Illegality and Adequate Causation as Preconditions to Torts Liability under sec. 823 par. 1 of the German Civil Code

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I. Introduction

It is generally accepted that any liability under sec. 823 par. 1 of the German Civil Code (Bürgerliches Gesetzbuch or BGB) requires the tortfeasor to have acted “illegally”, “wrongfully” or “unlawfully” (rechtswidrig)\(^1\) and to compensate the claimant for any and all damages “adequately attributable” (zurechenbar) to the tortfeasor’s relevant illegal action or omission. However, the concepts of Rechtswidrigkeit and Zurechnung, especially as regards their interrelationship, may well be considered the two “black boxes” of tort law not only in Germany but also in Europe and beyond. It is obvious that a scholar trying to shed a

\(^1\) In the following, the term illegality shall be used in a sense so as to encompass the concepts of unlawfulness and wrongfulness.
little light into a black box could not be considered a real scholar at all. Therefore I will at least try to give an outline of the specific problems encountered with regard to the questions posed by my subject.

II. Legal Outset

Let me begin with an examination of the aspect of Rechtswidrigkeit as mentioned in sec. 823 par. 1 BGB. This provision reads

„§ 823 Schadensersatzpflicht
(1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.“

and can be translated into the English language as follows:²

“Section 823. Liability in damages
(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.”

This wording seems to contain two trivialities: Firstly, one can easily derive a definition of Rechtswidrigkeit from the text: An act or omission that has caused a damage to one of the rights or interests protected by sec. 823 par. 1 BGB is considered illegal if it is contrary to law.

Consequently, actions or omissions that are legally permitted do not give rise to tortious liability even if they cause injury to the rights and interests protected by sec. 823 par. 1 BGB. This formulation evokes memories of penal law and of the exceptions of self-defence, self-help, or valid permission by the victim etc. Also, it seems as if the victim or claimant had to prove the facts that underlie the provisions dealing with illegality and that in case such evidence is not at hand, the claim would have to be dismissed in court.

Secondly, the application of sec. 823 par. 1 BGB requires a four step approach.³ Firstly, it has to be determined whether one of the rights or interests named in sec. 823 par. 1 has been injured by the tortfeasor, such determination to include an investigation as to whether the tortfeasor has (adequately) caused the infraction of the rights and interest protected under sec. 823 par. 1

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BGB ("haftungsbegründende Kausalität"). Secondly, the illegality of such injury has to be examined. Thirdly, the tortfeasor is responsible for these actions or omissions and their consequence only if he (or she) has committed a fault by either acting deliberately or at least negligently. Fourthly and finally, it also has to be determined whether the infringement of the rights and interests protected by sec. 823 par. 1 BGB has adequately resulted in the specific damages the recovery of which is claimed by the creditor ("haftungsausfüllende Kausalität").

So far, everything seems to be in good order in the civil law state of Germany. However, German doctrine is still fighting never ending battles on fundamentals and specifics of the concepts of “illegality” as well as of “causation” in tort law – and especially on the interrelation between these two concepts.

III. Illegality as a precondition of liability under sec. 823 par. 1 BGB

A. Fundamentals

The most fundamental scientific debate relates to the question of the object of illegality. The problem can be formulated as a question: Has the illegality of the act or omission that has provoked the violation of the rights and interests protected by sec. 823 par. 1 BGB to be positively established or does the mere existence of a violation of one of the rights and interests mentioned in sec. 823 par. 1 BGB suffice for the statement of illegality?

Mainly in the first half of the last century it was argued that the concept of illegality would have to be considered with regard to the rights and interests mentioned in sec. 823 par. 1 in such manner that the existence of a violation of a protected right or interest would prove the illegality of the malefactor. This "Theorie vom Erfolgsmrecht" is mainly based on the assumption that the rights and interests mentioned in sec. 823 par. 1 BGB are under specific protection by the German legal order and that therefore their violation should be presumed illegal. This approach seems to comply with reality since it takes into account that cases of self-defence or self help or similar justifications are quite rare. Although sec. 823 par. 1 BGB seems to require the claimant to provide

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5 For the following see See Larenz/Canaris, (fn. 3) 364 et seq.; Deutsch, Allgemeines Haftungsrecht (2nd ed. 1996), 153 et seq.; Esse/Weyers, Schuldrecht Vol. II/2 (8th ed. 2000) 171; Wagner, (fn. 3) § 823 BGB no. 4 et seq.
evidence for the facts based on which the verdict of illegality is derived, the *Theorie vom Erfolgsunrecht* is compliant with the law because it does not question the necessity of proving the illegality of the tortuous act or omission but merely uses the method of presumption, leaving it to the debtor to prove the legality of his or her action or omission.

However, the *Theorie vom Erfolgsunrecht* has been nowadays replaced by the “*Theorie vom Verhaltensunrecht*” (illegality deriving from illegal action) that requires the relevant action or omission to be positively illegal. This theory is founded on the observation that the mere causation of damage to another person cannot be considered illegal as such. To illustrate this finding, I will give two examples: Sec. 823 par. 1 BGB protects the life of a person. However, the death of a person is not illegal but quite natural and only is relevant under sec. 823 par. 1 BGB in case it has been inflicted on the victim at an unnatural time and/or by use of unnatural means. Also, driving on a wide street in broad daylight at normal cruising speed does not become an illegal act only because another person commits suicide by suddenly jumping in front of the car from behind a tree where he or she had been purposefully hiding. Finally, it should be evident that persons are to be judged by the acts or omissions they consciously commit as responsible individuals but not by sheer objective results they cannot influence.

The concept of *Verhaltensunrecht* does not, however, restrict German law from judging the legality or illegality of the actions or omissions of a person by looking at the behaviour itself and at the rights and interests protected by German tort law. Both factors may very validly be taken into account. Let me explain this by giving another two examples: A driver who disregards the speed limit of 50 kilometers per hour in an inner city district and who collides with an old lady trying to cross the street due to the fact that he cannot stop the car in time to avoid an collision acts illegally in the sense of sec. 823 par. 1 BGB. In this case, illegality derives from the consideration that under German law speeding is forbidden exactly in order to avoid accidents that could have been prevented by timely braking. Therefore, in this case the illegality is not founded on the killing of another person as such but on the active violation of the law forbidding speeding in inner cities. On the other hand, a car driver also commits an illegal act in the sense of sec. 823 par. 1 BGB when driving at normal speed and – seeing an old lady crossing the street – runs her over at even speed because he considers the accident the “just punishment for obstruction of traffic by the increasing number of overaged people”. Here it is the achievement of an illegal purpose that makes us consider the otherwise harmless action of driving at 50 kilometers per hour illegal.
B. Limitations?

With regard to actions and omissions that are considered illegal because of their results, the concept of illegality obviously needs limitations in order to avoid unacceptable results. For example, not only the driver of a car that has killed a pedestrian has caused the accident but also the production – or rather the distribution – of the vehicle is a necessary precondition to the accident – without the car the driver could not have killed the old lady. Obviously, a liability of the manufacturer seems quite far fetched. The carmaker would most probably argue that he cannot be held liable for an accident involving a functioning vehicle in case the collision has been primarily caused by reckless driving or even a purposeful killing in which the car was abused as a weapon. In this case the collision might not be attributable to the producer because of a lack of causation (haftungsbegründende Kausalität). Additionally, the producer could defend himself (or herself) by invoking that the production of cars is not illegal under German law. This is somewhat astounding since several thousand persons per year are killed on German streets in the course of car accidents and cars therefore definitely are very dangerous machines. Still, cars are generally considered to be useful in the overall context of an industrialized society dependent on mobility and therefore the risks incurred by cars are considered "sozialadäquat" (socially adequate). Therefore it seems that even dangerous activities that effectively increase the danger of violations of protected rights and interests of others might not be illegal under German law. Finally, the producer would argue that he or she did not act negligently when selling the car because at that time it was not foreseeable that the driver would abuse the machine as a weapon or drive recklessly fast.

Having said this, it is obvious that we are in danger of getting entangled in a great mix up of causation, adequacy, illegality and fault. Consequently, it is commonly acknowledged in German doctrine and jurisprudence that in case of the so called “Verkehrssicherungspflichten” (duties of care) such as products liability, the questions of negligence, adequate causation, illegality and fault need to be considered together. In theses cases, illegality does not play a significant role as a precondition or limiting factor of tortious liability any more, because the question of illegality is answered as soon as the other factors determining the liability under sec. 823 have been considered fulfilled or not fulfilled. Furthermore, Gerhard Wagner is right in saying that it is impossible to differentiate between illegality, fault and causation under sec. 823 par. 1 BGB in most cases. Whether the rights or interests protected by sec. 823 par. 1 BGB have been infringed and the question whether any such infringement is due to intent or negligence have to be considered together. If an infringement has been determined after a thorough investigation of the merits of the case,

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6 Wagner (fn. 4) Einleitung zu § 823 BGB no. 24.