

Abstract

Rechtswidrigkeitszusammenhang and the Purpose of Rules

Dogmatic Chimeras in the Context of „rechtmäßiges Alternativverhalten“

In German law, the concept of „rechtmäßiges Alternativverhalten“ is used as a defence in order to avoid compensation claims (whether in contract or tort) for harm that would have occurred even if the injuring party had applied due care. The „Cyclist Case“ is an example often used to illustrate the concept: A truck driver disregards the minimum distance required by traffic law while overtaking a cyclist on the road and, thereby, causes an accident. He (accurately) claims, however, that the accident would not have been avoided by maintaining the minimum distance, since the cyclist was not cycling in a straight line (due to the influence of alcohol). The question arises, whether this particular unavailability (by applying due care) can exclude liability.

In older legal literature this question is answered by the doctrine of the „Rechtswidrigkeitszusammenhang“. According to this doctrine, which is conceptually rooted in older court decisions, compensatory liability requires a certain connection between the breach of a duty and the harmful incident. This connection does only exist, where honouring a duty would have prevented the harm in the particular case. The underlying idea of that concept is, that the compensatory system of German law is based not only on the purpose of compensation but also on the purpose of prevention, meaning that whenever prevention cannot be achieved in the first place (because the harm was unavoidable even under the application of due care/ by honouring the legal duties), liability cannot be justified. In contrast, some voices of the older legal discussion classified the issue of „rechtmäßiges Alternativverhalten“ as part of the calculation of damages as set out by Sec. 249 of the German Civil Code („BGB“).

Recently, the highest court decisions treat the issue of „rechtmäßiges Alternativverhalten“ as part of the general question of the purpose and range of rules or obligations. „Rechtmäßiges Alternativverhalten“ shall only exclude liability, if the legal duty infringed upon in the particular case is not rendered „sanction-free“ and thereby meaningless. Thus, the purpose of prevention is also used as the basis for this concept. However, it remains unclear how the exclusion of liability may be justified in the first place. Only after a thorough analysis it becomes apparent, that the concept of the recent case law is based on Sec. 249 of the BGB, taking into account hypothetical developments when determining the amount of damages. However, it remains highly case specific, whether or not „rechtmäßiges Alternativverhalten“ can exclude the liability in a particular case.

Neither the concept of the „Rechtswidrigkeitszusammenhang“, nor the concept presented in recent decisions of the highest courts are valid solutions to the issue posed by the legal

phenomenon which is „rechtmäßiges Alternativverhalten“. Only the unrestricted, not case specific, consideration of hypothetical developments under the application of due care in a particular case when determining the amount of damages under Sec. 249 of the BGB is convincing. When analysing the legal system with regard to the concepts of liability and compensation, the purpose of prevention, which has been accurately determined in older legal literature, points clearly towards an unrestricted relief from liability, where „rechtmäßiges Alternativverhalten“ would have occurred, i.e. the harm could not have been avoided under due care.