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DEVELOPMENT

The Criminal Liability of Corrections Officers in German Prisons: The Landmark Decision of the Federal Court of Justice from November 28, 2019 (2 StR 557/18)

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Abstract

Within the criminal justice system, there is always a balancing act between two conflicting tenets: incarcerating the prisoners as a preventive measure, on the one hand, and, on the other, aiming to rehabilitate them. Without a proper transition, it is possible that prisoners will reoffend upon release. German legislation allows corrections officers to grant relaxed terms of imprisonment to prisoners who have proved themselves suitable. However, on June 7, 2018, corrections officers were essentially deprived of this power when the Regional Court of Limburg convicted two corrections officers of negligent killing after a prisoner, to whom they had granted relaxed terms of imprisonment, killed someone during one of his periods of release. In the immediate wake of this controversial judgment, corrections officers throughout Germany were seemingly left with two options: either to remain conscientious and attempt to rehabilitate the prisoners with the underlying risk of being subject to prosecution themselves, or to ensure their own "safety", thereby jeopardizing prisoners' crime-free futures. This article provides an overview regarding negligently committed offenses under German law, analyzes what led the trial court to this radical decision, and assesses why the final appeal court overruled the Regional Court's decision.

Keywords: Criminal liability; correction officers; relaxed terms of imprisonment; negligence; breach of duty

A. Introduction

I. Circumstances of the Decision

The judgment of the LG Limburg[1] (*Landgericht Limburg*; LG Limburg) unfolds like a thriller documenting a wild car chase through the western part of Germany. It all began with a convicted criminal—hereinafter referred to as *K*—who was serving a twenty-one-month sentence for driving without a license pursuant to Section 21 I Nr 1 StVG[2], *Fahren ohne Fahrerlaubnis*; forgery of

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[1]LG Limburg [LG Limburg] [Regional Court Limburg], Case No. 5 KLs 3 Js 11612/16 (June 7, 2018), https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190006320 [hereinafter Judgment of June 7, 2018].

[2]Straßenverkehrsgesetz [StVG] [Road Traffic Act], Mar. 5, 2003, BGBl I at 310 2003, last amended by Gesetz [G], Dec. 5, 2019, BGBl I at 2008 (Ger.), https://www.gesetze-im-internet.de/stvg.

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documents pursuant to Section 267 I StGB[3], *Urkundenfälschung*; coercion pursuant to Section 240 I StGB, *Nötigung*; resistance to enforcement officers pursuant to Section 113 I StGB, *Widerstand gegen Vollstreckungsbeamte*; endangering road traffic pursuant to Section 315c I StGB, *Gefährdung des Straßenverkehrs*; and driving without requisite insurance coverage pursuant to Section 6 PflVG[4], *Fahren ohne nötigen Versicherungsschutz*. All of these charges were contained within one Act. According to the Federal Central Criminal Register (*Bundeszentralregister*), *K* had previously been convicted of twenty-five other offenses, the majority of which involved driving without a license. After *K* had served two months of this particular sentence, he was committed to an open prison, a minimum-security institution (*Offener Vollzug*) by one of the accused corrections officers —hereinafter referred as to *D*—who was the head of department of the correctional facility. In addition, *K*'s conditions of imprisonment were eased further in this open prison by the second defendant, a corrections officer hereinafter referred to as *W*, who was the head of department of the minimum security institution. *W* granted *K* permission to take short leave (*unbegleiteter Ausgang*), which allowed him to leave the minimum-security institution without supervision for six hours a day, as well as granting him leave from custody (*Langzeitausgang*) for an entire day up to eight times a month.[5] However, *K* was subject to certain conditions, such as not drinking alcohol and not driving any vehicles.

Nevertheless, on one occasion while *K* was benefitting from these relaxed terms of imprisonment (*Vollzugslockerungen*), he appropriated a vehicle and drove it without a license. On his return from this period of short leave, he parked the vehicle out of sight at a nearby restaurant. Even after he had handed the car keys over to a member of staff at the minimum-security institution, no one became suspicious or surveilled *K* during his periods of short leave. On a separate occasion, *K* was confronted with a random police traffic check and tried to flee in his vehicle. Due to his previous encounters with the police, he knew that he would have to perform hazardous maneuvers in order to dissuade the police from chasing him further and, as such, he proceeded to drive against the direction of traffic on a federal highway. He was aware of the imminent danger to his own life and to the life of others and deliberately accepted this risk. *K* initially succeeded in eluding his pursuers, but only until he collided with another vehicle. The driver of the other vehicle was killed in the collision. *K* was sentenced to life imprisonment for murder under specific aggravating circumstances, in this case with base motives (*niedrige Beweggründe*) and by means that could pose a danger to the public (*gemeingefährliche Mittel*) pursuant to Section 211 I 1 and II, group 1, variant 4 and group 2, variant 3 StGB; forgery of documents pursuant to Section 267 I 1 StGB; driving without a license pursuant to Section 21 I 1 StVG; and driving without the requisite insurance coverage pursuant to Section 6 PflVG.[6]

II. Criminal Liability of Corrections Officers

In addition to *K*, the corrections officers also came into the focus of the judiciary. The LG Limburg[7] and, more recently, the German Federal Court of Justice[8] (*Bundesgerichtshof*; BGH)

[3]Strafgesetzbuch [StGB] [Criminal Code], Nov. 3, 1998, BGBl I at 3322, last amended by Gesetz [G], Nov. 20, 2019, BGBl I at 1626 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/.

[4]Pflichtversicherungsgesetz [PflVG] [Car Liability Insurance Act], Apr. 5, 1965, BGBl I at 213, last amended by Verordnung [V], Feb. 6, 2017, BGBl. I at 147 (Ger.), https://www.gesetze-im-internet.de/pflvg.

[5]The difference between 'short leave' and 'leave from custody' is that leave from custody is granted on a daily basis for a maximum of twenty-one days per year, while short leave is only granted on an hourly basis for a maximum of twenty-four hours at a time. Section 45 I of the Landesjustizvollzugsgesetz Rheinland-Pfalz [RPLJVollzG] [Law Enforcement Act Of The State Rheinland-Pfalz], Mar. 8, 2013, Rheinland-Pfälzisches Gesetz- und Verordnungsblatt [RP GVBL.] at 79 (Rhineland-Palatinate) (Ger.) (current version amended by G., Sept. 3, 2018, RP GVBL. at 276).

[6]LG Limburg [LG Limburg] [Regional Court Limburg], Case No. 2 Ks - 3 Js 5101/15 (Dec. 18, 2015), https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190006292.

[7]Judgment of June 7, 2018, *supra* note 1.

[8]Bundesgerichtshof [BGH] [Federal Court of Justice] Case No. 2 StR 557/18 (Nov. 26, 2019), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&client=12&pos=0&anz=1&Blank=1.pdf&nr=106029 [hereinafter Judgment of Nov. 26, 2019].

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had to deal with the question of whether, and to what extent, corrections officers can be held criminally liable for offenses committed by a prisoner to whom they had granted unaccompanied leave from a minimum-security institution. The LG Limburg[9] convicted the corrections officers *D* and *W* to nine months imprisonment on probation for negligent killing (*fahrlässige Tötung*) in accordance with Section 222 StGB[10]. Both defendants subsequently appealed to the BGH on points of law and the BGH then reversed this verdict in full and acquitted both accused.[11]

When analyzing both judgments, a number of salient questions must be posed. Can the fatal accident caused by *K* really be attributed to the accused corrections officers? Have the accused corrections officers (negligently) breached a duty essential to their job in this case? And if so, was the death of the victim reasonably foreseeable?

B. Basic Tenets of Punishment and Relaxed Terms of Imprisonment

The predominant objective in Germany's prisons today is the rehabilitation of prisoners.[12] At the same time, the state has the duty to protect the general public from criminal offenders who may pose a danger to society.[13] The latter is usually met by meting out terms of imprisonment or other measures of reform and security. However, this creates a certain degree of tension in view of resocialization, as shown by the rates of recidivism in countries with a low resocialization target.[14] As early as in 1973, Germany's Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) described resocialization as a concept whereby prisoners should be taught to possess the ability and will to lead a responsible life, and that they should learn to assert themselves under the conditions of a free society without breaking the law, to take advantage of its opportunities and to withstand its risks.[15] This is achieved by dint of minimum-security institutions. In these institutions, prisoners are allowed to move unrestrictedly and can enjoy certain relaxed measures that can be granted to those without behavioral disorders and where a risk of flight (*Fluchtgefahr*), in other words failing to return to the correctional facility at the agreed time, or the abuse of such measures (*Missbrauchsgefahr*) for criminal acts is improbable.[16]

[9]Judgment of June 7, 2018, *supra* note 1.

[10]"Negligent killing: whoever causes a person's death by negligence incurs a penalty of imprisonment for a term not exceeding five years or a fine." § 222 StGB.

[11]Judgment of Nov. 26, 2019, *supra* note 8.

[12]*See* Strafvollzugsgesetz [StVollzG] [Prison Act], Mar. 3, 1976, BGBl I at 581, last amended by Gesetz [G], Dec. 9, 2019, BGBl I at 2146, (Ger.), https://www.gesetze-im-internet.de/englisch_stvollzg [hereinafter Prison Act]; Johannes Kasper, Remark, *Remark to Judgement of Nov. 26, 2019*, 2020 JURISTENZEITUNG [JZ] 959, 960.

[13]*See* Prison Act, *supra* note 12.

[14]Rates of recidivism within three years after being released: in the USA, it is sixty-seven and a half percent. U.S. Dep't of Justice, Bureau of Justice, Special Report 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) 4 (2018). In Germany, it is thirty-five percent. JÖRG-MARTIN JEHLE, HANS-JÖRG ALBRECHT, SABINE HOMANN-FRICKE, AND CARINA TETAL, LEGALBEWÄHRUNG NACH STRAFRECHTLICHEN SANKTIONEN, 14 (2016). In Norway, it is twenty percent. CAROLYN W. DEADY, INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD 4 (2014).

[15]"Dem Gefangenen sollen Fähigkeit und Willen zu verantwortlicher Lebensführung vermittelt werden, er soll es lernen, sich unter den Bedingungen einer freien Gesellschaft ohne Rechtsbruch zu behaupten, ihre Chancen wahrzunehmen und ihre Risiken zu bestehen."Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 202, 235.

[16]*See infra* note 26; The federal states Sachsen-Anhalt and Hesse stipulate in their Law Enforcement Acts that—in addition to risk of flight and abuse of relaxed terms of imprisonments—protection of the general public and the interests of victim protection are to be considered, too. *See* § 22 Absatz 2 Satz 3 Erstes Buch Justizvollzugsgesetz Sachsen-Anhalt [JVollzGB I LSA] [First Book Law Enforcement Act of The State Saxony-Anhalt], Dec. 18, 2015, Gesetz- und Verordnungsblatt Sachsen-Anhalt [GVBL. LSA] at 666, § 13 Absatz 2 S. 3 Hessisches Strafvollzugsgesetz [HStVollzG] [Law Enforcement Act of Hesse], June 28, 2010, Gesetz- und Verordnungsblatt Hessen I [GVBL. I] at. 185.

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C. Negligent Offenses

I. Basic Structure

The case at hand revolves around criminal negligence. Under German criminal law it is stated that only conduct that is intentional attracts criminal liability unless the law expressly provides criminal liability for negligent conduct—see Section 15 StGB[17]. This applies to negligent manslaughter since the legislature enacted Section 222 StGB. Even though criminal negligence is not defined by the StGB,[18] jurisprudence has established and consolidated a common formula to assess negligence. A person may be held criminally liable for an act or omission which has been carried out without the requisite due diligence and which has caused a particular and reasonably foreseeable criminal event to occur.[19]

II. Specific Elements

The breach of an objective duty of care (*objektive Sorgfaltspflichtverletzung*) and the reasonable foreseeability (*objektive Vorhersehbarkeit*) constitute key elements of negligence and both require elaboration in order to provide a clearer understanding of the judgments in this case.

The breach of an objective duty of care serves as a benchmark for the required defective behavior. The type and degree of care to be applied is determined by how a fictitious, thoughtful, and responsible person would have acted in that situation, analogous with the common law concept of the 'reasonable person.'[20] It is crucial to assess the required level of care from an *ex-ante* perspective. This bulky and *ad hoc* definition can be completed by a normative filling of special rules.[21] Common examples are the provisions of the StVG, WaffG[22] and AtomG[23]. This also includes Section 22 II RPLJVollzG[24] *a.F.*[25] regarding a transfer to a minimum-security institution and Section 45 II 1 RPLJVollzG *a.F.* for possible relaxed terms of imprisonment. They impose the duty for corrections officers to assess the propensity of a prisoner to abscond from their detention or to abuse the opportunities offered by prisons to commit offenses before approving any relaxed terms of imprisonment.[26] Therefore, the entire evaluation is based upon a prediction made by the officials

[17]"Unless the law expressly provides for criminal liability for negligent conduct, only intentional conduct attracts criminal liability." § 15 StGB.

[18]The opposite is true to negligence in contract or tort law, Bürgerliches Gesetzbuch [BGB] [Civil Code], § 276, https://www.gesetze-im-internet.de/englisch_bgb (Ger.).

[19]Detlev Sternberg-Lieben & Frank Schuster, Strafgesetzbuch § 15 para. 116 (Adolf Schönke, Horst Schröder, Albin Eser, Walter Perron, & Detlev Sternberg-Lieben eds., 30th ed. 2019); Joachim Kretschmer, *Das Fahrlässigkeitsdelikt*, 2000 JURA 267, 269; Rudolf Rengier, Strafrecht Allgemeiner Teil 539 para. 7 (12th ed. 2020); Susanne Beck, *Achtung: Fahrlässiger Umgang mit der Fahrlässigkeit! – Teil 1*, 2009 Juristische Arbeitsblätter [JA] 111, 112; Johannes T. Wessels, Strafrecht Allgemeiner Teil 403 para. 1101 (50th ed. 2020).

[20]Hans Kudlich, Beck'scher Online-Kommentar StGB § 15 para. 42 (Bernd von Heintschel-Heinegg ed., 50th ed. 2021); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947).

[21]Kudlich, *supra* note 20, at para. 39.

[22]Waffengesetz [WaffG] [Weapons Act], Oct. 11, 2002, BGBl I at 3970, last amended by Gesetz [G], Nov. 20, 2019, BGBl I at 1626 (Ger.), https://www.gesetze-im-internet.de/englisch_waffg/index.html.

[23]Atomgesetz [AtomG] [Act on the Peaceful Utilization of Nuclear Energy and the Protection against its Hazards], July 15, 1985, BGBl I at 1565, last amended by Gesetz [G], Dec. 12, 2019, BGBl I at 2510 (Ger.).

[24]*Supra* note 5. In the course of the federalism reform in 2006, all federal states (*Bundesländer*) passed their own law enforcement acts, so that a decision is to be made on the basis of federal state law and not on the basis of the StVollzG.

[25]"*a.F.*" (*alte Fassung*) denotes a previous version of a statue. Meanwhile, the provisions applied in the present case have been amended. *See* part G. Nevertheless, pursuant to the ban on retroactivity (*Rückwirkungsverbot*) stipulated in Article 103 Absatz 2 of the Basic Law (*Grundgesetz*)—Germany's constitution—and identical in § 1 StGB, the LG Limburg and the BGH had to decide on the legal situation at the date of the crime. *See* Christoph Degenhart, Grundgesetz Art. 103 para. 71 (Michael Sachs ed., 9th ed. 2021).

[26]"A prisoner shall be committed to an open prison if he meets the special requirements for such treatment and, in particular, if it is not to be feared that he might evade serving his prison sentence or abuse the opportunities offered by an open institution to commit criminal offences." § 22 II RPLJVollzG *a.F.* "Relaxation may be ordered if it is not to be feared that the prisoner or juvenile prisoner might evade serving his prison sentence or youth custody, or abuse the relaxation of imprisonment to commit criminal offences." § 45 II 1 RPLJVollzG *a.F.*

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responsible.[27] Besides, the foreseeability determines that the success of a criminal act in its specific form and the causal course in its essential features must have been reasonably foreseeable.[28]

D. Decision of the LG Limburg[29]

The aforementioned principles of negligence under criminal law are the basis for understanding the decision of the LG Limburg. The following will elucidate how the LG Limburg appraised the situation and which legal issues arose that lead the Court to render a guilty verdict regarding the corrections officers.

I. Breach of the Duty of Care[30]

The LG Limburg would merely have been able to convict the accused if they had breached their duty of care. This must be affirmed when the predictive decision was indeed wrong and when this can be held against the accused.

1. Incorrect Predictive Decision[31]

The corrections officers decided that *K* would not abuse the privileges granted to him or disobey his conditions during his period of leave, otherwise he would not have been committed to a minimum-security institution in the first place and, furthermore, would certainly not have been granted this specific form of leave. It transpired that during his time outside of prison, *K* did not refrain from breaking the law and therefore the predictive decision was wrong.

2. Incorrect Factual Basis or Incorrect Assessment of Facts

It must not be forgotten that a predictive decision grants the authorities a certain degree of latitude.[32] As it is only an estimation, a predictive decision will always carry the risk of an undesired outcome.[33] However, not every incorrect decision results in an action which runs contrary to the duty of care. An incorrect predictive decision can only constitute a breach of duty if a risk of abuse has been refuted on the basis of an incomplete yet relevant factual basis or on the basis of an apparently incorrect assessment of the established facts.[34] In other words, it has to be determined whether facts that would have, or at least should have, justified the concerns that the prisoner would abuse his position to commit an offense were indeed recognizable.[35] In this respect, it is necessary to differentiate between the two accused throughout this analysis as the defendant

[27]Gabriele Kett-Straub & Franz Streng, Strafvollzugsrecht 134 (1st ed. 2016); Klaus Laubenthal, Strafvollzugsgesetze 142 para. 348 (Klaus Laubenthal & Nina Nestler & Frank Neubacher & Torsten Verrel, 12th ed. 2015).

[28]Sternberg-Lieben & Schuster, *supra* note 19, at para. 180.

[29]Judgment of June 7, 2018, *supra* note 1.

[30]Judgment of June 7, 2018, *supra* note 1, at 158–84.

[31]Judgment of June 7, 2018, *supra* note 1, at 58-161.

[32]Christian Hufen, *Ermessen und unbestimmter Rechtsbegriff*, 5/2010 Zeitschrift für das juristische Studium [ZJS] 603, 606; Franz-Joseph Peine & Torsten Siegel, Allgemeines Verwaltungsrecht 67, para. 203 (13th ed. 2020).

[33]Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 25, 2012, 2013 Neue Zeitschrift für Strafrecht [NStZ] 225, 226; 1999 NStZ 51 (52); Judgment of Nov. 26, 2019, *supra* note 8.

[34] Sternberg-Lieben & Schuster, *supra* note 19, at para. 229.

[35]Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 22, 1981, 1982 Neue Juristische Wochenschrift [NJW] 1057, 1059; Helmut Pollähne, Remark, *Remark Regarding StA Paderborn Jan. 30, 1997*, 1999 Neue Zeitschrift für Strafrecht [NStZ] 53, 54.; Kett-Straub & Streng, *supra* note 27; Laubenthal, *supra* note 27, at 349, para. 142.

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D was the person who transferred *K* into the minimum-security institution and *W* was the person who granted the specific day release during which *K* committed the crime.

1.1 Breach of Duty by the Defendant D[36]

In the LG Limburg's view, it was unambiguous that there was a high probability of *K* relapsing yet again. The lack of willingness to adhere to rules can be deduced from his numerous entries in the Federal Central Criminal Register which demonstrated his numerous previous convictions and highlighted the remarkably short periods of time between the commission of these offenses. *K* obviously had no compunction whatsoever regarding new violations of the law and whenever there had been an incentive, *K* had been unable to resist. Previously, he had already become recidivous whilst on parole, which demonstrates that even with his freedom at stake, he had been unable to resist breaking the law and had already breached previous relaxed terms of imprisonment whilst being held in a minimum-security institution. Indications that he would behave otherwise were practically nonexistent and the LG Limburg referred to him as an incorrigible delinquent with a lack of control over his impulsive behavior who constituted a public danger.

Furthermore, it became apparent that driving without a license was common practice for *K*. His inhibition threshold had always been so low that he even drove to work—a distance of five kilometers—without a license. According to the Federal Central Criminal Register, driving without a license was not *K's* only point of contact with the law. The broad spectrum of offenses was indicative of his high-risk potential. In 1993, *K* was, *inter alia*, convicted of driving without a license pursuant to Section 21 I StVG; of illegally leaving the scene of an accident pursuant to Section 142 StGB; of endangering road traffic pursuant to Section 315c StGB; and three counts of negligent bodily harm pursuant to Section 229 StGB. All this would unquestionably support the presumption of him behaving no differently in the future. *K* had also been convicted of drunk driving. This illustrates once more his inability to display roadworthy behavior. Even though earlier offenses need to be considered to a far lesser extent, *K*'s previous behavior shows that the latest incident was not a momentary lapse. *K's* long criminal career left very little leeway to draw any inferences other than that he would commit such criminal offenses again and that this proclivity is deeply ingrained in his personality.

In addition to this, one must bear in mind that he had already committed an offense—criminal damage (*Sachbeschädigung*) pursuant to Section 303 StGB—while serving a sentence in a minimum-security institution. In this case, *K* was committed to a minimumsecurity institution under the strict condition that he would not drink alcohol and would not drive a vehicle. There was no indication that these instructions would achieve the desired effect that a statutory criminal proscription did not.

The LG Limburg stated that the arguments raised by the defense in support of the decision to commit *K* to an open facility were weak and rather illogical. The reason for committing *K* into the minimum-security institution was due to the fact that he had acknowledged and accepted his guilt and incorrect behavior. However, this runs counter to the situation as it really was, as *K* emphasized that he did not consider himself to be a criminal and displayed a notable lack of contrition regarding any wrongdoing.

Another element of the corrections officer's decision was that *K* had been in a stable relationship with his wife. However, they had been in a relationship since 2004 and had married in 2008 but that had not kept him from committing twenty-nine offenses. As such, this argument was taken *ad absurdum*. The statement that unemployment was one of the grounds for his recidivism was incongruous with the fact that he had been employed the last time he committed a crime.

[36]Judgment of June 7, 2018, *supra* note 1, at 161–78.

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The statement from the corrections officer that this particular offense was not a danger to the public was evidently false. *K* had already been convicted of dangerous interference with road traffic pursuant to Section 315b StGB and of endangering road traffic pursuant to Section 315c StGB. This provision is located in Chapter 28 of the StGB under the heading "Offenses constituting public danger" (*gemeingefährliche Straftaten*). The argument that the offense was merely driving without a license and nothing more severe was absurd as neither Section 22 II *a.F.* RPLJVollzG nor Section 45 II 1 *a.F.* RPLJVollzG differentiate between the severity of offenses.

It was for these reasons that the LG Limburg decided that *D* had dismissed the risk of abuse on the basis of an incorrect assessment of the established facts and, as such, the Court affirmed a breach of the duty of care. In addition to this, the LG Limburg held that the risk of abuse had also been dismissed on the basis of a relevant incomplete factual basis. The documents at *D*'s disposal contained a note written by the person who had interviewed *K* when he came into the prison. The note stated that a risk of abuse pursuant to Section 22 II RPLJVollzG *a.F.* and Section 45 II 1 RPLJVollzG *a.F.* existed and the interviewer expressed a strong preference for keeping *K* in a closed correctional facility. *D* failed to take this note into account and, in addition, failed to examine the report compiled by *K*'s social worker. If she had done so, *D* would have noticed errors, contradictions, and false statements made by *K* in this report. For example, a number of offenses previously committed by *K* were omitted from the report and only *K*'s traffic offenses were mentioned. Without full disclosure in respect of his criminal past, an incomplete and misleading picture of *K* was painted. Furthermore, the statement from *K*'s probation officer that driving without a license is comparable to an addiction for *K* was ignored. If the head of department of the minimumsecurity institution had observed the documents, she would have come to the conclusion that *K*'s transfer was not justifiable.

1.2 Breach of Duty by the Defendant W[37]

With regards to *W*, the LG Limburg held that *W* had breached his duty of care on the grounds that he had denied the risk of abuse on the basis of a relevant incomplete factual basis by not examining *K*'s *Strafvollzugsplan*[38] which had been compiled by *D*. If *W* had complied with his duties and checked the *Strafvollzugsplan,* mistakes and contradictions in the report would have been obvious. *K*'s unlawful committal to the minimum-security institution should have been overturned by *W*.

The LG Limburg stated that *W* was also organizationally at fault. He did not monitor *K* during his leave in any way. To mention one gross error: When *K* returned from his leave he was obliged to hand in his key ring. A car key was attached to it and that did not arouse the prison guards' suspicion in any way, although it was explicitly noted in *K*'s file that he was not allowed to drive a vehicle. Furthermore, nobody ever enquired as to how *K* was spending his leave. Obviously monitoring every inmate for every minute during their time outside of the facility is impossible and runs contrary to the aim and the purpose of such relaxed terms of imprisonment. Were it necessary to monitor the prisoners' every step in such cases, then prisoners may just as well remain incarcerated. However, one must bear in mind that not every inmate is deemed sufficiently fit to be granted this option. If there is a possibility that a prisoner may commit further offenses during their period of leave, they will simply not be granted relaxations. Being granted relaxations is a privilege and not a right and in full consideration of *K*'s criminal history, he was clearly unsuitable for these measures. What was also striking was the lack of any probationary period as *K* was granted relaxations without first having to prove himself. It seemed as if he had been handed relaxation *carte blanche*.

[37]Judgment of June 7, 2018, *supra* note 1, at 178–84.

[38]*Strafvollzugsplan*: A "*Strafvollzugsplan*" is a specific plan for each prisoner in which details and objectives of the stay at the facility are determined—sentence administration plan.

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II. Foreseeability[39]

The question the LG Limburg had to determine was whether the corrections officers could have anticipated this outcome. When determining foreseeability, one needs to look at the course of events and the ultimate result and not at their every detail.[40] Only a completely atypical course of events excludes liability.[41] Entries in the Federal Central Criminal Register demonstrate that *K* had already tried to elude a traffic check through reckless and highly risky driving. The defense's argument that this specific case varied widely from his previous actions was incorrect. On July 15, 2013, *K* had attempted to escape a routine traffic check while under the influence of alcohol, almost hitting a policewoman in the process and causing other cars to swerve to avoid a collision. Thanks to the quick reactions of other road users, nothing serious happened. The fortunate outcome for *K* therefore depended solely upon chance. This incident had already contained a significant risk potential and it did not differ, on the whole, from the fatal incident in the current case. As such, *K*'s erratic and reckless driving cannot be said to constitute an atypical course of events.

IV. Conclusion[42]

Based upon these facts, the LG Limburg convicted *D* and *W* to a nine-month suspended prison sentence for negligent killing in accordance with Section 222 StGB.

E. Decision of the BGH[43]

This incisive and radical ruling by the LG Limburg had the potential to create situations where corrections officers would now err on the side of caution and would refrain from granting relaxed terms of imprisonment due to the justifiable fear of being held criminally liable themselves. The defendants were clearly not satisfied with this judgment and therefore lodged an appeal to the BGH. How and why the BGH came to its decision shall now be elaborated upon.

I. Reasons for D's Acquittal upon Appeal

The BGH declared that the statement made by the LG Limburg which stipulated that the defendants should have, *inter alia*, taken all *K*'s previous convictions into account, had overstepped the mark as, in accordance with the law, *D* was not in fact obliged to do so. *D* had only had the Federal Central Criminal Register and three judgments at his disposal and the specific progression of events did not arise from these documents.

It should also be mentioned that the offense driving without a license is not suitable to form the basis for determining a risk of abuse. Resocialization of the perpetrators predominates when only minor offenses have been committed. For this reason, this series of offenses remains out of consideration although a risk of abuse was obvious. No risk of abuse for sufficiently serious offenses resulted from the files available, or at least it was not unlawfully denied. Therefore, the central question was whether the officer had the duty to obtain further files. Had this been the case, *D* would have violated her duty, and this would also have been relevant, as with all the files there would have been three judgments containing offenses of resisting enforcement officers which would render this specific case foreseeable. If *D* had had access to all the documents and judgments, her decision may well have been different. However, she was neither obliged to procure those documents nor to analyze them and to include them in her decision. For this reason, *D*'s

[39]Judgment of June 7, 2018, *supra* note 1, at 184–87.

[40]Sternberg-Lieben & Schuster, *supra* note 19, at § 15, para. 180; Wessels, *supra* note 19, at 419, para. 1144.

[41]Bundesgerichtshof [BGH] [Federal Court of Justice] July 10, 1958, 1958 Neue Juristische Wochenschrift [NJW] 1980, 1981; Rengier, *supra* note 19, at 91, para. 62.

[42]Judgment of June 7, 2018, *supra* note 1, at 195.

[43]Judgment of Nov. 26, 2019, *supra* note 8.

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predictive decision did not run counter to her duty. Her decision lay within her scope of discretion and was *ex ante* professionally and legally reasonable. Furthermore, the LG Limburg erred in failing to consider *D*'s margin of discretion and, in fact, it replaced *D's* decision with its own. Therefore, the duty of care had not been breached and, consequently, there was no negligent behavior. The BGH acquitted *D* in accordance with Section 354 I StPO[44]—successful appeal on points of law.

II. Reasons for W's Acquittal upon Appeal

With regards to *W*, the BGH declared that it was irrelevant whether *W* had acted contrary to his duty by not examining the *Strafvollzugsplan* and by failing to observe *K* during his leave. In order to be held criminally liable, the fatal collision must have been foreseeable. The course of events which led to the fatal accident was too complex and, therefore, could not have been anticipated. Furthermore, the BGH declared *K*'s conduct as being utterly unreasonable ("*gänzlich vernunftwidrig*"[45]). The collision was the result of an accumulation of unusual circumstances: *K* stole a vehicle and attached false license plates to it which is why he was subjected to the police check which he tried to evade. As a consequence of his failure to stop, he was followed by the police officers, whereby he consciously drove on the wrong side of the road which is when the collision occurred. In an overall appraisal of all the circumstances, this course of events was completely atypical and, as such, not foreseeable. The BGH also acquitted *W* in accordance with Section 354 I StPO.

F. Critical Evaluation

These judgments have created enormous ripples. It was the first time that corrections officers had been accused of a criminal offense on the basis of an offense committed by a detainee during a period of short leave. Experts were afraid of an ensuing chilling effect on any type of relaxed terms of imprisonment due to a lack of legal certainty on the part of corrections officers.[46] The signal from the BGH was clear and the relief from within the prison ranks was palpable.[47] Resocialization as a constitutional right must be defended and the imminent risk of the failed enforcement of parole measures must, on the balance of interests, be borne by society.

Yet, similar cases have only taken place in the area of forensic commitment (*Maßregelvollzug*[48]).[49] The BGH is now applying the standards elaborated in several decisions over the past decades[50] one-on-one to incorrect predictive decisions rendered in correctional institutions.[51] This will ensure legal certainty and transparency for correctional staff.

[44]Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, BGBl I at 1074, 2003, last amended by Gesetz [G], Apr. 22, 2020, BGBl I at 840 (Ger.), https://www.gesetze-im-internet.de/englisch_stpo.

[45]Judgment of Nov. 26, 2019, *supra* note 8, at para. 55.

[46]*See, e.g.,* Christian Rath, *BGH rettet den offenen Vollzug*, TAZ (Nov. 26, 2019), https://taz.de/Urteil-des-Bundesgerichtshofs/!5644515; *Freisprüche für Vollzugsbeamten gefordert*, Der Spiegel (Sept. 25, 2019), https://www.spiegel.de/panorama/justiz/todesfahrt-eineshaeftlings-bgh-fordert-freispruch-fuer-vollzugsbeamte-a-1288584.html; Marc Arnold, "*Das Aus des offenen Vollzuges*", Legal Tribune Online (June 29, 2018), https://www.lto.de/recht/hintergruende/h/lg-limburg-urteil-jva-mitarbeiter-fahrlaessige-toetung-offener-vollzug-aus.

[47]Kaspar, *supra* note 19, at 960.

[48]Mentally ill or addicted offenders may be placed in detention facilities to cure or care for their conditions. Gerhard Van Gemmeren, Münchner Kommentar zum Strafgesetzbuch II § 63 para. 1 (Wolfang Joecks & Klaus Miebach eds., 4th ed. 2020).

[49]*See, e.g.,* Staatsanwaltschaft Paderborn [StA Paderborn] [Prosecution Paderborn] Jan. 30, 1997, 1999 Neue Zeitschrift für Strafrecht [NStZ] 51, 52.

[50]*See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 11, 2003, 2004 Neue Juristische Wochenschrift [NJW] 237, 239 with further references.

[51]Kristina Peters, Remark, *Remark regarding Judgment of Nov. 26, 2019*, 2020 Neue Juristische Wochenschau [NJW] 2128.

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As far as the BGH makes it clear on this point, such clarity is lacking elsewhere. One basic problem of the case is the very limited factual basis on which *D* had to decide. Only the Federal Central Criminal Register and the recent judgments had been available to *D*. Both had shown a clear risk of abuse and a propensity merely for the crime of driving without a license — Section 21 I StVG—but not for further offenses. As in the case of petty criminality—in particular minor traffic offenses—the risk of abuse is predominated by the right to rehabilitation, *D*'s decision was lawful and within her margin of discretion. Unfortunately, the BGH does not elucidate whether this privileging of petty criminals should also apply if they have already abused the trust placed in them several times before, in other words whether one can forfeit rehabilitation with, for example, multiple relapses and breaches of probation. Indeed, there may be a case for denying prisoners privileges precisely when they have shown to violate them to a considerable extent.

Besides, another issue revolves around whether *D* was obliged to carry out further investigations, in other words whether the decision was based upon an incomplete yet relevant factual basis. The question is whether *D* should have researched the underlying facts of two judgments from 1993[52] and 1999[53], which were not apparent from the Federal Central Criminal Register. The Federal Central Criminal Register contained *inter alia* only the penalty imposed and the legal provisions applied, but not the specific circumstances. As the facts of the two judgments from 1993 and 1999 coincided with the facts of the most recent verdict—in all cases *K* fled from police checks—a positive prognosis such as that rendered by *D* would have likely been unjustifiably wrong and thus outside her margin of discretion. Resisting enforcement officers— Section 113 I StGB—and endangering road traffic— Section 315c I StGB—outweighs in its severity, together with the threatened legal interest, the right to rehabilitation. While the LG Limburg affirmed the duty to investigate, the BGH curtly rejected such a duty by stating that there were no particular indications that would have required a further clarification of the facts. Admittedly, the BGH referred to a thirty-year-old ruling which generally established that higher requirements are to be imposed on a duty of care if "exceptional circumstances [exist] which noticeably increase a risk"[54]. However, the BGH did not decide what the scope of these exceptional circumstances was. It could have defined the cornerstones of future predictive decisions at this very point.[55] Contrary to the BGH's view, it is not obvious that *D*'s duty to investigate did not persist. In particular, as *K*'s actions did not concern a basic form of driving without a license—there were countless respective previous convictions, in which other offenses were almost always included—this issue should have been discussed in more detail.

In addition, the BGH remains short on the issue of whether *W* had breached his specific obligation of monitoring the prohibition of not driving a vehicle. The BGH is content with the lack of foreseeability in the case of *W*, yet it remains silent with regard to an objective breach of the duty of care, although at least the BGH established the principle that any prohibitions issued are to be checked for compliance on a sample basis. The BGH reifies this by stating that the frequency, nature and extent of such checks are subject to the same margin of discretion as applied in the case of a transfer to a minimum-security institution. This concretization by the BGH is laudable. Unfortunately, the BGH refrained from elaborating upon these principles in more detail and from applying these standards to the case stating "no further elaboration is required"[56]—just as it did when discussing the duty to further investigate facts of previous judgments. This gives rise to the suspicion that *W*'s evident failure to recognize that *K* drove a car daily in blatant violation of

[52]Amtsgericht L. [AG L.] [District Court L.], Case No. Ds 330 Js 29029/92 (Mar. 08, 1993).

[53]Amtsgericht A. [AG A.] [District Court A.], Case No. Ls 330 Js 34923/98 (Apr. 19, 1999).

[54]Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 25, 1990, Neue Zeitschrift für Strafrecht [NStZ] 31 (1991).

[55]*See* Anja Schiemann, Remark, *Remark regarding Judgment of Nov. 26, 2019*, 2020 Neue Zeitschrift für Strafrecht [NStZ] 411, 416.

[56]Judgment of Nov. 26, 2019, *supra* note 8, at para. 49.

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strict orders not to do so—he handed in his car key at the gate of the minimum-security institution after every period of leave—was in fact, objectively, contrary to a duty of care.[57] Not only were there no spotchecks, but no checks at all. Indications for the need for checks were also evident in relation to the family's residence fifty kilometers away, which was difficult to reach by public transport. Had *W*'s actions not been contrary to a duty of care, the BGH would certainly have seized upon the opportunity and would have established clear limits on the margin of discretion within the granting of prohibitions. Instead, it concealed this under the pretext of reasonable foreseeability,[58] where the BGH made its next error.

What is problematic is that the BGH did not make clear in precise terms what conduct by *K* was completely irrational, why, and to what extent the accumulation of special events rendered foreseeability impossible. It is true that if a third party intervenes the chain of causation set in motion by the offender with conduct that is completely irrational and unreasonable, foreseeability may cease to exist.[59] However, negligence is basically not excluded by the fact that the offender could only foresee the result of the criminal activity, but not the details of the events that led to the result.[60] Therefore, the cases in which foreseeability actually fails due to third party intervention are very limited.[61] Yet, such cases were only based on extremely unusual interventions or courses of events.[62] It is not convincing that the present case should join these cases. From his previous convictions and his previous behavior, it was certainly clear how *K* would behave in the face of a police check.[63] It was not unlikely that *K* would tend to act in bad faith and that he would not shrink from endangering bystanders. Of course, *K* acted irrationally. However, irrational conduct was foreseeable. As a result, the exact course of events—especially driving the wrong way down a road—is not important anymore. It was within the expected and foreseeable irrational behavior of *K*.[64] Therefore, *W* should have been convicted of negligent killing for neglecting his duties to supervise *K*.

G. Conclusion

Ultimately, the decision of the BGH is anything but legally unobjectionable. On many points, the BGH could certainly have taken or even should have taken a different direction. As such, there is a creeping suspicion that the judgment—at least in some points—was merely aimed at an acquittal.

However, these are considerations that no longer occur under the new legal regime in the German federal state of Rhineland-Palatinate. Immediately after the Judgment of June 7, 2018, the Rhineland-Palatinate government leapt to the defense of the institutions officials' and amended both Section 22 and Section 45 RPLJVollzG.[65] Now, it expressly states that conduct during the execution of the prison sentence is particularly decisive in the weighing up of

[57]The same conclusion is reached by Peters, *supra* note 51, at 2129.

[58]Schiemann, *supra* note 54, at 417. *Contra* Kaspar, *supra* note 12, at 962, fully agrees with the BGH on this point.

[59]Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 29, 1952, 1952 Neue Juristische Wochenschrift [NJW] 1184.

[60]Oberlandesgericht Nürnberg [OLG Nürnberg] [Higher Regional Court Nürnberg], May 9, 2006, 2006 Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report [NSTZ-RR] 248.R

[61]Gunnar Duttge, Münchner Kommentar zum Strafgesetzbuch I § 15 para. 109 (Wolfang Joecks & Klaus Miebach eds., 4th ed. 2020).

[62]*See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 29, 1952, 1952 Neue Juristische Wochenschrift [NJW] 1184 (first responder dies as a result of a third party accident while trying to help the drunk accused); Oberlandesgericht Karlsruhe [OLG Karlsruhe] [Higher Regional Court Karlsruhe], June 09, 1976, 1676 Neue Juristische Wochenschrift [NJW], 1853 (death by heart attack due to a minor rear-end collision); Oberlandesgericht Stuttgart, [OLG Stuttgart] [Higher Regional Court Stuttgart], Sept. 18, 1959, 1959 Neue Juristische Wochenschrift [NJW], 2320 (non-fatal heart attack due to a risky passing maneuver).

[63]Peters, *supra* note 51, at 2129.

[64]Schiemann, *supra* note 55, at 417.

[65]It can be assumed that the Rhineland-Palatinate government enacted the amendment as a reaction to the Judgment of June 7, 2018 in order to smooth flared tempers coming from within the ranks of law enforcement authorities. *See* Bill, June 13,

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interests.[66] Therefore, it is clear what is to be regarded as the main indication for relaxed terms of imprisonment entitlements: commendable conduct during the period of imprisonment. The judgments discussed above referred to the former legal position; these days, a comparable case in Rhineland-Palatinate is almost inconceivable.

Even though it appears that all the other fifteen federal states (*Bundesländer*) do not feel compelled to adapt their enforcement laws to the new law in Rhineland-Palatinate, there is still an urgent need to follow suit. From the perspective of correction officers, it is an unsatisfactory situation not to be presented with a clear standard from the ranks of the legislature that outlines the limits to criminal liability when dealing with forecast decisions.[67] In the meantime, one recommendation for action for correction officers can be derived from the case. It is essential to comply with the given formal procedural rules for issuing predictive decisions and to document every consideration and acknowledgment. It is also advisable to clearly indicate that the material drawn upon in the decision-making process has been identified in full, as well as stipulating which aspects have been included in the forecast and to what extent. This is the only way to prove in court that a complete and correctly assessed factual basis was applied.

2018, Landtag Rheinland-Pfalz Drucksache 17/6470, Second Reading, Aug. 23, 2018, Landtag Rheinland-Pfalz Drucksache 17/6470 (Ger.).

[66]"A prisoner shall be committed to an open prison if he meets the special requirements for such treatment and, in particular, if it is not to be feared that he might evade serving his prison sentence or abuse the opportunities offered by an open institution to commit criminal offences. *The aptitude assessment of prisoners is based in particular on their behavior and their development in prison*." § 22 II RPLJVollzG *a.F;* "Relaxation may be ordered if it is not to be feared that the prisoner or juvenile prisoner might evade serving his prison sentence or youth custody, or abuse the relaxation of imprisonment to commit criminal offences. Section 22 *§ 2 sentence 2 shall apply accordingly*." § 45 II 1 RPLJVollzG *a.F.* (Amendment highlighted).

[67]Kaspar, *supra* note 12, at 961 (pointing out that a similar problem exists in the field of forensic commitment, where—in the absence of legislative intervention—a private working group of scientists has drawn up recommendations and minimum standards for forecast medical reports).

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