
[68] Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN [BR] 362/16, (Ger.).
[69] *See* StGB § 315c (I) No. 2, (listing the seven deadly sins of driving).
[70] *Ordnungswidrigkeiten*, CREIFELDS KOMPAKT RECHTSWÖRTERBUCH (3d ed. 2020) (Ger.).
[71] *Id.* at *Strafen*.
[72] *Id.* at *Ermittlungsverfahren in Strafsachen*.
[73] The official English translation is available at *German Criminal Code*, BUNDESAMT FÜR JUSTIZ, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2933 (last visited Jan. 23, 2021).

3. moves with inappropriate speed as the driver of a motor vehicle and in gross violation of traffic regulations and carelessly in order to achieve maximum speed incurs a penalty of imprisonment for a term not exceeding two years or a fine.

(2) Whoever, in the cases under subsection (1) no. 2 or 3, endangers the life or limb of another person or property of significant value belonging to another incurs a penalty of imprisonment for a term not exceeding five years or a fine.
(3) In the cases under subsection (1) no. 1, the attempt is punishable.
(4) Whoever causes the danger by negligence in the cases under subsection (2) incurs a penalty of imprisonment not exceeding three years or a fine.
(5) Whoever, in the cases under subsection (2), causes another person's death or serious damage to another person's health or causes damage to the health of a large number of people incurs a penalty of imprisonment for a term of between one year and 10 years, in less serious cases imprisonment for a term between six months and five years.

III. Analysis of § 315d StGB

Section 315d StGB aims to protect road safety and the related physical integrity of other road users —such as other vehicle drivers, cyclists, or pedestrians—and their property from damage caused by accidents. It penalizes the organization and carrying out of an illegal motor race, as well as the participation in such a race.

What is particularly noteworthy in the new provision is § 315d (I) No. 3 StGB. This paragraph deals with so-called "*Alleinraser*." *Alleinraser* are drivers who, without any other race participants, drive at inappropriate speeds, carelessly, and in gross violation of traffic regulations in order to achieve maximum speed. Driving at an inappropriate speed means driving in a manner that is too fast and which violates the speed limit or is contrary to the current traffic situation.[74] Inappropriate speed therefore means a speed which does not correspond to the road, visibility, and weather conditions, whereby the violation of the speed limit may be regarded as a decisive indicator.[75] The crucial question is whether or not the vehicle can be controlled at the attained speed.[76] In comparison with real car races, cases of *Alleinraser* appear less dangerous. The sanction for the offenses listed in § 315d (I) StGB is a term of imprisonment not exceeding two years or a fine.

In addition to terms of imprisonment and fines, § 315f StGB allows for the confiscation of motor vehicles which were used as an object in the commission of an offense listed under § 315d (I) Nos. 2, 3 (II, IV, V) StGB. Furthermore, § 69 (II) No. 1 StGB allows for the revocation of the offender's driving license. In cases in which a revocation of the driving license was not utilized, there is also the possibility of imposing a driving ban in accordance with § 44 StGB. Thus, repetition of the offense can be prevented in the long term, or even permanently.

In accordance with § 315d (II) StGB, penalties are increased to up to five years' imprisonment if the race participants endanger the life and limb of, or property of significant value belonging to another person. It is a specific-endangerment offense (*konkretes Gefährdungsdelikt*), the requirements of which are met when the endangered object comes within the effective range of the act causing the damage, so that the occurrence of the damage can no longer be averted, and its failure only depends on mere randomness—so-called "near-miss" scenarios. The endangerment must be attributable to an act under § 315d (I) Nos. 2, 3 StGB. It is penalized with a term of imprisonment not exceeding five years or a fine, and conditional intent is required with regard to the endangerment of others. In the event of negligently causing danger under § 315d (II) StGB, the term of imprisonment shall not exceed three years

[74] Tobias Kulhanek, BeckOK StGB, § 315d at recital 35 (46th ed. 2020) (Ger.), *available at* Beck-Online by subscription; *see also StVO*, *supra* note 4, § 3.

[75] *Id.*

[76] Kammergericht Berlin [KG] [Higher Regional Court of Berlin], Case No. (3) 161 Ss 134/19 (75/19), para. 16, (Dec. 20, 2019).

or a fine. Pursuant to § 315d (V) StGB, in cases where the race results in death or damage to the health of another person or larger number of people, the term of imprisonment shall be from one to ten years and—in less serious cases—from six months to five years.

Had § 315d StGB already been in force at the time of the collision on the *Kurfürstendamm* on January 31, 2016, the offenders *H* and *N* may well have been convicted pursuant to § 315d (I) No. 2, (II) and (V) StGB for carrying out an illegal car race and thereby damaging *K*'s health and causing the death of *W*. Their sentence would have been a term of imprisonment between one and ten years if they were only charged with participating in an illegal car race. Nevertheless, because the court determined that they acted with intent to kill, the murder charges would not have been dropped, resulting in them being punished for more than one criminal offense. This is due to the fact that a conviction pursuant to § 315d StGB does not replace a murder conviction.[77] Pursuant to § 52 (I) StGB, if the act of an offender violates more than one criminal statute, only one penalty is imposed.

The penalty for murder is life imprisonment, while the penalty for participating in an illegal car race that causes another person's death or serious damage to another person's health is imprisonment for a term of between one year and ten years. Under § 52 (II) StGB, in cases of several offenses committed by one act, the penalty is determined according to the statute which provides for the most severe penalty. In the end, this means that even if § 315d had been in force, *H* and *N* could have also been convicted for murder and sentenced to life imprisonment.

Nevertheless, it can be assumed that the existence of § 315d StGB at the time of the collision would have evaded the issue that a sentence of maximum five years for negligent manslaughter appeared too low, but that the alternative sentence for murder—life imprisonment—appeared to many as too harsh.

IV. Critical Assessment of § 315d StGB

While the creation of § 315d StGB in principle was met with approval,[78] the content of § 315d StGB was—and still is—rather controversial. During such illegal car races, numerous traffic rules and speed limits are wantonly and grossly flouted. The danger thereby created is increased when two or more vehicles are competing with each other as they distract and provoke each other.

Criticism of § 315d StGB was expressed in relation to § 315d (I) No. 2 StGB, because not every form of conduct mentioned therein justifiably deserves a criminal sanction. These are, for example, races which take part late at night on a deserted road, where the participants ensure that they do not pose any risk to other road users.[79] In addition, the wording of the law suggests that a race where the participants comply with traffic regulations can also be punished by § 315d StGB.[80] Problems arise in relation to § 315d (I) No. 3 StGB, where the term "achievement of the highest possible speed" is not clearly specified. There is thus no clear distinction between massive speeding —which is not punishable—and a race against yourself, which is covered by § 315d (I) No. 3 StGB.[81] It must be welcomed, however, that vehicles used to commit an offense under § 315d StGB can be confiscated. Furthermore, engaging in unauthorized vehicle races will be included in the catalogue of offenses that result in the revocation of a person's driving license.

Over time, the jurisprudence and judicial practice will shape the new law and clarify any ambiguities or application problems; this is what has happened to date. Since coming into force, § 315d StGB has already been applied in several cases—one of which the conviction has already been quashed by the appellate court. In their reasoning, the courts completely contradicted each other concerning the interpretation of the term "highest possible speed." The LG Berlin, on the one hand, stated that

[77] Karl Lackner & Kristian Kühl, Strafgesetzbuch Kommentar, § 315d at recital 11 (29th ed. 2018).

[78] *See* Statements in Sitzungsprotokoll [Minutes], Deutscher Bundestag: Drucksachen [BT] 18/157.

[79] Frank Zieschang, *Zur Strafbarkeit nicht genehmigter Kraftfahrzeugrennen im Straßenverkehr*, 48 Juristische Arbeitsblätter 721, 722–26 (2016).

[80] Carsten Kusche, *Die Strafbarkeit illegaler Rasereien im Straßenverkehr nach § 315d StGB n. F.*, 30 Neue Zeitschrift für Verkehrsrecht 414, 419 (2017).

[81] *Id.*

the intention to achieve the highest possible speed does not require reaching the maximum speed of the vehicle, but rather the highest possible speed from the offender's point of view.[82] The Regional Court Stade (*Landgericht (LG) Stade*), on the other hand, ruled that in contrast to mere speeding, a race is only present when the driver extends his vehicle to its technical and physical limits.[83]

In another case, the Higher Regional Court Stuttgart (*Oberlandesgericht (OLG) Stuttgart*) held that cases of *"Polizeiflucht"*—a situation where a suspect is trying to flee from the police in a vehicle—may also be punished under § 315d (I) No. 3 StGB, as the suspect was—in this instance—acting with the intent to achieve the highest possible speed in order to escape.[84]

The most significant case to date is arguably the one tried in front of the District Court Villingen-Schwenningen (*Amtsgericht (AG) Villingen-Schwenningen*). The reason for this is not due to the circumstances of the case but rather because of the court's decision to suspend the proceedings and to submit the case to the Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) to examine its conformity with the German Constitution (*Grundgesetz*; GG),[85] on the grounds that the District Court was convinced that § 315d StGB was unconstitutional in relation to the principle of legal certainty (*Bestimmtheitsgrundsatz*).

The principle of legal certainty—with regard to criminal law—is defined in Article 103(II) GG and in § 1 StGB. The legislator is obliged to describe the scope of criminal liability as precisely as possible so that a layperson is able to construe the scope of a criminal offense directly from the law itself. In this context, the AG Villingen-Schwenningen decided that, though the elements "inappropriate speed," "in gross violation," and "carelessly" can be differentiated from each other and their legal meaning can be determined because there are many higher judicial decisions that shaped them,[86] the legal meaning of the element "in order to achieve maximum speed" cannot be determined by the interpretation methods known to German law.[87]

Should the BVerfG decide that § 315d StGB is unconstitutional, it will naturally have an enormous impact on all cases already tried on the basis of § 315d StGB. Rendering this, and any, provision void has a retroactive effect—meaning that it must be treated as if the law had never been enacted.[88] At the time of this writing, a decision by the BVerfG is still pending.

G. Conclusion

As demonstrated in the course of this Article, the case concerning the tragic illegal car race in Berlin raised numerous questions and has led to heated debates regarding illegal motor races in general, as well as the differentiation between intent and negligence under German law in particular—a problem which still remains unsolved. There was, however, one positive effect: With the introduction of § 315 d StGB, the legislature finally targeted the *Raserszene* and other people endangering the lives of others by carrying out car races, although this new law is not without ambiguities. Nevertheless, it must generally be welcomed that illegal car races are no longer merely an administrative but now a criminal offense—a fact which, hopefully, will act as a deterrent to speed merchants and prevent events like those in Berlin from happening again.

[82]Kammergericht Berlin [KG] [Higher Regional Court of Berlin], Case No. (3) 161 SS 134/19 (75/19), para 29, (Dec. 20, 2019).

[83]Landgericht Stade [LG Stade] [Regional Court of Stade], Case No. 132 Qs 88/18, para. 10, (July 4, 2018).

[84]Landgericht Stuttgart [OLG Stuttgart] [Higher Regional Court of Stuttgart], Case No. 4 Rv 28 Ss 103/19, para. 18, (July 4, 2019).

[85]Grundgesetz [GG] [Basic Law], *translation at* https://www.gesetze-im-internet.de/englisch_gg/.

[86]Amtsgericht Villingen-Schwenningen [AG Villingen-Schwenningen] [District Court of Villingen-Schwenningen], Case No. 6 Ds 66 Js 980/19, para. 45, (Jan. 16, 2020).

[87]*Id.* at 45.

[88]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Effect of decisions*, Bundesverfassungsgericht, https://www.bundesverfassungsgericht.de/DE/Verfahren/Wichtige-Verfahrensarten/Wirkung-der-Entscheidung/wirkung-der-entscheidung_node.html (last visited Jan. 8, 2021) (discussing declarations of voidness in paragraph 3).

It is, nonetheless, regrettable that it took several serious accidents which cost the lives of innocent bystanders—the race in Berlin being only the last one in a series of similar cases—until parliament finally decided to take action. The BGH's decision—that participants in illegal car races which end fatally can be convicted of murder, if the existence of conditional intent to kill is sufficiently proven—will also be an important precedent for future cases, even after the introduction of § 315d StGB. Because murder is an offense more serious than any other, it can supplant § 315d (V) StGB. This means that in a situation where the offender shows signs of acting with conditional intent to kill, the courts will always have to consider a murder charge. This precedent could have an even greater impact should the BVerfG decide to declare § 315d StGB unconstitutional. This is due to the fact that without § 315d StGB, the legal situation returns to the previously mentioned loophole concerning illegal car races. The offender would, once again, only be able to be sentenced to either a term of imprisonment not exceeding five years for negligent manslaughter or to life imprisonment for murder. It will certainly be interesting to see how the situation develops and what the courts will decide in future cases.

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