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The evaluation of the behaviour of the injured party in respect of unintentional criminal offences occurring in connection with the application of technological achievements

by

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In order to clarify the role of the injured party, the author puts the following questions in the first part of his study:

Is it practicable at all to speak of the consent of the injured party to the act, and if so, under what circumstances; when is social dangerousness excluded by the consent of the injured party. Next, the author outlines the Hungarian views on these problems that may be considered as generally accepted. These, within the field of negligence, comment only on sports activities. As to the field of deviations connected to traffic, representing the overwhelming majority of the cases of negligence, earlier it was not discussed in the Hungarian special literature at all.

The second part of the study deals with the interrelations which should be taken into consideration when judging the role of the injured party from the aspect of criminal law. Such are: the unexpected development of situations, their rapid changeability, and the high degree of instability of the balance of these situations. Accordingly, the system in question is stable only relatively and for a short time. In this system, it is the injured party beside the perpetrator who is in a position to do the most for preserving the stability of the situations. In the author's opinion it is precisely for this reason that the injured party is also obligated to do everything within his power to prevent that an antisocial (unlawful) act should take place. Following this, the views related to the consent of the injured party are reviewed, the possibilities of the exclusion of unlawfulness included. The problem whether the consent of the injured party beyond the act itself, may also embrace the result, is also dealt with.

The third part contains the summary of the author's own views. Thus, criminalists should consider only the behaviour, disregarding the psychological relation to the act. The behaviour of the injured party forms part of the situation, irrespective of his will. Precisely for this reason, what should be investigated is whether the injured party had an actual chance to do something in order to prevent the occurrence of an undesirable consequence. The only point to be analyzed in connection with an actual case is whether some kind of consequence would have occurred if the injured party acted in conformity with the legal and other social requirements, and what would have been the nature of the occurred consequence. Accordingly, the existence or absence of the subjective consent of the injured party is irrelevant in respect of his role under the aspects of criminal law.

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I

As a result of the fruitful development of criminology, criminal law, and their auxiliary disciplines over the last decade, the investigation of the role of the injured party, beside that of the perpetrator, came also to the foreground of interest within the increasingly many-sided research of criminal etiology. The respective analytical works presented numerous new findings mainly in the sphere of criminology: however, even their short survey would exceed the frames set for the present paper.

The achievements of the research work referred to above contain a great deal of novelties of importance, mainly in connection with the relationship between the perpetrator and the injured party, the clarification of some aspects of the personality of the injured party, and this latter's role in the mechanism of criminal acts. In possession of the knowledge collected so far, it seems to be advisable, beyond any doubt, for scholars engaged in criminal law to re-consider or modify and complete, respectively, the statements on the role of the injured party in a criminal act, or the views regarded as predominant. The following comments should contribute to the study of unintentional criminal offences committed in the course of the application of the achievements of technology,[1] which represent a special group of criminal acts.

When analysing the role of the injured party, it is important to make clear the psychical relations between the injured party and the perpetrator or the act committed against him or his interests. Without exploring this relationship, the demonstration of a full causative mechanism can be hardly imagined. Evidently, consent to the offence represents an extreme case of the role of the injured party. It is for this reason that the question whether the consent of the injured party can be mentioned at all, and if so, under what circumstances, has been raised repeatedly in the relevant literature. Another point is added to the one mentioned above; when is relevant the consent of the injured party for the judgment of the perpetrator's act; in other words, when is excluded the act's dangerousness to society on account of the consent of the injured party. According to the view that may be regarded as leading in Hungary,[2] to answer these questions depends on the following general conditions should be considered:

— whether the consent was given by the injured party himself, before or during the perpetration of the act;

[1] The concept of the group of technological achievements is understood to comprise the results of scientific-technological development, e.g. transports, plant machinery, household machines, chemicals, electric current. In the course of their application accidents or criminal acts occur, for various reasons. In order to avoid a too complicated wording, the criminal acts concerned, committed by negligence, will be called as criminal acts of technological nature, and the term "technological negligence" will be applied to the behaviour of the perpetrators.

[2] Cf. BÉKÉS—BODGÁL—GYÖRGYI—KÁROLY—MOLNÁR—PINTÉR—SZŰK: *Büntetőjog. Általános rész, I. kötet.* (Criminal Law. General Part, Volume I.) Tankönyvkiadó, Budapest, 1973, pp. 182—183.

— whether the injured party is in possession of an adequate ability of judgment;

— whether the manifestation of the injured party's will was voluntary, serious, and unambiguous;

— whether the injured party was able to exercise his right to or not to consent without restrictions.

In case of the absence of any of the conditions enumerated above, the examination of the dangerousness of the act and the perpetrator to society cannot be omitted from the outset.

Two cases are mentioned in the university textbook referred to above, with a special emphasis, which constitute criminal offences even if the consent or, the more, the explicit demand of the injured party are undisputed:

— killing upon the demand of the injured party;

— assistance to a suicide.

On account of the high degree of the dangerousness of these acts and their perpetrators to society, both the Penal Code and the theoretical expoundings related to it, concentrate their attention to intentional offences. Basically, this attention seems to be fully justified, and this view is clearly demonstrated also in the theoretical views mentioned in the preceding.

As to the consent of the injured party in the cases of acts by negligence resulting in the injury to, or endangerment of life, bodily integrity, or health, committed more and more frequently, the discipline of criminal law has more or less failed to take a position.

Let us turn now to the points of support, giving guidance for shaping appropriate views.

First, the university textbook referred to above should be cited again. According to it, "the practice of sports activities may not involve, naturally, any danger to society. It is a well-known fact that the participants in combat-sports take the risk of serious injuries to their bodily integrity by their participation in a competition or a training. These injuries frequently amount to a grievous bodily harm. From the point of view of criminal law, the acts in question do not represent any danger to society, i.e. they are not unlawful, except for the case if a sportsman infringes the rules intentionally and with the purpose of endangering the bodily integrity of his opponent. In other cases the act is not punishable, on account of the absence of the dangerousness to society."

The summary of the conception may be that an injury to, or endangerment of, life, bodily integrity or health in the sphere of sports activity, where voluntary risk-taking is predominant, is only antisocial, i. e. dangerous to society if the act in question was not only intentional but purposive as well. In the case of an endangerment or injury, occurring at any degree of negligence, the unlawfulness of the action concerned cannot be established.

Taking into consideration that the views referred to above are dealt with in the following, in connection with the expounding of the author's views, the relevant conclusions from the preceding statements are not drawn here.

Not more than a single paragraph is dedicated to the problem of the injured party's consent in a study by I. Békés[3] in which the complex subject-matter of negligence is dealt with thoroughly. According to his view, the consent of the injured party is relevant only where he is entitled to dispose of goods subject to the rules of law. Consequently, nobody may give up his life. Concerning much disputed problem whether a person may give his consent to the endangerment of his life, I. Békés cites the views of M. Kádár and Gy. Kálmán, who give an affirmative answer to the question, on the condition, however, that the act is not of a nature that could promote aims contrary to the interests of society. I. Békés summarizes his opinion in stating that the unlawfulness of an act is not excluded by the consent of the injured party to the endangerment of his life but it may be applied to the justification of the permissible risk as an auxiliary principle.

It is worth mentioning that the role of the injured party in respect of unlawfulness has not been dealt with by any of the numerous Hungarian publications commenting deviations in the sphere of traffic which constitute the overwhelming majority of the cases of negligence. The problem of the permissible risk (to be dealt with separately in a future publication, owing to the intricate nature of the subject-matter) is examined in the papers concerned exclusively in connection with the perpetrator, and the role of the injured party, possibly excluding unlawfulness, is not even mentioned. This means, besides, practically that the experiences, main specific features, and relationships recognized in the sphere of negligence could not be "translated" to the language of criminal law at the desirable extent so far.

II

In the following I am going to give a summary of some interrelations, revealed principally in the sphere of traffic, that, on the one hand, would be inexpedient to disregarded in the judgment of the role of the injured party from the aspects of criminal law, and that, on the other hand, could be applied to several other fields of technological negligence, with the application of an appropriate analogy.

The unexpected unfolding of situations is one of the characteristic features of criminal acts of technological nature. A situation exists independently from human consciousness but its nature may be considerably influenced by man at the same time. Contrary to some "traditional" spheres of life, a situation used to be characterized in our world dominated by technology by a very rapid changeability and a high rate of instability of its balance. This means, briefly, that any constituting element of a situation or one of them determining its actual substance is subjected to changes which may result in an unbalance of its other elements. Consequently, the system is stable

[3] Békés, I.: *A gondatlanság a büntetőjogban* (Negligence in criminal law.) Közgazdasági és Jogi Könyvkiadó, Budapest, 1974, pp. 315--316.

only relatively and for a short duration. Decomposing the world of technology, taken as a system, to a multitude of distinct situations as subsystems, the following can be stated: in order to prevent the occurrence of mistakes within the system, all members of the series of situation, subjected to very rapid temporary changes, have to reach the relative stability mentioned above. Furthermore, it is also required that a given stable situation should be followed by an other one, also stable, of relative nature and short duration. The absence of this sequence leads to the unbalance of the system, with the consequence of the formation of an instable situation, involving an undesirable result.

In this system it is evident that, apart from the perpetrator, the injured party is the "element" principally capable of preserving the stability of situations. In other words, the injured party, as an active guiding figure of objective reality, has to make his best, together with others, the perpetrator among them, in order to prevent the occurrence of an antisocial, i. e. unlawful act in the world of technology. To comply with this requirement, no altruistic actions are expected by society. The only expectation is that every person should make his best in the interest of the protection of the life, bodily integrity and health of others, and of his own as well. Thus the task of the injured party-to-be is to make his best in order to avoid to become an actual injured party. The relevant expectations will be commented in the following. Now let us turn our attention to traffic, a special field of life, to examine the problem in that respect.

As a result of research work carried out in Hungary, principally in the National Institute for Criminology and Criminalistics, several regularities were revealed, that are of interest for the subject-matter of the present paper. Some of the most important ones are as follows:

a) A considerable proportion of the injured parties, with a rate as high as 50 to 80 per cent, depending on the respective groups, fails to do what could be expected from those participating in traffic, considering the actual conditions. This means that the persons concerned fail to make use of the available objective possibilities of protection; as a consequence of this, they become victims of others' faults, as a matter of fact but not necessarily at all, as passive spectators of the events, as if they were beings without a normal conscience.

b) These are a very high number of injured parties, who, as it is the case also in the field of other crimes, make the first link in the causative chain leading ultimately to injuries to their legal interests. For the sphere in question, the initial point is the will of the concerned parties to enforce their rights in a way that cannot be recognized at all, or only delayed, by the other party obligated to respect the rules of the law in question. In other words, the would-be injured parties behave themselves in a way differing from the average; thus the partners, having in mind the average human behaviour, confronted to surprising and rapidly developing situations, have to face insoluble problems.

c) Investigating the causes of the kinds of behaviour referred to above, further differentiations are needed. In this differentiation, the analysis will not concern whether a behaviour was displayed or not that may be expected from an average man

in respect of traffic but the circumstance whether the individual concerned, i.e. the injured party, was subjectively capable of the behaviour in question. The first aspect is decisive when judging the liability (culpability) of the perpetrator, while the other concerns the establishment of the "responsibility" of the injured party, regarding the motives of his actual conduct. Following the course of the objective action and subjective taking of responsibility, several variants of the two aspects mentioned above have to be analyzed, in order to be in a position to form an opinion of the fact of consent, if it were possible at all to speak of this, then to expound the ways and means of it, and also to prove the fact of consent. Otherwise it would be almost unbelievable even to reveal the role of the injured party and the perpetrator in the process leading to creating a danger to society by the situations in question, and to draw the necessary conclusion for prevention, from both the point of view of criminal law and other aspects.

It seems to be appropriate, however, to give first a brief survey of the views focussed on the very problem of negligence that had the broadest echoe. As it appears, the deepest interest in the problem came from scholars working in the German-speaking world: consequently, their views are commented on principally in the following.

The views of scholars dealing with the role of the injured party in criminal acts committed by negligence almost coincide in that the punishability of the perpetrator may be influenced by the more or less conscious self-endangerment of the injured party. On the other hand, the views differ from each other when the degree of importance of the injured party's role, or behaviour, is examined in respect of the judgment of the act of the perpetrator; besides, the views in question are rather polarized.

According to the views of some scholars, the role of the injured party in the causative mechanism of the criminal offences committed by negligence is not so important at all that its thorough investigation would be justified. According to an other view, diametrically opposed to the preceding one, it occurs frequently that the injuring party and his victim are equally negligent; accordingly, their roles change in a few moments or from one situation to the other. As the partisans of this latter view claim, "it would be a too expensive course to punish a more or less accidental perpetrator with the penal sanction of legal protection, and not to take into consideration the behaviour of the injured party at the same time."[4]

The majority of the authors try to overcome the difficulties by making recourse to the experiences obtained in the field of intentional crimes over several centuries, and utilizing that experience, just as it has been the case with the entire mechanism of the crimes committed by negligence. It may be added, however, that, essentially, they

[4] For details of the confronted views see: FRISCH, P.: *Die Fahrlässigkeit und das Verhalten des Verletzten*. Duncker und Humblot. Berlin, 1973. pp. 11–12. When writing about the various views, the sources cited or referred to in this work are considered first of all.

failed to reach success with this approach. As a consequence, the problem of the injured party's consent in the field of acts committed by negligence is dealt with as a peripherical issue within the complex of the injured party's consent in case of intentional criminal acts. In other words, the majority of the authors project the consent to intentional offences also on the cases of offences by negligence.

The authors who make their position clear in respect of the consent of the injured party, may be classified into five groups on account of their views. Thus, there are authors, according to whom the consent of the injured party

— plays a role from the point of view of legal practice; further,

— it is a cause excluding punishability, unless the perpetrator's unlawful activity, or his failure to act, reached a specified limit of action;

— excludes culpability;

— attenuates punishment;

— is irrelevant; this view was prevailing principally in the earlier literature.

The motives excluding the unlawful qualification of the act of the perpetrator, as mentioned in the second variant of the preceding enumeration, seem to be fairly important.

The basis of the effect of the injured party's consent, excluding unlawfulness, is the general view claiming that legal protection may be only granted to an object of law if it is required by the person concerned. (As it was made clear in the preceding, this view is in sharp contrast to the actual prevailing view in Hungary.)

As regards contemporary jurisprudence in the Federal Republic of Germany, there is a substantial agreement so far as the act of the perpetrator of crimes committed by negligence is considered to be lawful if the injured party granted his consent to the act of the perpetrator or he played a decisive role in the occurrence of the act concerned, respectively. This consent comprises the cases of injuries in connection with sports activity, injuries suffered by participants of dangerous journeys, mainly in case of the use of motor vehicles, and other actions with the consequence of an injury, resulting from the exposure of the injured party to a dangerous activity. This approach is backed by the view according to which in some fields of life or under given conditions the injured party takes a risk, as he has to take into consideration the possibility of a specific consequence.

As regards the problem whether the consent of the injured party should cover also the consequence, beyond the taking place of the action concerned, the opinions of those engaged in the study of these points is by far less harmonious. According to one view, who gives his consent to a dangerous act is bound, at the same time, to take into consideration the concurring consequence of the act as an actual possibility.[5] The representants of this view are of the opinion, however, that the injured parties of sports and motor vehicle accidents and other actions committed by negligence are never "anxious" of taking the risk or be confronted with the later consequence. They argue

[5] Cf. GEERDS, G.: *Einwilligung und Einverständnis des Verletzten.* Jur. Diss., Kiel, 1953.

that the taking of some kind of risk, i.e. participation in a hazardous situation or carrying out the own act in a hazardous way, is not equivalent to a consent to an injury, to death, as the unfavourable outcome of a risk. To support this view, reference is made to sportsmen with their various ways and means of protection against injuries.[6]

It is not without interest for the subject-matter dealt with here to take into consideration a stand taken in connection with a fine distinction made in this field. Some authors call attention to the circumstance that beginners and those with a long routine should be judged by different criteria. As a child, playing with wooden cubes, is unaware of the dangerous character of the game at the beginning (e. g. he will suffer a pain if a cube falls at his foot or a window will break if he throws a cube against it, etc.) so it is rather difficult to consider the conscience of taking a risk as an effective consent in case of a beginner sportsman.[7]

Some authors are of the view that, if a kind of sport is lawful by itself, the injuries concurring with it are lawful as well.[8] The will of the injured party is irrelevant; hence, the blow of a world champion of boxing, causing a heavy injury, is lawful if he fought unknown against a beginner.

Essentially, this is again the point of the permitted limit of risk, not to be dealt with in detail here.

The problem of the relation between the quantitative and qualitative characteristics of safety measures and the behaviour of the injured party raised relatively little attention in the relevant literature so far. According to the view of Frisch,[9] the less a given activity is guarded with safety measures, the more thoroughly the consent of the injured party has to be inspected. With an other approach, it may be said that the more the object the injured party uses is of a novel character, has a dangerous nature in use or shows a technical deficiency, the more his consent may be questioned.

Many scholars attempt to adapt achievements in civil law to the field of criminal law. In particular, the concept of "action at own risk" (handeln auf eigene Gefahr) seemed to be utilizable in an analogous way.

Stoll distinguishes two main forms of action at own risk, i.e. genuine and not genuine cases of action, the first group comprising situations in which the obligation of protection of the perpetrator in respect of other persons is releasable, i.e. it ceases to be binding for the person concerned could have recognized the danger, or he recognized and accepted it evidently.[10] If a dangerous action, acknowledged to have this nature, leads to a specific consequence, the behaviour of the perpetrator is not irresponsible according to his view and, as a result, he is not culpable.[11]

[6] Cf. SCHMIDT, E.: *Schlägermensur und Strafrecht*. Juristenzeitung, 1954, p. 369.
[7] STOLL, H.: *Das Handeln auf eigene Gefahr*. Berlin—Tübingen, 1961, p. 199.
[8] FLUME, C.: *Anmerkung zum Urteil des BGH* vom 14. 3. 1961. Juristenzeitung, 1961, p. 605.
[9] FRISCH: op. cit. p. 30.
[10] STOLL: op. cit. p. 243.
[11] STOLL: op. cit. p. 245.

Essentially, Hirsch takes the same stand, concentrating his arguments to the sphere of traffic, and claiming that no breach of the care required in traffic exists to be considered as a criterion of the definition of the offence if the endangered party deliberately takes the specific risk.[12]

Irrespective of the several differing features, the views outlined above have, however, a common characteristic element i. e. the consent of the injured party as a starting point. With this central concept in mind, we strive for comprising, as Frisch pointed out,[13] all cases as far as possible in which the endangered party exposed himself to danger more or less consciously. This opinion is supported by the logical sequence of thoughts that the effect of the injured party's consent for excluding punishment is essentially identical with renouncement of legal protection. According to the opinion of the author cited above, a renouncement of an interest having a legal protection can be established only in the few cases when the party concerned takes the risk being aware of a possibly unfavourable consequence that may also occur. Nevertheless, the deliberate taking of the risk requires that it should be actually and precisely known by the injured party at the granting of his consent.

It is a substantially different case when the would-be injured party accepts in the objective sense the hazardous situation but is, however, unaware of this fact. According to the view of Frisch, it is improper to restrict of the exclusion of punishability to the scope of the injured party's conscious renouncement of his rights.

The holder of the interest protected by the law (the injured party) may reduce the scope of the obligation of care, set for him by his behaviour, both intentional and unintentional. Accordingly, the actual behaviour of the injured party has to be subjected to investigation instead of his will. In this way numerous difficulties related to the subjective criterion of "consent" may be avoided.[14] He summarizes his opinion saying that the holder of the interest enjoying legal protection cannot expect more protection from anybody else than he displays himself in the protection of his own interests. As a consequence of the rapid changes of actions and situations in contemporary society, characterized by the predominant role of technology, and their momentary transformations, susceptible of taking a dangerous nature, the limits of responsibility under criminal law have to be restricted to a scope narrower than the traditional one. Protection under criminal law is due to only those who do their best to prevent the endangerment of their interests enjoying legal protection, and only to the extent of their actions taken to this end.

The views represented by Geppert and Zipf are not far, essentially, from the conception outlined above.[15] Refusing the view that a deliberate engagement in a

[12] HIRSCH, E.: *Soziale Adäquanz und Unrechtslehre.* Zeitschrift für die gesamte Strafrechtswissenschaft, 74 (1962). pp. 78—96.

[13] FRISCH: op. cit. p. 51.

[14] FRISCH: op. cit. p. 156.

[15] GEPPERT, K.: *Rechtfertigende „Einwilligung" des verletzten Mitfahrers bei Fahrlässigkeitsstraftaten im Straßenverkehr?* Zeitschrift für die gesamte Strafrechtswissenschaft, 83 (1969), p. 948. ZIPF, M.: *Einwilligung und Risikoübernahme im Strafrecht.* Neuwied und Berlin, 1970 p. 83.

hazardous situation means a consent to its consequences. they take the position according to which in certain cases of conscious self-endangerment. the realization of the elements of the offence should not be recognized. As regards, however. the cases of unconscious self-endangerment, the ways of thinking of both authors suffer a break. In Geppert's opinion, the behaviour of the injured party may justify the reduction of the degree of care to be taken into consideration for his case, but this would require the conscience of endangerment of the injured party. Zipf completely disregards the unconscious self-endangerment of the holders of interests enjoying legal protection.

III

In the following part I attempt to summarize my views concerning the complex of problems discussed above. Let us start the singular and proceed towards the general. The first point concerns the criteria of what may be considered as a consent.

According to everyday usage a consent means an approving agreement to a plan or action.

Several conclusions follow logically from this interpretation: the individual concerned approves the action in question, i.e. agrees with it; thus, the concerned individual's decision requires consciousness. All this means for the juridical interpretation, setting out from the meaning of the word "consent", that the consciousness concerns only the action but not its consequence. Accordingly, a consent to the action does not mean a consent to its consequences at the same time. In other words, agreement with the action is not identical with agreement to its possible consequences. Anybody is free to take a risk voluntarily, taking into account possible unfavourable consequences but all these do not mean at all the acceptance of the outcome as a natural consequence.

Still analyzing the subjective aspects, the lawfulness of the endangerment of the life of the would-be injured party should be also commented on briefly. My opinion is that, under contemporary conditions life is inconceivable without the (at least abstract) endangerment of life and bodily integrity. This statement needs no more explication. only a reference should be made to the following. Taking into consideration that nobody is capable to act in a faultless way, all civilized men are actually endangered by faulty actions which, for the individual committing the fault, may be considerably influenced also by unforeseen factors, and the probability of their occurrence may show very considerable differences. Taking into account that the law should be adjusted to the realities of life and not inversely, the view refusing absolutely to recognize the endangerment of life, bodily integrity, and health, has to be regarded as erroneous and unrealistic. Such a conception is completely separated from realities, as the possibility is not excluded at all that an act, relevant from the point of view of criminal law, is caused without the guilt of the perpetrator. In view of the afore-said expoundings, the question as put above ceases to be a question: not only individuals may endanger their own life but they actually do so.

It is an other point, however, whether this endangerment, if intentional, may be admitted and considered as lawful. Putting aside the difficulties of evidence that occur frequently, it seems that only a negative answer may be given. In view of the fact that man is a social being, he is responsible for his actions not only to himself but to his environment as well. The more human, people-centered and community-minded is a given society, the more watertight this statement is.

Taking into consideration the views commented in the preceding, the question turns up as a matter of course whether the judgment of the behaviour of the perpetrator is influenced by the self-endangering act of the injured party, and if so, to what extent.

The concept making dependent the judgment of the act, and thereby the behaviour, of the perpetrator on what the injured party did for the protection of his own interests seems to be diametrically opposed to our concept on law and its aims. With this in view, the concept claiming that the realization of the facts of the case should not be established for acts committed by negligence if the injured party endangered his own life, consciously or unconsciously, has to be refused as antihuman (this qualification may seem as a commonplace but it cannot be replaced by a more adequate one). Similarly, if the would-be injured party takes the injury or its probability deliberately, this must not be regarded as an excuse for the perpetrator. If such a view were accepted, a drunken driver causing the death of his passenger who was aware of the former's drunkenness ought to be acquitted. Similarly, no party of a traffic accident would be punishable as, on account of the causes referred to above, practically all of them consciously or unconsciously take the risk.

Thus this view is alien to the socialist concept of law in a double sense. First, the would-be injured party is not entitled to expose his life to dangers deliberately. Second, the criteria of the obligation of care of the other party cannot be made dependent on the activity of his opposed party, being in possession of his lawful interests.

It seems to be justified to raise the question whether the conception analyzed above can be put into harmony with the prevailing view saying that, for sports, self-endangerment and the endangerment of others is permissible within the limits mentioned in the preceding. For an answer nothing else is needed, in fact, than to make recourse to the Hungarian view referred to above, i.e. the endangerment of life is impermissible also in this case, on the one hand, and all possible has to be made to prevent injuries, on the other hand. Furthermore, intentional endangerment is prohibited also in this particular field.

Essentially, the above expoundings comprise all what was intended to put down here. As a summary, it may be noted that the consent of the injured party—which as it has been pointed out, always supposes consciousness that may be difficult to prove—is irrelevant for the judgment of the act in question. Consequently, it is also irrelevant to make dependent the decision concerning the guilt of the perpetrator on the consent; it cannot be considered even for the establishment of the degree of guilt of the perpetrator. As a matter of fact, its consideration for the judgment of a claim for

damages under civil law is quite an other point, but I do not intend to discuss this problem in this paper.

Could it be stated that the views referred to above were completely mistaken lacking any real basis? If so, it should have been unjustified to make reference to them. Evidently, it is inconceivable that the injured party has no influence whatsoever upon the perpetrator or its act, and if this is accepted, it also has to be taken into consideration. At this point, however, the approach of criminology and that of criminal law get separated from each other. For the criminologist, both the psychological contents of the injured party and its expression and visible reflection, i.e. the behaviour, are of interest. For criminal jurists, however, apart from preventive aspects it is only the objective behaviour influencing the perpetrator's act, that has to be investigated and not the psychological relation to the act.

The behaviour of the injured party forms part of the situation, irrespective of the existence or non-existence of his explicite will or the recognition of the substance of the situation. In the case of criminal acts of technical character, committed by negligence, it is particularly frequent that the would-be injured party agrees or seems to be agreeing to an act restricting his rights and interests, being actively part of it, or doing nothing to prevent the act what could have been expected from him.

Some scientists restrict their investigation to the subjective aspects of the injured party, i.e. taking into consideration only whether he was capable to do something in order to prevent the act or to mitigate its consequences. Essentially, the supporters of this tendency say the same as the representants of the views mentioned and criticized above. In their opinion, the act of the perpetrator has to be judged as less grave if the injured party was in a position to do something to prevent the act; in the opposite case, the judgment should be more severe.

In place of the opinion mentioned above, the appropriate approach is to put the injured party to the level of the average man.[16] This should be the basis of the investigation whether he had a real possibility to prevent the unfavourable consequences of the perpetrator's act.

The situation is similar if the behaviour of the injured party is placed into the chain of acts. Within the field of criminal acts committed by negligence, the would-be injured parties, triggering the causative chain of the criminal act, induce the other party to commit an act causing an injury to their lawful interests by their unexpected and unusual behaviour, differing from the average. (Taking an example from road traffic, this is the case of a pedestrian quickly leaving the group of others standing around the parting line of the road at a marked pedestrian crossing and waiting for the passage of the row of vehicles.) When judging the degree of the dangerousness of the perpetrator's act to society, the various characteristics of the injured party, mainly his psychological traits, cannot be considered, only his actual behaviour. Of course, there are always exceptions, also in this field. Remaining in the sphere of traffic, if a car driver

[16] Cf. Bíró: op. cit. pp. 384. et seq.

recognizes that he meets a person who is evidently incapable to take care of himself, he is not allowed to disregard this circumstance.

Thus it was not by chance that unexpected acts and cases of behaviour differing from the average were mentioned. From the point of view of the act and the perpetrator, it would be incorrect to consider as relevant a behaviour which, taking into account also the subjective characteristics and knowledges of the perpetrator, is actually unexpected and surprising, irrespective of the psychological approach of the injured party to this particular behaviour. Similarly, the existence or non-existence of a preventive behaviour has to be considered as a fact, putting aside the will and the psychological approach of the injured party, if the preventive behaviour could have been manifested objectively. The acquitting of the person taking part in the act concerned and breaking a rule formally or the particularly mild judging of his act may occur in both cases. From the aspect of criminal law, it is completely irrelevant for the judgment why and how the behaviour of the injured party was not in conformity with the environment, whether the act was intentional or unintentional, whether it constituted an infringement of a particular (professional) norm or "only" of the rules of social coexistence; the only essential point is the appearance of the act as it may be perceived by a third person.

I take again an example from the field of traffic to explain my views: Having in view the prevailing concept based on responsibility for consequences, the dangerousness of the perpetrator's act to society should be judged exclusively on the basis of the circumstance whether the driver of a vehicle advancing in opposite direction to an other one the driver of which contravened the rules of overtaking, would have equally died if he had kept engaged his safety belt as prescribed. If so, the driver infringing the rules had to be considered also as guilty but he had to be acquitted if, in case of an engaged belt, the other driver would have not even suffered an injury. The cause why the belt was not used i.e. failure of engagement or deliberate non-observance of the rules is completely irrelevant in this case.

The only point to be examined concerns whether a consequence would have occurred and, if so, of what kind of nature, provided that the injured party would have acted in conformity with the respective expectations, of legal, social, etc. character. If the facts of the case, as put down by the rules of the criminal law, are not established for this case, the guilt of the perpetrator cannot be established either.

As regards the role of the injured party from the point of view of criminal law, the decisive point is not the existence or non-existence of his subjective consent, at least within the sphere of technological negligence. Accordingly, the essential factor has to be searched in the injured party's relation to the customs of behaviour of the majority. The greater is the deviation of this behaviour from the average level, and in an unfavourable sense, the more important its role will be in respect of the act of the perpetrator. Taking an extreme case, such as referred to above with the pedestrian crossing, it is conceivable, in fact, that the perpetrator's act is thereby completely neutralized as an infringement of the rules of the law is only apparent. The behaviour

of the injured party may make it impossible that other persons should obtain knowledge of his rights. With an other approach, this may mean that no injury to the law occurs as the existence of the interest to be protected by the law is only apparent. With all this in view, the probability that, contrary to the first superficial statement, the actual perpetrator is the "injured party" and the role of the injured party is held, in fact, by the "perpetrator", cannot be excluded for any case which seemed "clear" at the first look.

Оценка поведения потерпевшего в кругу преступлений, совершенных по неосторожности в ходе внедрения технических достижений

Ф. Ирк

В интересах выяснения роли потерпевшего, во вступительной части статьи автор ставит следующие вопросы:

Можно ли вообще говорить о согласии потерпевшего и если да, то при каких обстоятельствах? В каком случае согласие потерпевшего исключает общественную опасность? После этого автор излагает соответствующие точки зрения венгерских специалистов. Эти взгляды относятся (в рамках неосторожности) только к спортивной деятельности. В то же время в отношении девиаций в области транспорта, составляющих большую часть неосторожности, этот вопрос в Венгрии отнюдь не был изучен.

Во второй части обнаружены те взаимосвязи, которые целесообразно учесть при уголовно-правовой оценке роли потерпевшего. Таковы, например: быстрое развертывание ситуаций; быстрое изменение ситуаций и высокая лабильность равновесного состояния ситуаций. Значит речь идет о такой системе, которая является стабильной только условно и на краткий срок. В этой системе, наряду с совершителем, потерпевший тот «элемент», который может сделать больше всех для сохранения стабильности ситуаций. Именно поэтому — по мнению автора — потерпевший обязан также сделать все от него зависящее в интересах предупреждения совершения антиобщественного (противоправного) деяния. После этого автор статьи рассматривает основные точки зрения по согласию потерпевшего, включая и возможности исключения противоправности. Автор изучает вопрос о том, что согласие потерпевшего может ли распространяться и на результат.

В третьей части автор суммирует свою позицию. По его мнению криминалист должен оценивать не психическое отношение к деянию, а лишь поведение. Поведение потерпевшего составляет часть ситуации, независимо от его желания. Именно поэтому целесообразно изучать то обстоятельство, что потерпевший имел ли шанс на то, чтобы сделать что-то в интересах устранения неблагоприятного результата. Значит в связи с конкретным делом следует проанализировать лишь то, что в случае, если потерпевший поступает в соответствии с правовыми и общественными требованиями, то данное дело наступило бы и если да, то каков его результат? В отношении роли потерпевшего по уголовному праву субъективное согласие или его отсутствие является нерелевантным.

L'appréciation du comportement de la partie lésée dans le cadre des infractions imprudentes intervenues par suite de l'application des acquisitions techniques

par

F. IRK

Dans l'étude l'auteur pose en premier les questions suivantes dans l'intérêt de l'éclaircissement du rôle de la partie lésée :

Est-ce qu'on peut parler du tout du consentement de la partie lésée, et dans le cas d'une réponse affirmative, dans quelles conditions ? Quand exclut-il le consentement de la partie lésée le caractère dangereux emportant à la société ? Par suite, il expose les lignes de conduite hongroises relatives aux questions et lesquelles peuvent être considérées en tant que déterminantes. Celles-ci — dans le cadre de l'imprudence — se rapportent seulement à l'activité des sports. Cependant dans le cadre des déviations de transports et de communication constituant la majorité prépondérante de l'imprudence on ne traitait absolument pas cette question dans notre pays.

Dans la deuxième partie a lieu la révélation de telles connexités lesquelles sont opportunes à prendre en considération lors de l'appréciation pénale du rôle de la partie lésée. Telles sont : le développement imprévu des situations, la mobilité rapide des situations et l'instabilité de haut degré des états d'équilibre des situations. Il s'agit notamment d'un tel système lequel n'est que relativement et pour une courte durée stable. Dans ce système à part de l'auteur de l'infraction c'est la partie lésée un tel « élément » qui peut faire le mieux à la sauvegarde de la stabilité des situations. Pour cette raison — selon l'avis de l'auteur de cette étude — la partie lésée a l'obligation de faire son mieux d'empêcher l'arrivée de l'acte antisocial (illégal). Par suite il expose les vues principales en connexion avec le consentement de la partie lésée y compris même les possibilités de l'exclusion de l'illégalité. Il s'occupe également de la question à savoir si le consentement de la partie lésée pourrait-il s'étendre — en dehors de l'existence de l'acte — même au résultat.

Dans la troisième partie l'auteur résume son propre point de vue. En conformité avec celui-ci, le criminaliste n'a pas l'obligation d'apprécier le rapport psychogène mais tout simplement le comportement. Le comportement de la partie lésée — à part du fait que cela soit explicitement sa volonté ou non — fait partie de la situation. Pour cette raison il est opportun d'examiner si la partie lésée avait-elle une chance sérieuse à accomplir quelque chose dans l'intérêt de la mise à l'écart du résultat défavorable. Il ne faut tout simplement qu'analyser à propos d'une affaire concrète si l'acte était-il intervenu et dans le cas d'une réponse affirmative quel soit le résultat si la partie lésée déploie une activité en conformité avec les exigences juridiques et avec d'autres exigences sociales. Lors du rôle pénal de la partie lésée le consentement subjectif de celle-ci et le défaut de celui-ci est sans importance.