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RESEARCH ARTICLE

The Intent Requirement for the Liability Arising from Immorality under German, Swiss and Turkish Laws

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Abstract

Upon the modernization of the Republic of Türkiye, the Swiss Civil Code and the Swiss Code of Obligations were adopted in 1926. The Turkish provision that regulates liability arising from immorality (Turkish Code of Obligations Art 49/2) requires the tortfeasor to act intentionally. However, it is controversial in Swiss doctrine whether the Swiss Code of Obligations Art 41/2 – the source law of Turkish provision – requires *Absicht* (malice/pure intent to cause harm) as a different degree of intent. Even though the Turkish Code of Obligations Art 49/2 uses the Turkish term kasit -intent- (*Vorsatz*), the debate in the Swiss doctrine spread to Turkish doctrine, and there is a disagreement regarding the degree of intent required in the provision. While some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such a provision with a restrictive nature, other authors find indirect intent (*dolus eventualis*) sufficient to invoke said provision. In brief, in this paper, the degree of intent required for the liability arising from immorality under Turkish tort law shall be evaluated in comparison with German and Swiss laws.

Keywords

Malice, Direct intent, Indirect intent, Liability, Immorality

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Introduction

Upon the modernization of the Republic of Türkiye, the Swiss Civil Code and the Swiss Code of Obligations were adopted in 1926. According to Art 49/2 of the Turkish Code of Obligations (TCO), which regulates liability arising from immorality: ‘Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.’ The source text of TCO Art 49/2 is Art 41/2 of the Swiss Code of Obligations (OR) which reads as follows: ‘A person who willfully causes damage to another in an immoral manner is likewise obliged to provide compensation.’ (*Ebenso ist zum Ersatze verpflichtet, wer einem, andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.*) The source law of OR Art 41/2 is the German Civil Code (BGB) which provides in BGB § 826: ‘A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.’ (*Wer in einer gegen die guten Sitten verstoßenden Weise einem, anderen vorsätzlich Schaden zufügt, ist dem, anderen zum Ersatz des Schadens verpflichtet.*)

Whether OR Art 41/2 requires *Absicht* – malice/pure intent to cause harm – as a different degree of intent is a controversial issue within Swiss doctrine. Whereas some authors argue for the *Absicht* (malice) requirement as the provision explicitly mentions *Absicht* and not *Vorsatz*; the prevailing opinion argues that *Vorsatz* – intent – is sufficient for the application of OR Art 41/2. According to the latter view, the provision in OR should be interpreted in accordance with German law (source law of Swiss law) where direct intent (*dolus directus*) (*Vorsatz*), and in fact, indirect intent (*dolus eventualis*) are sufficient for the application of BGB § 826.

Even though TCO uses the Turkish term *kasıt/intent* (*Vorsatz*) in its Art 49/2, the debate in the Swiss doctrine has spread to Turkish doctrine. There is disagreement regarding the degree of intent required in the Turkish provision, and some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such provision with restrictive nature; other authors find indirect intent (*dolus eventualis*) to be sufficient to invoke the immorality provision.

In this paper, the degree of intent required for the liability arising from immorality under Turkish tort law shall be evaluated in comparison with German and Swiss laws. First, liability arising from immorality under Turkish law shall be explained. Second, the concept of intent and its degrees shall be examined. Third and finally, the degree of intent required for the liability arising from immorality under German, Swiss and Turkish laws shall be analyzed and the approaches in the doctrine and the jurisprudence in the respective countries shall be compared.

I. Liability Arising from Immorality under Turkish Law

A. Tort Liability in General under Turkish Law

Pursuant to TCO Art 49, ‘Whoever causes harm to another by a faulty and unlawful act is obliged to compensate for this damage. Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.’ This provision which obliges anyone who causes harm to another by a faulty and unlawful act is to compensate for this damage, is the foremost, and most fundamental rule of Turkish tort law. This is the general tort liability provision and is referred to as fault liability.¹

The constituent elements of fault liability are act, unlawfulness, damage, causal link between the unlawful act, and damage, and finally, fault.² Fault is required for the establishment of the general tort liability regulated in TCO Art 49/1, and whether the fault is at the degree of intent or negligence does not make any difference in terms of establishing the liability. Even if the tortfeasor is at fault to a slight degree, tort liability arises. However, the gravity of the fault is taken into account in determining the amount of compensation and apportioning the responsibility among multiple tortfeasors.

In addition to fault liability, Turkish law recognizes several provisions of strict liability. Strict liability accepted in the TCO can be categorized into three groups: First, equity liability, which refers to the liability of persons who lack the power of discernment in accordance with equity, who otherwise could not have been held liable due to lack of power of discernment, hence, lack of fault. (TCO Art 65) Second, due diligence liability is another category of strict liability where TCO stipulates three provisions: employer’s liability (TCO Art 66), animal keeper’s liability TCO Art 67), and liability of the building owners (TCO Art 69). Third, danger liability refers to strict liability of the enterprises that arise from abnormally dangerous activity. (TCO Art 71)

B. Liability Arising from Immorality in General under Turkish/Swiss Laws

As opposed to the rule that any degree of fault is sufficient for the establishment of general tort liability (TCO Art 49/1) is the immorality provision in TCO Art 49/2. Pursuant to Art 49/2, which regulates liability arising from immorality: ‘Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.’

1 Fikret Eren, *Borçlar Hukuku Genel Hükümler* (26th edn, Yetkin 2021) 594.

2 M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt: II* (14th edn, Vedat 2018) 12.

The immorality required in TCO Art 49/2 refers to the objective immorality prevailing in a particular society.³ The objective morality prevailing in a certain society means the prevailing sense of justice, fairness in a certain time, place in the light of changes, and transformations in the society; therefore, the concept of immorality is subject to social change.⁴ Some of the cases where immorality has already been accepted in Turkish/Swiss law include encouraging others to breach a contract, agreements made during an auction process (e.g. *pactum de non licitando*-agreement not to make an offer at an auction), abuse of the right to file a claim, and refraining from entering into a contract in the absence of a justifiable reason.⁵

Regarding whether awareness of immorality (*das Bewusstsein der Sittenwidrigkeit*) is required for the implementation of TCO Art 49/2, the prevailing view in the doctrine states that awareness of immorality is not required on the grounds that it is always possible for the tortfeasor to have a moral understanding different from the established general moral understanding in the society, and in such case, it is unacceptable for the tortfeasor to escape from responsibility claiming unawareness of immorality.⁶

Under TCO Art 49/2, intent is sought as a constituent element so that immorality constitutes a tort, and thus liability arises. The requirement of intent for the emergence of liability from immorality has the function of eliminating the danger of vast application of liability due to the vague concept of immorality.

II. The Concept of Intent and Its Degrees

A. The Concept of Intent

According to the generally accepted definition, fault means causing damage deliberately, and willfully (intentionally), or by not showing the necessary care

3 Franz Werro, Commentaire romand, *Code des obligations I Art. 1-529 CO* (2nd edn, Helbing and Lichtenhahn 2012) art. 41, n. 99; Walter Fellmann and Andrea Kottmann, *Schweizerisches Haftpflichtrecht* (Stämpfli 2012) N 397-398; Christoph Müller, *CHK- Handkommentar zum Schweizer Privatrecht* (3rd edn, Schulthess 2016) Art 41, N 55; Eren (n 1) 687; Nami Barlas, 'Başkasının Sözleşme İlişkinine Müdahale Sebebiyle Sorumluluk' in Engin Bİ, Baysal B and Aydın Ünver T (ed), *Prof. Dr. Rona Serozan'a Armağan* (Onikilevha 2010) 422; Pınar Çağlayan Aksoy, *Hukuka ve Ahlaka Aykırılık Unsurları Çerçevesinde Salt Malvarlığı Zararlarının Tazmini* (Onikilevha 2016) 350; Kadir Berk Kapancı, *Ahlaka Aykırı Bir Fiille Kasten Verilen Zararın Tazmini* (TBK m. 49 f. II) (Vedat 2016) 14-15; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri* (Yetkin 2021) 460.

4 Reto Bieri, 'Sittenwidrige Schädigung nach Art 41 Abs. 2 OR Einblick in eine 'Mauerblümchen'-Bestimmung des Haftpflichtrechts' (2008) *Aktuelle Juristische Praxis* 551; Derya Ateş, *Borçlar Hukuku Sözleşmelerinde Genel Ahlaka Aykırılık* (Turhan 2007) 87; Çağlayan Aksoy (n 3) 350; Kapancı (n 3) 12, fn 39.

5 Ingeborg Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil* (7th edn, Stämpfli 2016) N 51.05-51.09; Claire Huguenin, *Obligationenrecht- Allgemeiner und Besonderer Teil* (5th edn, Schulthess 2014) N 1960; Müller (n 3) Art 41, N 56; Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26th edn, Turhan 2022) 371; Eren (n 1) 687; Çağlayan Aksoy (n 3) 427.

6 Selim Kaneti, *Haksız Fiilde Hukuka Aykırılık Unsuru* (Kazancı 2007) 175; Meliha Sermin Paksoy, *Sözleşmeyi İhlale Yönelme* (Onikilevha 2018) 133; Barlas (n 3) 428; Çağlayan Aksoy (n 3) 379.

(negligently).⁷ Turkish/Swiss private law doctrine divides the concept of fault into two: intent and negligence. Neither the concepts of fault, intent or negligence is defined in the Turkish, and Swiss Codes of Obligations.

There is no legal definition of fault in the German Civil Code either. In BGB §276, intent and negligence are counted as categories of fault by stating that liability will arise from intent and negligence. Although the concept of intent does not have a legal definition in BGB as in Turkish and Swiss laws, the definitions of direct intent and indirect intent applied in Turkish/Swiss law, which shall be explained below, are also valid in German law.⁸ However, unlike Turkish/Swiss law, negligence is defined in BGB §276 as failure to exercise reasonable care. According to this definition, an objectified fault yardstick is applied in terms of negligence.⁹ In determining fault, the tortfeasor is compared with a hypothetical person under the same external conditions, and the tortfeasor's personal inadequacies do not matter in this evaluation.¹⁰ Although there is no legal definition of negligence neither in Turkish nor in Swiss law, the objective yardstick of fault is applied both in Turkish and Swiss laws.

The task of defining intent is left to the doctrine, and the judiciary by the legislator.¹¹ Intent means that the harmful result is known, and desired by the tortfeasor. In intent, the will of the tortfeasor is directed to a harmful result, and the value protected by law is violated deliberately. Accordingly, the tortfeasor knows that their behavior will cause harm, and wants the harm to occur or acts with the foresight that the result will occur. Hence, intent is a subjective matter of evaluation regarding the tortfeasor.¹²

The awareness of unlawfulness is not required to determine that the tortfeasor has acted with intent.¹³ The decisive factor is that the tortfeasor knowingly, and willingly committed the act that is not approved by the legal order. Even if the tortfeasor does

7 Günhan Gönül Koşar, Haksız Fiil Sorumluluğunda Kusur ve Etkisi (Onikilevha 2020) 298.

8 Basil S. Markesinis and Hannes Unberath, *The German Law of Torts, A Comparative Treatise* (4th edn, Hart 2002) 84.

9 Erwin Deutsch, 'Grundmechanismen der Haftung nach deutschem Recht' in Klein FE (ed), *Colloquium über die Grundlagen und Funktionen des Haftpflichtrechts* (Helbing and Lichtenhahn 1973) 58.

10 Markesinis and Unberath (n 8) 814.

11 Vito Roberto, *Schweizerisches Haftpflichtrecht* (Stämpfli 2002) N 235; Heinrich Honsell, Bernhard Isenring and Martin A. Kessler, *Schweizerisches Haftpflichtrecht* (5th edn, Schulthess 2013) §6, N 30; Schwenzler (n 5) N 22.12; Fellmann and Kottmann (n 3) N 559; Bieri (n 4) 552; Ferit H. Saymen and Halid K, Elbir, *Türk Borçlar Hukuku Umumi Hükümler Birinci Cilt* (İsmail Akgün Matbaası) 1958 393; Haluk Tandoğan, *Türk Mes'uliyet Hukuku (Akit Dışı ve Akdi Mes'uliyet)* (1961 reprinted edn, Vedat 2010) 46; Osman Sabri Güven, 'Kusur Kavramı ve Çeşitleri (I)' (1981) 20 *Yargıtay Dergisi* 585; Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel Hükümler Cilt I* (Fakülteler Matbaası 1976) 479, *Borçlar Hukuku Genel Hükümler Cilt I* (Fakülteler Matbaası 1976) 478; Selahattin Sulhi Tekinay and others, *Tekinay Borçlar Hukuku Genel Hükümler* (7th edn, Filiz 1993) 493; Damla Gürpınar, *Sözleşme Dışı Yanlış Tavsiyede Bulunma, Öğüt veya Bilgi Vermeden Doğan Hukuki Sorumluluk* (Güncel Hukuk 2006) 109; Başak Baysal, *Zarar Görenin Kusuru (Müterafik Kusur)* (Onikilevha 2012) 131; Ali Naim İnan and Özge Yücel, *Borçlar Hukuku Genel Hükümler* (4th edn, Seçkin 2014) 394; Safa Reisoğlu, *Türk Borçlar Hukuku Genel Hükümler* (25th edn, Beta 2014) 172; Oğuzman and Öz (n 2) 55; O. Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Volume II* (2nd edn, Legal 2018) 28; Hüseyin Hatemi and Emre Gökyayla, *Borçlar Hukuku Genel Bölüm* (5th edn, Filiz 2021) 155; Eren (n 1) 659; Kılıçoğlu (n 5) 409.

12 Theo Guhl and others, *Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts* (9th edn, Schulthess 2000) §24 N 39.

13 Karl Olfinger and Emil W. Stark, *Schweizerisches Haftpflichtrecht Erster Bd.: Allgemeiner Teil* (4th edn, Schulthess 1995) §5, N 45; Oğuzman and Öz (n 2) 55-56.

not know about the existence of the rule violated, the intent is accepted if the act that causes the harmful result, which the tortfeasor had voluntarily created, is unlawful.¹⁴ For example, there is intent even if the person does not know that their act constitutes fraud.

B. The Degrees of Intent

1. Direct Intent

In tort liability, intent is divided into two degrees: Direct intent (*dolus directus*), and indirect intent (*dolus eventualis*). Direct intent means that the tortfeasor has acted with the will to create the harmful result.¹⁵ Generally, the concept of intent is defined broadly as such. In direct intent, the tortfeasor wants to cause harm, but the act that causes harm is not necessarily carried out solely for the purpose of causing this harm.¹⁶ Contrary to *Absicht* (malice -pure intent to harm), which is debated whether it is a degree of intent as discussed below, in direct intent, the harmful act itself is not the end, but a means to achieve the goal.¹⁷ For example, there is direct intent in damaging a car in order to retrieve its contents because in order to steal, the thief must first break the window.¹⁸

2. Malice (*Absicht*) as a degree of intent?

If the tortfeasor has carried out their act solely for the sake of achieving the harmful result, then there is malice/*Absicht* (pure intent to harm).¹⁹ Accordingly, malice/*Absicht* (pure intent to harm) means that the main purpose of the act is to harm another person. An example of this is when someone breaks the window of a store because they enjoy causing harm.²⁰

It is debated whether malice (*Absicht*) constitutes a degree of intent in tort law. A group of scholars argue that malice, which is a concept of criminal law, has no place

14 Gönül Koşar (n 7) 183.

15 Karl Oftringer and Emil W. Stark, *Schweizerisches Haftpflichtrecht Zweiter Band: Besonderer Teil - Erster TeilBd.: Verschuldenshaftung, gewöhnliche Kausalhaftungen, Haftung aus Gewässerverschmutzung* (4th edn, Schulthess 1995) §16 N.23; Emil W. Stark, *Ausservertragliches Haftpflichtrecht Skriptum* (2nd edn, Schulthess 1988) N 451; Martin A. Kessler, *Basler Kommentar, Obligationenrecht I: Art. 1-529 OR* (6th edn, Helbing and Lichtenhahn 2015) Art 41, N 45; Heinz Rey and Isabelle Wildhaber, *Ausservertragliches Haftpflichtrecht* (5th edn, Schulthess 2018) 171; Fellmann and Kottmann (n 3) N 561; Mehmet Ayan, *Borçlar Hukuku Genel Hükümler* (11th edn, Seçkin 2016) 273; Saymen and Elbir (n 11) 393; Eren (n 1) 659; Oğuzman and Öz (n 2) 55; Antalya (n 11) 29.

16 Alfred Keller, *Haftpflichtrecht im Privatrecht, Band I* (6th edn, Stämpfli 2002) N 118.

17 Gönül Koşar (n 7) 178.

18 Roland Brehm, *Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41 - 61 OR Schweizerisches Zivilgesetzbuch, Das Obligationenrecht* (4th edn, Stämpfli 2013) Art 41, N 194; Fellmann and Kottmann (n 3) N 561; Keller (n 16) N 118.

19 Oftringer and Stark (n 15) §16, N 23; Keller (n 16) N 118; Huguenin (n 5) N 1976; Brehm (n 18) Art 41, N 193; Rey and Wildhaber (n 15) 171; Fellmann and Kottmann (n 3) N 560; Gönül Koşar (n 7) 179.

20 Brehm (n 18) Art 41, N 193; Rey and Wildhaber (n 15) 171.

in tort law since direct intent is considered sufficient in tort law. Accordingly, where the law requires intent, direct intent is sufficient, and malice/pure intent to harm is not required in tort law. For this reason, there is no need for the concept of malice (*Absicht*) as qualified intent in tort law. In tort law, it is sufficient for the tortfeasor to perform the act knowingly and willingly, which corresponds to direct intent²¹; hence, the terms *Absicht* (malice), and *Vorsatz* (intent) have the same meaning in tort law, as opposed to criminal law.²² To sum up, from the perspective of tort law, causing damage with the pure intent to cause harm/malice corresponds to intent in terms of the categories of fault. However, such malice is a matter to be taken into account against the tortfeasor in determining the amount of compensation.²³

According to another group of scholars, the term *Absicht* in OR Art 41 is a conscious choice of the legislator, and malice will be sought.²⁴ As it shall be discussed further below, these authors, who find direct intent insufficient for the application of TCO Art 49/2-OR Art 41/2, argue that malice (*Absicht*) will be sought.

3. Indirect intent

Indirect intent (*dolus eventualis*) means that the tortfeasor does not directly wish the harmful result of their act, yet does not care about the occurrence of this damage, takes this risk, and consents to it.²⁵ If the tortfeasor leaves it to chance whether the harm will occur or not, then there is indirect intent. Accordingly, in indirect intent, the tortfeasor is aware of the possibility of the harmful result, and risks the possible consequences that may occur even if they do not wish this result.²⁶

To illustrate, setting someone's house on fire at the risk that someone might die in the fire, while actually only wishing to burn the house would be indirect intent.²⁷ Another example of indirect intent would be a driver in a hurry who takes the risk of harming other vehicles and causes harm.²⁸ Similarly, it is considered indirect intent if the manufacturer knows that the cans it produces may poison the consumers, yet still

21 Schwenzer (n 5) N 22.13.

22 Kessler (n 15) Art 41, N 45; Roberto (n 11) N 235; Schwenzer (n 5) N 22; 13; Keller (n 16) N 118; Oftringer and Stark (n 15) §16, N 219-220.

23 Feyzioğlu (n 11) 479.

24 Stephan Fuhrer, 'Computerviren und Haftung' (1991) 87 *Schweizerische Juristen-Zeitung* 132; Brehm (n 18) Art, 41, N 243.

25 Oftringer and Stark (n 15) , §16, N 23; Stark (n 15) N 453; Honsell, Isenring and Kessler (n 11) §6, N 30; Huguenin (n 5) N 1976; Schwenzer (n 5) N 22.06, N 22.12; Kessler (n 15) Art 41, N 45; Rey and Wildhaber (n 15) 172; Fellmann and Kottmann (n 3) N 562; Keller (n 16) N 119; Andreas B. Schwarz, *Borçlar Hukuku Derstleri I. Cilt* (Kardeşler Basımevi 1948) 109; Tandoğan (n 11) 47; Saymen and Elbir (n 11) 394; Feyzioğlu (n 11) 479; Güven (n 11) 585; Tekinay and others (n 11) 493; Eren (n 1) 659; Oğuzman and Öz (n 2) 55; Hatemi and Gökyayla (n 11) 155; Antalya (n 11) 30; İnan and Yücel (n 11) 394; Reisoğlu (n 11) 172; Ayan (n 15) 273; Barlas (n 3) 428; Gürpınar (n 11) 109; Gönül Koşar (n 7) 180.

26 Brehm (n 18) Art 41, N 195.

27 Eren (n 1) 659.

28 Oğuzman and Öz (n 2) 55.

puts these cans on the market.²⁹ It is also considered indirect intent if a pedestrian who has right of way damages a car door with their fist³⁰, or a surgeon who performs an operation even though they know that they do not have the necessary skill, is at fault for the sake of performing said act (*Übernahmeverschulden*), and their fault can be characterized as indirect intent.³¹

III. The Degree of Intent Required for the Liability Arising from Immorality in German Law

Under BGB §826 titled 'Intentional damage contrary to public policy', a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.³² BGB §826 is the source law of OR Art 41/2- TCO Art 49/2.

The behavior of the tortfeasor must objectively constitute a violation of morality. The greatest difficulty in the context of BGB §826 is the concretization of the vague legal concept of morality as in Turkish/Swiss laws.³³ The goal of the German provision is to prevent someone from ignoring generally accepted standards of behavior and these standards of behavior are a minimum that is accepted by everyone and consists of both social-ethical and legal-ethical elements.³⁴ In order to promote legal certainty relating to this provision, the formation of case groups is encouraged. Some case groups from German law to illustrate immorality are misstatements, malicious falsehood, abuse of rights, malicious prosecution, and rejected applications to join business or social clubs.³⁵

In order for this provision to apply, the awareness of immorality is not required.³⁶ It is not required that the tortfeasor was aware of the immorality as it would be an advantage for those who carry out the harmful act yet lack an understanding of morality; rather, it is required that the tortfeasor knew the actual circumstances from which the immorality has arisen.³⁷

In German law, there is no discussion of whether malice (*Absicht*) is necessary for the application of the immorality provision; in fact, indirect intent is considered

29 Tekinay and others (n 11) 493, fn 2.

30 Brehm (n 18) Art 41, N 195.

31 Schwarz (n 25) 113.

32 The unofficial translation of the provision by the Federal Ministry of Justice of Germany can be found here: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3497 Date of Access 24 November 2023.

33 Maximilian Fuchs, *Deliktsrecht* (7th edn, Springer 2009) 146.

34 Fuchs (n 33) 146.

35 Markesinis and Unberath (n 8) 890-892.

36 Christian Förster C, *Beck'sche Online-Kommentare zum BGB* (63th edn, 2022) §826, N 30; Ansgar Staudinger, *Handkommentar zum BGB* (6th edn, Nomos 2009) §826, N 10.

37 Fuchs (n 33) 147.

sufficient for the application of this provision.³⁸ Indirect intent requires a cognitive element, the awareness that the occurrence of damage is within the realm of possibility, and a volunative element, the acceptance of the occurrence of the damage.³⁹ In German law, the debate regarding the element of fault for the applicability of this provision is about how far the element of intent can be stretched. There are decisions where the German Federal Court of Justice stretched the element of intent to include recklessness (*die Leichtfertigkeit*)⁴⁰ and even advertent negligence (*die bewusste Fahrlässigkeit*), especially in cases regarding purely economic losses and the liability of the credit institutions, experts, tax consultants, auditors and informants (*Auskunftsperson*).⁴¹

Regarding the difference between indirect intent and advertent negligence, while both presuppose that the tortfeasor recognizes the occurrence of damage as possible and not entirely remote (cognitive element), they differ with regard to the approval of the occurrence of damage (volunative element). The advertently negligent tortfeasor genuinely trusts the damage will ultimately not happen. However, the tortfeasor with indirect intent accepts the outcome of the act, even if it is inconvenient for them, possibly even reluctantly, knowing that they cannot achieve their goal otherwise.⁴²

In German law, if the probability of damage occurring is high and recognized *ex ante* by the actor at the time, it must be assumed that the person causing the damage acted with recklessness (*die Leichtfertigkeit*), which falls into the category of intent.⁴³ Accordingly, reckless acts are considered to fall in the scope of indirect intent depending on the individual case.⁴⁴ The German Federal Court of Justice assumes an act intentional ‘if the tortfeasor has acted so recklessly that he must have accepted damage’ (*wenn der Schädiger so leichtfertig gehandelt hat, dass er eine Schädigung des anderen Teils in Kauf genommen haben muss*).⁴⁵

It should be underlined that in the German approach, a degree of intent below indirect intent can be used to apply to the immorality provision, which is not accepted either in Turkish or in Swiss law.⁴⁶

38 Hein Kötz and Gerhard Wagner, *Deliktsrecht* (13th edn, Vahlen 2016) N 268; Gerhard Wagner, *Münchener Kommentar zum BGB* (8th edn, C.H.BECK 2020) §826, N 28; Caes van Dam, *European Tort Law* (2nd edn, Oxford 2013) 83; Fuchs (n 33) 147; Förster (n 36) §826, N 32; Staudinger (n 36) §826, N 9; Markesinis and Unberath (n 8) 889;

39 Wagner (n 38) §826, N 28.

40 For *die Leichtfertigkeit* as a form of recklessness, see van Dam (n 38) 83.

41 Wagner (n 38) §826, N 32.

42 Förster (n 36) §826, N 33.

43 Wagner (n 38) §826, N 31.

44 Staudinger (n 36) §826, N 9.

45 Wagner (n 38) §826, N 31. (BGHZ 176, 281 Rn. 46 = NJW 2008, 2245)

46 Ingeborg Schwenzer and Beat Schönenberger, ‘Civil Liability for Purely Economic Loss in Switzerland’, in *XVth International Congress of Comparative Law* (Publications of the Swiss Institute of Comparative Law 1998) 355. The authors note that ‘Courts in Switzerland remain faithful to the wording of this provision and do not apply it in cases of (even gross) negligence.’ For Turkish law, see Barlas (n 3) 423; Çağlayan Aksoy (n 3) 382.

IV. The Degree of Intent Required for the Liability Arising from Immorality in Swiss Law

The provision which regulates immorality liability under Swiss law is OR Art 41/2 and reads as follows: 'A person who wilfully causes damage to another in an immoral manner is likewise obliged to provide compensation.' (*Ebenso ist zum Ersatze verpflichtet, wer einem, andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.*)

It is controversial in Swiss doctrine whether the term *Absicht* in the provision OR Art 41/2 is a conscious choice of the legislator. Some argue that *Absicht* means malice/the tortfeasor's purpose in carrying out the act is harming someone else, while others argue the term *Absicht* is not a conscious choice of the legislator, and the term *Absicht* means/equals to *Vorsatz*, and means intent.

According to a view argued by authors such as Brehm, and Fuhrer, in Swiss doctrine, the term *Absicht* in the provision does not allow for any other interpretation; hence, malice will be sought in the application of OR Art 41/2.⁴⁷ According to these authors, any other degree of intent, direct intent or indirect intent will not suffice for the application of this provision.

According to another opinion, which is also the prevailing opinion, *Absicht*/malice is not required for the application of the immorality provision for several reasons.⁴⁸ First, this is not a conscious choice of the legislator, and *Vorsatz* should be understood from the term *Absicht* in the provision. Second, the term *Vorsatz*/intent, not *Absicht*, is used in the German Civil Code BGB §826, which is referred to as source law in the legislative intent of OR Art 41/2. Third, where the law calls for *Absicht*, intent is sufficient, and malice is not required in tort law. As opposed to criminal law, the terms *Absicht*, and *Vorsatz* have the same meaning in tort law. Fourth, if it is accepted that only malice will be required for the application of the immorality provision, which is rarely applied due to its harsh conditions, then the immorality provision shall become useless. To sum up, '*Absicht*/malice' is not used here in the technical sense as the most severe form of intent.

According to Oftinger and Stark, it can also be deduced from the legislator's preferences in other provisions of the Swiss Code of Obligations that the legislator does not seek *Absicht* technically in OR Art 41/2, and considers any kind of intent sufficient. For example, in OR Art 100/1, and OR Art 248/1, it is accepted that *Absicht* and gross negligence will have the same consequences. Therefore, it cannot be argued that direct, or indirect intent is not included in a case where the term of *Absicht* and gross negligence is together referred to.⁴⁹

47 Brehm (n 18) Art 41, N 243; Fuhrer (n 24) 132.

48 Honsell, Isenring and Kessler (n 11) §7, N 7; Stark (n 15) N 275; Bieri (n 4) 551-552; Kessler (n 15) Art 41, N 42, 45; Roberto (n 11) N 235; Schwenger (n 5) N 22, 13; Keller (n 16) N 118; Huguenin (n 5) N 1959; Werro (n 3) art. 41, n. 100; Arnold F Rusch, 'Scheinvaterregress' in Fankhauser R and others (eds), *Brennpunkt Familienrecht* (Dike 2017) 486.

49 Oftinger and Stark (n 15) §16, N 220.

It is also worth mentioning that the French and Italian versions of the Swiss Code of Obligations refer to the term ‘intentionally’ as opposed to any other term such as ‘maliciously’: the French version uses the term *intentionnellement* and the Italian version uses the term *intenzionalmente*.⁵⁰ Finally, according to the prevailing opinion, which does not require malice to be existent, indirect intent is sufficient for the application of this provision.⁵¹

In brief, whereas some authors argue for the *Absicht* (malice) requirement as the provision explicitly mentions *Absicht* and not *Vorsatz*, others argue that (the prevailing opinion) *Vorsatz* – intent – is sufficient for the application of OR Art 41/2. According to the latter view, the provision in OR should be interpreted in accordance with German law (source law of Swiss law) where direct intent (*dolus directus*) (*Vorsatz*), and in fact, indirect intent (*dolus eventualis*) are sufficient for the application of the immorality provision.

V. The Degree of Intent Required for the Liability Arising from Immorality in Turkish Law

The provision which regulates immorality liability under Turkish law is TCO Art 49/2 and it reads as follows: ‘Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.’ (*Zarar verici fiili yasaklayan bir hukuk kuralı bulunmasa bile, ahlaka aykırı bir fiille başkasına kasten zarar veren de, bu zararı gidermekle yükümlüdür.*)

Even though the Turkish Code of Obligations uses the Turkish term *kasıt* (*Vorsatz*/intent) in its Art 49/2, and not *Absicht*, the debate in the Swiss doctrine has spread to Turkish doctrine. There is a disagreement regarding the degree of intent required in the provision while some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such provision with restrictive nature; other authors find even indirect intent (*dolus eventualis*) sufficient to invoke the immorality provision. Turkish doctrine is so divided on this issue that it is quite difficult to state whether malice or non-malice views constitute the prevailing opinion in the Turkish doctrine. Even though some authors state that the non-malice view supporters form the prevailing opinion,⁵² upon detailed research, we found Turkish doctrine equally divided on this matter. Another reason for the difficulty to claim

50 French version of OR Art 41/2 is as follows: *Celui qui cause intentionnellement un dommage à autrui par des faits contraires aux mœurs est également tenu de le réparer.* Italian version of OR Art 41/2 is as follows: *Parimente chiunque è tenuto a riparare il danno che cagiona intenzionalmente ad altri con atti contrari ai buoni costumi.*

51 Honsell, Isenring and Kessler (n 11) §7, N 8; Fellmann and Kottmann (n 3) N 400; Keller 151; Oftinger and Stark (n 15) 69, N 220; Werro (n 3) art. 41, n. 100.

52 Nalan Kahveci, ‘İnançlı İşlemlerde El ve İşbirliği ile Hareket Kavramı’ (2021) 23 (1) *Dokuz Eylül University Law Faculty Journal* 286; Gümüş (n 3) 461. Kahveci is among non-malice view supporters and Gümüş is among malice view supporters; however, both authors state that non-malice view constitutes the prevailing opinion in Turkish doctrine.

the direction of the prevailing opinion is because some authors do not engage in the malice discussion at all and simply repeat the wording of the law.

According to a view argued in Turkish law, malice (*Absicht*) should be required for the application of the immorality provision for several reasons.⁵³ First, the source law-Swiss law mentions malice (*Absicht*). Turkish doctrine and jurisprudence generally follow the discussions and the jurisprudence in the source law. Second, the supporters of malice refer to the Swiss legislation and assert that the arguments in the Swiss doctrine are valid for Turkish law. Third, this immorality provision is foreseen as an exception and carries the risk of having a vast application due to the relativity of the concept of immorality, and only by accepting the requirement of malice can this provision be implemented in a narrow sense and in a controlled manner. These authors require malice even if this requirement narrows down the application area of the immorality provision.⁵⁴ In Turkish doctrine, while some authors do not mention this discussion at all, they state that the tortfeasor must have acted with the purpose of causing harm without referring to the term malice.⁵⁵

According to another group of scholars, malice is not required and intent (*Vorsatz*) is sufficient for several reasons.⁵⁶ First, the word choice of the Turkish text is intent (*kasıt*) and not malice (*Absicht*). Second, the arguments of the prevailing opinion in Swiss doctrine, which does not require malice, should be supported. Third, the source law of the immorality provision is the German provision BGB §826 and this provision refers to intent (*Vorsatz*) and not malice (*Absicht*). Fourth and finally, Turkish Code of Obligations Art 49/2 does not differentiate between degrees of intent.

In our opinion, malice should not be required for the application of the immorality provision under Turkish law. We cannot agree with the Turkish scholars who uphold the Swiss scholars' view seeking malice based on the use of the term *Absicht* in OR Art 41/2 as there is no use of a term in Turkish law that justifies a similar thinking. In fact, we find the arguments of the non-malice view, which form the prevailing view in Swiss doctrine more legitimate. Moreover, the general tort liability provision OR Art 41/1 regulates that 'Any person who unlawfully causes damage to another, whether willfully or negligently [*sei es mit Absicht, sei es aus Fahrlässigkeit*], is

53 Rona Serozan, *Medeni Hukuk Genel Bölüm Kişiler Hukuku* (8th edn, Vedat 2018) 244; Bilge Öztan and Hatice Tolunay Ozanemre Yayla, 'Yargıtay Hukuk Genel Kurulu'nun 22.3.2017 Tarih 2017/4-1334 Esas ve 2017/545 Karar Sayılı Kararı Üzerine Eleştirel Bir Yaklaşım' (2017) 3 *Ankara Barosu Dergisi* 208; Emel Badur and Gamze Turan Başara, 'Aile Hukukunda Sadakat Yükümlülüğü ve İhlalden Kaynaklanan Manevi Tazminat İstemi' (2016) 65 (1) *Ankara University Law Faculty Journal* 126; Mehmet Erdem and Aslı Makaracı Başak, *Aile Hukuku* (11th edn, Seçkin 2022) 200; Zeynep Şeyma Ceylan, 'Yargıtay Kararları Işığında Zina Sebebiyle Boşanmada Manevi Tazminat İstemi' (2022) 17 (1) *Erciyes Üniversitesi Hukuk Fakültesi Dergisi* 83; Kapanacı (n 3) 31; Gümtüş (n 3) 461.

54 Gümtüş (n 3) 461.

55 Schwarz (n 25) 109; Tandoğan (n 11) 47; Saymen and Elbir (n 11) 394, 413; Kaneti (n 6) 175; Güven (n 11) 587; Tekinay and others (n 11) 493; İnan and Yücel (n 11) 395.

56 Atilla Altop, *Türk, İsviçre ve Alman Hukuklarında Bankaların Verdikleri Banka Bilgilerinden Dolayı Hukuki Sorumlulukları* (Filiz 1996) 101- 102; Oğuzman and Öz (n 2) 66; Barlas (n 3) 425; Çağlayan Aksoy (n 3) 375; Paksoy (n 6) 133; Gürpınar (n 11) 123; Kahveci (n 52) 286.

obliged to provide compensation.⁵⁷ In order to express intent, this provision uses the term *Absicht* and there is no doubt that the term *Absicht* in OR Art 41/1 covers all degrees of intent.⁵⁸ Therefore, we find a different interpretation of the same term in different paragraphs of the same article (OR Art 41/1 and OR Art 41/2) inconsistent.⁵⁹ Furthermore, it is worth noting that malice is not required, and indirect intent is found sufficient without any hesitation under German law for the application of the immorality provision, which is the source law of the Swiss immorality provision, and this approach should be upheld in Turkish law as well. Finally, the requirement of malice in the element of intent would limit the framework of the immorality liability so much that this provision would become non-functional.

However, it should be noted that acting with the intent of harming another person will make this person's behavior immoral anyway. In other words, acting with the intent of harming someone else will qualify the act as immoral.⁶⁰ The proof of acting with the aim of harming someone else will be sufficient to prove both immorality and intent. In this scenario, the discussions in terms of the degree of intent sought in this provision will not have a major impact. It has been emphasized in the doctrine that the aim of harming is at the forefront in the 'overwhelming' majority of cases upon which this provision is based.⁶¹ The effect of this discussion will be seen in cases where the tortfeasor does not act with the aim of harming another, but their act is still immoral.

Another discussion regarding the application of TCO Art 49/2 is whether indirect intent (*dolus eventualis*) will suffice, or whether direct intent (*dolus directus*) will be sought. This issue is controversial in Turkish doctrine. According to a group scholars, indirect intent is not sufficient on the grounds that it will greatly expand the limits of liability arising from immorality.⁶² These authors, who criticize the view that indirect intent is sufficient for TCO Art 49/2 to be applied, draw attention to the ambiguous border between indirect intent and advertent negligence (*die bewusste Fahrlässigkeit*). They argue that it is not possible to make a healthy distinction between the two in practice, and that it would expand the application area of the immorality provision too much, whereas it should be quite limited.⁶³ Another group of scholars argues that since TCO Art 49/2 does not distinguish between the types of intent, the concept of intent required in this provision includes indirect intent as well.⁶⁴ Advertent negligence

57 The unofficial translation of the provision by the Federal Council of Switzerland can be found here: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en Date of Access 24 November 2023.

58 Rey and Wildhaber (n 15) 171.

59 Paksoy (n 6) 131.

60 Ateş (n 4) 191; Oğuzman and Öz (n 2) 66.

61 Kapancı (n 3) 34.

62 Başak Baysal, *Haksız Fiil Hukuku* (Onikilevha 2019) 154.

63 Kapancı (n 3) 32.

64 Oğuzman and Öz (n 2) 66; Barlas (n 3) 429; Altop (n 52) 101- 102; Çağlayan Aksoy (n 3) 375; Paksoy (n 6) 133; Gürpınar

is a term and a level of negligence in criminal law and not in tort law. The tort law understanding and practice differentiates between indirect intent and negligence. As put by Wagner, the distinction between intent and advertent negligence is not entirely impossible. Rather, intent can be determined on the basis of objective circumstances, such as circumstantial and empirical evidence.⁶⁵

When it comes to the position in Turkish jurisprudence, the Turkish Supreme Court of Appeals (*Yargıtay*) requires malice for the application of the immorality provision (TCO Art 49/2). According to the Supreme Court of Appeals Assembly of Civil Chambers, ‘... in a lawsuit, any unlawful behavior, immoral behavior, that ‘solely aims to harm the plaintiff intentionally’⁶⁶ that would lead to compensation under the Code of Obligations Art 41/2⁶⁷ has not been proven.’⁶⁸

In addition to the above, a noteworthy matter is the context of the discussions regarding the element of intent required in the immorality provision in Turkish law. The Turkish immorality provision has become popular in recent years upon the Turkish Supreme Court of Appeals judgments of whether or not a cheated spouse can claim non-pecuniary damages from the third party who participated in the act of adultery with the other spouse. Formerly, the Turkish Supreme Court of Appeals had ruled in favor of these claims. However, Turkish doctrine heavily criticized this line of jurisprudence for different reasons, and then the Supreme Court of Appeals began to reject these claims. Upon contradicting judgments of the civil chambers, the highest authority within the Supreme Court of Appeals, the Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals gathered and ruled on this matter stating that ‘In order for the purpose of willful harm in the sense specified in the law to exist, the third person must have committed the immoral act with the sole intent of harming the spouse of the person they have an affair with. Unless it can be said that the third person who participated in the act of adultery with the married spouse acted with the sole intent of harming the other spouse, this act of the third person shall no longer require compensation according to TCO Art 49/2.’⁶⁹ The Grand General Assembly on the Unification of Judgments has not delved into the discussion of malice as in the doctrine. However, it has explicitly required ‘the sole intent of harming the other spouse’. It is necessary to mention that the judgments ruled by the

(n 11) 123.

65 Wagner (n 38) §826, N 30.

66 Emphasis added by the author.

67 Former Code of Obligations of Türkiye.

68 The Supreme Court of Appeals Assembly of Civil Chambers No E 1997/327 K 1997/765 (1 October 1997). www.lexpera.com.tr Date of Access 24 November 2023. See a similar judgment: The Supreme Court of Appeals 11th Civil Chamber No E 2002/7293 K 2002/11567 (13 December 2002): ‘... in the lawsuit filed by the defendant, any unlawful behavior, immoral behavior, that solely aims to harm the plaintiff intentionally that would lead to compensation under the Code of Obligations Art. 41/2 has not been proven.’ www.lexpera.com.tr Date of Access 24 November 2023.

69 The Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals No E 2017/5 K 2018/7 (6 July 2018).

Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals is binding for the general assemblies, civil law chambers of the Supreme Court, and also for the courts of first instance.⁷⁰ So far, several Regional Court of Appeals judgments have been rendered that require malice, and state explicitly that indirect intent is insufficient for the application of the immorality provision (TCO Art 49/2). It should be noted that all these judgments refer to whether the cheated spouse can claim non-pecuniary damages from the third party with whom the cheating spouse had an affair.⁷¹

Conclusion

The Turkish provision that regulates liability arising from immorality (Turkish Code of Obligations Art 49/2) requires the tortfeasor to act intentionally. It is controversial in Swiss doctrine whether the source law of Turkish provision, Swiss Code of Obligations Art 41/2 requires *Absicht* – malice/pure intent to cause harm – as a different degree of intent. Even though TCO Art 49/2 uses the Turkish term *kasıt* – intent- (*Vorsatz*), the debate in the Swiss doctrine has spread to Turkish doctrine. There is a disagreement regarding the degree of intent required in the provision and some authors state that, in accordance with Swiss law, malice (*Absicht*) should be required for the application of such provision with restrictive nature; other authors find indirect intent (*dolus eventualis*) sufficient to invoke the immorality provision referring to German law upon which the immorality provision is based. Upon a review of the discussions in German, Swiss and Turkish laws, both the immorality provision in the Swiss Code of Obligations (Art 41/2) and in the Turkish Code of Obligations (Art 49/2) should be interpreted in parallel to each other, and malice (*Absicht*) should not be required as the degree of intent to apply to the immorality provision, on the contrary, direct intent (*dolus directus-Vorsatz*), and indirect intent (*dolus eventualis*) should be found sufficient for the application thereof.

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70 Art 45 of the Law on the Supreme Court of Appeals. <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.2797.pdf> Date of Access 24 November 2023.

71 Antalya Regional Court of Appeals 4th Civil Chamber No E 2001/895 K 2001/12714 (21 March 2017); Antalya Regional Court of Appeals 4th Civil Chamber No E 2016/35 K 2016/39 (19 December 2016); Antalya Regional Court of Appeals 4th Civil Chamber No E 2017/310 K 2017/320 (18 April 2017); Antalya Regional Court of Appeals 25th Civil Chamber No E 2020/859 K 2020/1490 (2 September 2020); Konya Regional Court of Appeals 3rd Civil Chamber No E 2019/1456 K 2020/189 (5 February 2020); Konya Regional Court of Appeals 3rd Civil Chamber No E 2020/678 K 2020/783 (24 September 2020); Konya Regional Court of Appeals 4th Civil Chamber No E 2018/186 K 2018/1917 (19 December 2018). www.lexpera.com.tr Date of Access 24 November 2023.

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