

CASE TRANSLATION: SWITZERLAND

Case citation:

PEN 17 16 DIP

Name and level of the court:

**Regionalgericht Emmental-Oberaargau,
Strafabteilung (Regional Court Emmental-
Oberaargau, Criminal Division)**

Date of decision:

30 May 2018

Members of the court:

President Blaser

Lawyer for the prosecutor:

**Sibylle Röthlin (EO 16 3343), Public
Prosecutor's Office of Emmental-
Oberaargau, Dunantstrasse 11, 3400
Burgdorf**

Lawyer for the appellant:

**Geneviève Chapuis Emery, Boulevard de
Pérolles 5, Postfach 264, 1701 Freiburg i.Ü.**

**Switzerland; criminal law; traffic
violation; Autobahn; Tesla motor vehicle
'Traffic-Aware Cruise Control' and
'Autosteer' mode engaged; collision;
driver failed to control vehicle;
Convention on Road Traffic, Vienna;
evidential value of report by Tesla Motors
Switzerland GmbH**

Appellant: M. ___ P. ___, born. ___ 1980, from _____
FR, _____, _____

*Charge: a simple traffic violation and gross traffic
violation*

Grounds for the judgment of 30 November 2017

I. HISTORY OF THE PROCESS

1. Based on an assessment of the various attachments of the cantonal police of Berne on 27 May 2016 (p. 1 f.), the public prosecutor's office at Emmental-Oberaargau issued a summary penalty order against P . ___ M . ___ on 6 July 2016, for a gross traffic violation and a simple violation of the traffic rules, and was issued a conditionally enforceable fine of 20 daily rates of 330 francs, 1,650 francs in liaison buses and 300 francs in penalties (p. 59 et seq.). A formal

opening of an investigation was not carried out in accordance with article 309 (4) Swiss Criminal Procedure Code ("CPC").

2. Geneviève Chapuis Emery, Freiburg i.Ü., informed the public prosecutor that P . ___ M . ___ had commissioned her to safeguard his interests (p. 53) on 23 May 2016.

3. The appellant issued a notice of opposition to the summary penalty order of 6 July 2016 (p. 62).

4. Following the prosecution of the appellant (p. 70 et seq.), and additional inquiries, and inquiries to the cantonal police, the public prosecutor's office issued a new summary penalty order on 12 January 2017 (p. 85 ff). The prosecutor did not change the summary penalty order or the fine, but added to and clarified the description of the facts.

5. The appellant, in turn, objected to the new summary penalty order of 12 January 2017 in due time (p. 91).

6. After the prosecution had upheld its second summary penalty order, the files arrived at the Emmental-Oberaargau Regional Court on 25 January 2017 for the main proceedings (p. 95).

7. The main hearing took place on 30 November 2017 in the Regional Court of Emmental-Oberaargau (p. 105 ff.). The appellant was present in person, assisted by his lawyer. Witness, R . ___ A . ___ was heard. P . ___ M

.___ was declared guilty of gross and multiple simple traffic violation.

8. The convicted person lodged a notice of appeal against the judgment given the same day (p. 140).

II. FACTS AND PROVISIONS

1. Facts

1. On 17 March 2016, a serious traffic accident occurred on the A 1 Autobahn between Kirchberg and Schönbühl (driving in the direction of Bern), in the municipality of Kernenried. P .___ M .___ driving his car made by Tesla, collided with a trailer in front of a construction site, shortly after 10:30.

According to the police report and accident report of 27 May 2016 (p. 1 ff.), M .___ slept more than eight hours and set off with his car in Sursee on 17 March 2016 at 09:52. With a speed of about 100 km/h, he had been in the fast lane of the A1 Autobahn from Kirchberg in the direction of Schönbühl. Because he had used his mobile telephone (sending pictures and messages to his business associate) his attention had been diverted from the road, and he did not notice the presence of the stationary lorry with a signalling trailer, and the vehicles driving ahead. The appellant did not notice the sign, which announced the construction site, together with the associated temporary shift of the lane to the right. The vehicle in front had changed to the normal lane, the appellant, however, had not realized that the fast lane was blocked, and that this was signalled by a stationary lorry with a signalling trailer. As a result, the appellant collided with several road cones, and then collided head-on with the rear of the signalling trailer. As a result, the trailer was pushed against the truck and squeezed together. The vehicle combination had been pushed forward a few meters by the impact. The truck, the trailer and the car of the appellant had finally come to rest in the direction of travel in the fast lane.

The cantonal police further reported that upon arrival, the driver of the accident vehicle as well as employees of the motorway maintenance company were at the

location. The driver made an uncertain and rushed impression. However, the result of a breath test carried out on the site of the accident was negative, with zero alcohol per thousand (p. 13). Blood and urine samples were also taken, and the result was negative (p. 13).

Regarding the skid marks, the police noted that there were no signs of braking, and no signs of braking were visible on the road. The accident site is a two-lane highway with an additional breakdown lane. At the time of the accident, the motorway maintenance company was working on the fast lane, which is why it was closed to traffic. For this purpose, the fast lane had been diverted to the right on the normal lane, and the normal lane on the breakdown lane. This had been announced by means of pre-signalling, signalling tag and speed reduction. In front of the signalling trailer, road cones were placed left guardrail to the guideline between the two original lanes. There was heavy traffic.

As far as the cause of the accident was concerned, the cantonal police stated in its report that the evaluation of the data of the mobile telephone and of the car of the appellant confirmed the assumption that he had averted his attention from the course of the road. The appellant sent and received several messages while driving with his mobile telephone. At 10:31, he had sent a message via the news service Whatsapp. Shortly thereafter, the car recorded a head-on collision. The appellant deleted the message in question after the accident. On the basis of this information and the damage to the car, the signal trailer and the towing vehicle, it could be assumed that the passenger car of the appellant had crashed into the stationary vehicle.

2. The appellant's statement was first taken by hand by the police and integrated into the report (as is customary in the case of accidents involving purely material damage) (p. 8 f.). According to P .___ M .___ on the record, he had come from Sursee and driven off there at 09.45 clock. He had driven on the highway at a speed of 120 km/h, where it was permitted. He had to attend an appointment in Lausanne at 12:30.

He felt well and rested, he slept more than eight hours. Everything was normal, the weather was also good. There was a lot of traffic, but it was moving along. He probably had a vehicle in front of him. He had been driving in the left lane for a while, and thinks that he drove at 120 km/h. He could not remember that he had reduced the speed prior to the collision. His vehicle independently regulates the distance to the car in front of the vehicle and, if necessary, undertakes emergency braking. He did not turn off this system. There are different 'levels', when the emergency braking system intervenes. He had set the system to the 'latest level'. He could not remember the location. He believes that he was around the beginning of the canton of Bern. He could not remember a tunnel. From a reaction of his vehicle, he had not noticed anything, he did not perceive a braking or a warning tone. He had not telephoned, not even on the speakerphone. He also did not look out of the side window. He had not seen that he was colliding with a vehicle. Only after the accident did he realize what had happened. He did not feel dazzled and did not wear sunglasses. He had not felt rushed and did not look in the rear view mirror. He was listening to 'electric chill music' at normal volume. He did not feel distracted by the music. He himself had not seen the collision coming and thus had neither slowed down nor tried to swerve. He had seen neither the construction site signalling nor the trailer standing in the passing lane. He thought, because there was a maximum speed of 100 km/h signalled, he was driving as usual with cruise control set at 100 km/h.

M .___ concluded that he could not explain how the accident had happened. He only knew that he had neither seen the warning signals nor realized there was a trailer in front of him, nor did he slow down.

3. On the afternoon of the day of the accident, the police interrogation was continued by means of a computer protocol (p. 17 ff.). In the hours after the collision, the appellant's mobile telephone had been evaluated by the police (see point 4 below). P .___ M .___ confirmed in this survey that 'some things' had 'arrived' on the mobile telephone before the accident. He even acknowledged that he had been watching the

news while driving (p. 17, lines 20). He denied, however, that he had been writing during the accident. He had 'received something', read the message and then put the mobile telephone aside again. At the moment of the accident, he was not 100 per cent occupied with the mobile telephone. He was sure that he did not do anything on his mobile telephone two, three or four minutes before the accident. He thinks the mobile telephone had nothing to do with the accident. But he did not want everything to be read, so he deleted the messages (p. 18, line 38). The message he sent at 10:31 was after the accident. He probably wrote to Etienne, his business partner. He sent him a picture. But that had been before the accident, in his opinion, several minutes before, (p. 18, Z. 39 ff.).

4. When evaluating the mobile telephone of the appellant (p. 23 ff.), it must be taken into account that one hour should be added to the time information of the system. The extraction report shows that the caller's cell phone received two calls on the day of the accident at 9:50 and 9:51, and that a call was made at 9:56 shortly after. Later, between 10:13 and 10:14, there are seven entries in the 'Web History'. Finally, at 10:31 (zero seconds) a message (instant message) was sent using the mobile telephone. The calls and the message were subsequently deleted from the log. All this information can be found on page 24 of the file, the other pages of the extraction report are no longer relevant.

5. The public prosecutor's office also initiated the evaluation of the accident vehicle via Tesla Motors Switzerland GmbH (p. 30 f.). The report received ('Privileged and confidential business information', pp. 35 f.) is written in English and gives all times in 'Pacific Time (PT)'. Converted into Central European time, it is clear that the journey started at 09:52 and 53 seconds. The frontal collision was recorded at 10:32 and 57 seconds. In the two minutes before the accident, the car drove at 55 to 68 mph (miles per hour), i.e. 88.5 to 109.4 km/h. No manual operation of the brake pedal was registered in the two minutes prior to the accident and during the collision. On the other hand, the 'autopilot' of the Tesla slowed down

at 10:32 and 53 seconds (four seconds before the accident) for about a second, allegedly because of the reduced speed of the vehicle in front, before switching lanes and getting out of the Tesla's way. Following this, the report contains an extensive list of warnings in the operating instructions for the 'autopilot' follows in the report. In particular, the driver must keep control of the vehicle and keep his eyes on the road at all times. It is also mentioned that the control system cannot detect all objects and, if necessary, does not brake before stationary vehicles (!). Regarding the status of the distance control at the time of the accident, the report states that the control system was activated in the two minutes preceding the accident and during the accident. The vehicle had followed a preceding vehicle until about one to two seconds before the accident, at which time the preceding vehicle slowed down and changed lanes. The collision warning of the system took place only at 10:32 clock and 57 seconds, i.e. at the time of the collision itself. In the two minutes before the accident and during the accident, there was no manual control pulse of the driver. The 'autopilot' had been activated and controlled the vehicle. This is followed by detailed warnings, according to which the driver, despite the 'autopilot', must retain full control and attention. Finally, it is stated that at the time of the accident no telephone call and no activities were recorded on the touch screen.

6. In the public prosecutor's interrogation (p. 70 ff.) P .___ M .___ acknowledged again that while driving with his mobile telephone he had searched for the telephone number of a company and had surfed the internet for this purpose (p. 71, p. Z. 35 f.). Nevertheless, he stated that he had been absolutely attentive and that his attention had been focused one hundred per cent on the road (p. 71, lines 45 et seq.). One has to see the whole context: he drove behind another vehicle. He could not remember very well, but he believed that this other vehicle was 'very big and very wide', dark blue with tinted windows. He was driving normally behind this car. His car is equipped with an 'autopilot'. This system gives the driver more safety by automatically keeping the

distance, automatically braking and steering. These are all things that help you as a driver, but this is similar in other cars. He had driven behind the other car in the tunnel, then there had been a left turn. Then the car drove in front of him on the left lane, he had no time to react, and already there had been the accident. He was attentive at the wheel, but he could not do anything, he had noticed nothing of a construction site (p. 72, lines 50 ff.). He was absolutely sure that he had not used the telephone when the accident happened. He had been attentive at the wheel, but he had not seen the construction site. It is true that he answered a few telephone calls, but that was always with the Bluetooth system. It also happened that he quickly grabbed the mobile telephone to answer, but only for a very short time, and always looked at the street (p. 72, lines 57 ff.). At the request of the prosecutor, M ___ stated that he could not remember that he had seen the construction site signalling trailer. He was not the only one, because the car in front had changed lanes only at the very last moment (p. 72, lines 73 ff.). He was simply surprised that it was an accident. He would have liked to 'slow down', but he was surprised when the car in front had changed lanes (p. 72, lines 82 f.). The message at 10:31 he had sent, but this was before, that had not happened at the moment of the accident. He did not know the time he had previously sent the message. He deleted the telephone calls and the message that he had made during the trip from the log because they were private. He did not want the message to be read by a third party (p. 73, line 99). At the same time, M .___ underlined that he had given the policeman his cell with the code. He knew very well that they could verify everything, and that he was a computer scientist (p. 73, lines 94 f.).

On supplementary questions by his lawyer, the appellant was still on record that the driver of the vehicle ahead had stopped. He had asked him how he was doing, and he had also talked to the police (p. 73, lines 120 f.).

7. Based on this last and new statement, the public prosecutor's office requested the police to add a supplement. With a follow-up report dated 23

December 2016, the police directed their attention to the steering wheel of the vehicle ahead (p. 78 f.). It was a passenger car VW Touran, which was driven by R. ___ A. ___. He had stopped and announced his personal details. In a telephone interview, A. ___ reported that he had driven in front of the white Tesla in the passing lane. He, A. ___, had slowed down a bit and then switched to normal lane. After that, the white Tesla overtook him and crashed into the signalling truck.

Furthermore, the police officer in the additional report further detailed— as requested by the prosecutor’s office – the signalisation before the site of the accident. According to this, the signalling trailer was placed in the fast lane 500 meters from the construction site on both sides of the double lane. 300 meters in front of the trailer, a further signalling trailer was standing in the breakdown lane, with the words ‘top speed 100 km/h’ and the blocking of the passing lane and the shift of both lanes to the right was displayed.

8. In the questioning at the main hearing (p. 107 et seq.), M. ___ confirmed that he was searching for addresses on the internet with his mobile phone on the day of the accident between 10:13 and 10:14 and sent a Whatsapp message at 10:31 (p. 108, lines 15 ff.). Afterwards he had put his mobile telephone in the centre console of his car and no longer used it (a.a.O., Z. 20 ff.). If he received telephone calls while driving, he was using a hands-free device. For this purpose, he could push a button on the steering wheel, then he could talk while he kept his hands on the wheel. It is true that he had to pick up the mobile telephone to find the address and send the message. He simply received a Whatsapp message and replied ‘very briefly’ (p. 108, lines 32 ff.). The message was private, so he deleted it after the accident. It had not been secret, but he simply deleted the message, and today he cannot say why (p. 109, lines 1 ff.).

As for the circumstances prevailing at the time of the accident, M. ___ stated that at the time it was heavy but flowing traffic (p. 109, line 17). In his opinion, the reason for the accident was to be found in the fact

that the preceding vehicle had very brusquely switched to the right-hand lane (p. 109. lines 20 ff.). He could not react to that. He could not make a precise indication in meters to the distance to this preceding vehicle. But it had been such that he had the Tesla autopilot turned on. This computer automatically sets the necessary distance to the vehicle ahead (p. 109, lines 25 ff.). He had already actively controlled his car at that time, asserted M. ___. He was concentrated and looked ahead. In his opinion, the distance to the vehicle in front was ‘normal’ (p. 110, lines 1 ff.). The first time he saw the construction site effectively, was the moment when he came to recover after the accident (a.a., Z. 5 ff.). It was right that he had not slowed down, he had no time for it (a.a.O., Z. 15 f.). He recalled a blue vehicle with tinted windows being driven in front of him. It was a van or a bus. This van had changed to the right, and immediately afterwards he had suffered the accident (a.a.O., Z. 18 ff.).

A little later in the trial, the appellant suddenly declared that he had already seen the construction site signalling. He had not been able to remember exactly the sign, which he wanted to express at the prosecutor. He had seen that a construction site would follow, he had realized at seeing this signal (a.a.O., Z. 25. ff.). However, he did not see the construction site itself, he could not have seen it because he had this big vehicle in front of him (a.a.O., Z. 33 ff.). He saw the two signals 500 and 300 meters in front of the construction site. On the other hand, he did not perceive the road cones (p. 111, lines 2 f.). After the car had changed lanes in front of him, only one second had passed, then the accident had already happened (a.a.O., Z. 3 ff.).

9. The Tribunal questioned R. ___ A. ___, who, astonishingly, does not appear anywhere in the police report, at the main trial as a witness (p. 113 ff.). In doing so, he confirmed that on 17 March 2016 he was driving a white (p. 116, Z. 12 f.) VW Touran with tinted windows on the A1 highway. Since he works in the field, he drives about 70,000 km a year. A. ___ reported, that ‘normal traffic’ prevailed on the highway, the visibility had been good. Everything went

pretty fast. He had been in the left lane when a construction site signalling had pointed out that both lanes shifted to the right, that is, the right lane was placed on the breakdown lane and the fast lane shifted to the normal lane. He switched from the left to the right lane and noticed the Tesla in his rear view mirror; because he was a 'Tesla fan', he noticed this car. The Tesla then overtook him and remained in the fast lane. He, A . ____, had then thought that the Tesla should 'slowly come to the right', but then it was already too late, it came to the collision (p. 114, 2 ff.). A . ____ went on to describe that after switching to the right lane, one or two vehicles were still in front of him, although he was no longer quite sure about this. The impact was about 100 or 150 meters ahead of him in the fast lane (a.a.O., Z. 15 ff.). He wanted to say that after overtaking, the Tesla had still gained about this distance to him, so he was then about 150 meters further forward, the distance was difficult to estimate (a.a.O., Z. 30 ff.). He could no longer say with certainty that the other two vehicles would have changed from the fast lane to the normal lane, but he already believed that it had happened. He had been able to easily change lanes, it was not the case that it would have been difficult to change lanes because of the traffic.

As for the Tesla driver, he had noticed nothing, answered A . _____. He had no idea why the Tesla had crashed into the construction site. After the Tesla had passed him, he had again paid attention to the traffic, he had not looked into the vehicle (p. 115, lines 25 ff.). After the accident, he stopped because he wanted to know what had happened and how the driver was doing. He found that all the other cars were moving on and the people from the construction site had been quite far away. Therefore, he stopped about 100 or 150 meters after the scene of the accident in an SOS bay and then walked back, at the same time he had alerted the police (a.a.O., Z. 34 ff.).

In conclusion, A . ____ stated that the appellant's description that the vehicle in front of the Tesla switched lanes only at the last moment was, in his opinion, 'an absolute false statement' (p. 116, line 18).

When asked by the defence attorney, the witness stated that he could not remember road cones. These would have been swept away by the Tesla, but he could not remember it concretely. If he had switched lanes later (only one or two seconds before the accident), he himself would have had to ram the road cones. After the overtaking manoeuvre of the Tesla, almost ten seconds had passed before the collision had taken place (p. 117, line 12). Before him on the standard gauge were still two cars, but in front of the Tesla were no more cars in the fast lane on the road (a.a. Z. 24 f.).

10. The court considers the facts in the main points as clarified. Contradictions and inconsistencies are primarily between the Tesla Report and the statements of the appellant on the one hand, and the police findings and the accounts of witness A . ____ on the other hand. This will be dealt with in depth in the following evidence.

2. Evidence

1. Legal basis of the evaluation of evidence

According to Art. 10 para. 2 in connection with Art. 350 para. 2 and Art. 341 et seq. CPC, the tribunal acknowledges the result of the collection of evidence and decides the verdict according to its free conviction derived from the entire procedure. According to the provisions of Art. 10 para. 1 CPC, Art. 32 para. 1 Swiss Federal Constitution, Art. 26 para. 4 Cantonal Constitution and Art. 6 ECHR ('in dubio pro reo') innocence is presumed until guilt has been proven. As a rule of evidence, the maxim states that the criminal court cannot declare itself convinced of the existence of a fact that is unfavourable to the appellant if there is doubt as to whether the facts have materialized on an objective consideration. The evidence-evaluation rule is violated if the criminal judge had to doubt the culprit's guilt. Only abstract and theoretical doubts are not decisive, because such are always possible. It must be significant and reasonable doubts, i.e., which are based on objective facts (BGE 124 IV 86 ff. E. 2a). In other words, this principle states that the court cannot condemn an

appellant if, despite the objective assessment of the entire evidence, there is doubt that cannot be suppressed (see eg BGE 120 Ia 31 and 37 and 104 IV 279 and 106 IV 89).

2. Concrete evaluation of evidence

As mentioned above, in the present case a clear subject matter is presented in most respects. P. ___ M. ___, a 36-year-old entrepreneur at the time of the accident, left his former home in Sursee on Thursday, 17 March 2016 at 09:52. The vehicle was a white Tesla, equipped with the systems 'Traffic-Aware Cruise Control' and 'Autosteer', commonly called – although technically not quite fitting – 'autopilot'. In Sursee, M. ___ drove onto the A2 Autobahn. It is not certain whether he had already turned on the 'autopilot' at this time, but it is accepted he did. In any case, he had a telephone conversation at 09:56, according to his information, which is to be believed in this regard, that he used the hands-free device for this purpose. As a result, M. ___ made his way via the A1 towards Bern, claiming that he wanted to go to Lausanne to an appointment there at 12:30. Between 10:13 and 10:14, he searched the internet on his mobile telephone for an address or telephone number, seven entries in the web history are listed in this context in the extraction report of his mobile telephone. M. ___ has admitted that he has taken the mobile telephone for this purpose. Logically, he must have repeatedly looked at the display, even if he always wanted to keep track of the course of the road. But it is not possible to do both at the same time, at least not with sufficient visual acuity and concentration. His attention as a driver of a vehicle was obviously impaired during this period. Fifteen minutes later, exactly at 10:31 (zero seconds), M. ___ sent out a Whatsapp message. For this, he also had to take his mobile telephone in his hand. According to his description, it was not a text message, but a picture that he had sent. Even if that was the case, M. ___ had to select the image and send it to the receiver, which meant he had to turn his attention away from the road and traffic for at least a few seconds to the display of his mobile telephone.

M. ___ was now driving his Tesla between the motorway junction at Kirchberg and the junction Schönbühl, in municipality Kernenried. In this section, employees of motorway maintenance company were busy with work that morning. For this purpose, both lanes were shifted to the right, that is, the fast lane was shifted into the normal lane and the normal lane in turn on to breakdown lane. The construction site was signalled 500 meters in front of the trailer standing in the fast lane, 200 meters later, thus 300 meters in front of the construction site, attention was also drawn to the shifting of the driving lanes and a reduction in the maximum speed was signalled. Directly in front of the construction site, a lorry with a signalling trailer stood in the fast lane. In front of the trailer, orange-white road cones were placed in an oblique line, which led from the left guardrail to the guideline between the two original lanes.

At 10:32 and 57 seconds, M. ___ collided with his Tesla into the signalling trailer located in the fast lane. The collision occurred without or almost without braking. In any case, no skid marks were visible on the road; M. ___ stated that the vehicle had not slowed down manually. The system of the Tesla recorded an automatic braking intervention four seconds before the collision for a period of only about one second, then the automatic braking ceased. The speed of the Tesla should have amounted to about 100 km/h at the time of the collision, with a view to the automatic braking intervention four seconds before, maybe a little less. In any case, the signalling trailer was completely pushed in, including the towing vehicle, a Mercedes-Benz Unimog was pressed in and the chassis possibly compressed. The Tesla was also badly damaged, causing a total property damage of around 200,000 francs. Fortunately, the driver, P. ___ M. ___, was not injured despite the fierce frontal collision.

The weather and visibility at the time of the accident were good, the road was dry. There was heavy but moving traffic. The question of the cause of this accident, which at first sight could only be explained with a driver who fell asleep, was soon answered by the police to the effect that the driver had been busy with his mobile telephone and had therefore turned

his attention away from the course of the road. This result may have been helped by the fact that M. ___ deleted the message sent at 10:31 on his mobile telephone after the accident, as well as two calls received shortly before the start of the journey and the call made shortly after the start of the journey. M. ___ admitted that he had deliberately deleted these data, but nevertheless stressed that he, as a computer scientist, was of course aware that the police could reconstruct the log. He first pointed out that he had simply deleted the message because it was “private”, but finally he left it at the rather helpless conclusion that he did not remember why he had deleted this data after the accident. In the opinion of the court, the deletion, when viewed soberly, can hardly be explained otherwise than by the fact that the appellant, in his excitement after the accident, actually wanted to avoid that his manipulations on the mobile telephone come into the focus of the police. However, this point is not decisive, but more on this later.

The public prosecutor’s office took over the police’s view, refined it even further and in its summary penalty order of 12 January 2017 (pag. 85 ff.) stated that the appellant had sent a Whatsapp message with his mobile telephone while driving a car, thereby diverting his attention from the road and traffic. This had led to the fact that, despite three advance signals, he had not noticed that the fast lane in which he was driving was closed and that in front of him, behind the closing of the lane and the road cones, there was a stationary lorry with a signalling trailer. The appellant did not react and his vehicle collided without braking with the signalling trailer.

Although the court arrives at the same result as the prosecution in terms of guilt and punishment, it cannot fully agree with their assessment. There is no doubt that the appellant was distracted from his duty of caution as a driver of a car by the way he handled his mobile telephone. Firstly, while searching for an address or number on the internet at 10:13 and 10:14, and secondly, at 10:31 when a Whatsapp message was sent. M. ___ himself admitted, as already mentioned, that he had to pick up the telephone on

both occasions, he had to keep his eyes on the display for several moments. The court considers it established that, as a result of these actions, he carried out actions that affected the operation of the vehicle. For the legal qualification, please refer to the following chapter.

But whether these activities, this distraction caused by operating the mobile telephone, were actually the direct cause of the accident, is another question. This assumption is obvious, and the court understands the attitude of the police and the public prosecutor’s office, at least where they associate the failure to observe the distraction caused by the mobile telephone. However, when viewed in the light of day, the question cannot be answered with sufficient certainty. M. ___ sent his message at exactly 10:31, the accident happened at 10:32 and 57 seconds. So there are still 117 seconds in between, almost two minutes. The first signal was given 500 meters before the accident site. M. ___ covered this distance with his Tesla in about 18 seconds at an assumed average speed of 100 km/h. Even the first distant signalisation was only passed about 99 seconds after the message was sent. Not even the Whatsapp message can be used with sufficient certainty as a reason for not observing the first approach signal, 500 metres before the construction site.

M. ___ suddenly claimed in the main hearing that he had already seen the approach signal, after he had still claimed the opposite to the police and the public prosecutor’s office. This statement must be regarded as a protective assertion in court, which is, however, not decisive either.

Of course it is possible, even probable, that M. ___, contrary to his assertion, did not put his cell phone away immediately, but perhaps expected an immediate answer (or started to write another message, which he then did not send because of the accident and which therefore cannot appear in the extraction report). However, this is pure speculation. It has not been created and therefore cannot be legally proven to the appellant that the performance

of a task that affects the operation of the vehicle was causal for the collision.

However, contrary to the defence's apparent view, this question is not necessarily decisive. What is decisive is rather the following: A driver must be in constant command of his vehicle in such a way that he can perform his duties of caution. He can only do this if he is attentive and concentrates on the course of the road and traffic (on the question of who is to be considered the driver of a vehicle equipped with "autopilot", please refer to the following legal assessment). In the present case, it is obvious that the appellant was inattentive at the decisive moment – in any case at the time of the accident, but also at least in the 20 seconds before. In the clear view of the court, it is simply unthinkable that he would have collided without braking (!) with a large and conspicuous obstacle clearly visible from afar on the roadway (including a road cones and two advance signals), if he had paid even the slightest attention to the course of the road (apart from intentionally causing the collision, but this can be excluded here). The concrete cause for the driver's inattention is quite difficult to determine in such cases, and not relevant anyway in the case at hand.

Ultimately, therefore, the question can and must be left open as to why M. ___ was inattentive. That he was inattentive is established, otherwise he would not have collided with the signalling trailer. This is by no means intended as a result oriented criminal law. There may be many cases in which motorists cause an accident because they have overlooked something they could have seen in themselves, without this necessarily being able to or having to conclude that inattention was contrary to duty. However, these are mostly unclear, very demanding traffic situations, e.g. at busy intersections, during re-routing or overtaking manoeuvres, or at best incidents under poor external conditions such as fog, heavy rain or darkness. If, however, a motorist on the motorway, in good visibility and on a dry road, drives without braking into a large obstacle visible from afar (which was announced 500 metres in advance), it is permissible and necessary to conclude without further ado that

there has been considerable inattention and thus a lack of control of the vehicle, without being able to determine the concrete reason for this.

Both the police and witness R. ___ A. ___ took the view that the construction site had been signalled in accordance with the rules or "normal as usual" (A. ___). The court sees no reason to doubt the police's assessment. All other road users had no trouble with the traffic situation, apparently saw the approach signal and the signalling trailer, reacted and passed the construction site without any problems. Only P. ___ M. ___ had not noticed any of this. In the initial questioning after the accident – which as the closest information is of great evidential value – he even said himself that he had not seen any advance signals, that he had never even noticed the construction site trailer before the accident – only after the accident did he realise what his car had collided with it. The logical conclusion from these statements can only be that at least 20 seconds before the accident and until the collision he had not concentrated on the course of the road and the traffic.

Even though the concrete reason for the inattention cannot be decisive and cannot be proven in the present case, the presumed background of the whole matter should not remain unmentioned: The court assumes that M. ___ trusted his Tesla autopilot, which was undoubtedly switched on. He steered the vehicle and also regulated the distance to the rest of the traffic, namely to vehicles in front. Apparently, the system only records control and braking impulses for just two minutes, but the report from Tesla-Motors Switzerland GmbH makes it clear in any case that no manual control or braking impulses (i.e. those made by the driver) were recorded in the two minutes before the accident. At least in the two minutes before the accident M. ___ neither turned the wheel nor braked. Obviously he left all this to the "autopilot". This is exactly what he did at least indirectly to the police directly after the accident, he explained: "The vehicle controls the distance and makes an emergency stop on its own if necessary". What he actually meant by this seems clear: "I did not

intervene, because I assumed that the system had everything under control.” Incidentally, the message from Y. T., who in response to the message that he had been in a car accident, wrote on his mobile phone: “C’est ton pilote automatique qui t’as lâché?” [“Did your autopilot fail you?”] (pag. 25, fourth line of box).

The fact that M. ___ did not even know what had actually happened before the accident can also be seen from his statements. On the day of the accident he had told the police that he “suspected” that a vehicle had been in front of him. He could not remember the location at the time, not even the tunnel directly in front of the Kirchberg motorway junction. Maybe he had not even noticed it, because he had not concentrated on the course of the road. He did not remember a speed reduction, and he had not seen that he hit a vehicle. M. ___ himself said (pag. 9): “Only after the accident did I realize what had happened.” Before the collision, which he had not seen coming, he had neither braked nor swerved. He had neither seen the signals nor the trailer standing on the passing lane. He could not explain how the accident could have happened. These are the first statements of the appellant directly after the accident. He was obviously perplexed, he had not noticed anything of what had happened in the seconds before the accident.

Against the assumption that he had fallen asleep – at best due to inactivity, because the “autopilot” was steering – the sending of the Whatsapp message 117 seconds before the accident speaks against it. The court considers it probable that the appellant continued to use his mobile telephone after the message was sent, or perhaps studied documents while he thought his car was safely steered by the automatic systems. In any case, M. ___ did not mention anything about a large vehicle which he had followed and which had obstructed his view to the front on the day of the accident, except for the vague remark that he “probably” had a vehicle in front of him. Also in the minutes of the computer recorded in the late afternoon of the accident M. ___ did not mention anything about another vehicle which had

taken his view and had only changed lanes by a hair’s breadth in front of the signal trailer.

Only at the public prosecutor’s office, when he was aware of the files and thus also of the report on the evaluation of the Tesla system, did he now talk about another vehicle behind which he had been driving, although he believed that this vehicle had been “very large, very wide”, dark blue with tinted windows. Now he suddenly also mentioned the tunnel, which according to his statement to the police he had not noticed at all, and claimed that the car in front of him had changed lanes at the very last moment and that he had not had any time to react and that the accident had already happened.

The court cannot avoid the impression that the appellant – whether intentionally or not, it remains to be seen, such trials can also happen almost unconsciously – adapted his statements, his description to the state of the files: at the police station he had no idea what had happened before the accident, he could not explain all this. At the public prosecutor’s office, it was suddenly clear to him that a large, wide car driving in front had changed lanes at the very last moment and thus robbed him of the opportunity to react in time.

Apart from the fact that, as a motorist, one should of course not follow so closely behind a large vehicle that one could not see the rest of the road – we will come back to this – this statement by M. ___s is obviously inspired by the evaluation report of the Tesla system. Now, as far as this report is concerned, it is not entirely clear to the court how exactly this report came about. The public prosecutor’s office had asked Tesla Motors Switzerland GmbH to provide numerous “statements” regarding the vehicle and the traffic accident. In the report, which is written in English, neither dated nor signed, and which was apparently received by the public prosecutor’s office by e-mail (see pag. 34), the requested information is indeed included, but all of it is already embedded in the text, i.e., it appears that not only was the data from the system transmitted, but a written report was written or edited from the data, which incidentally

also contains numerous warnings and instructions on the consequences of non-compliance, as is sufficiently familiar from US user or operating manuals. Under these circumstances, the court considers a certain scepticism towards this report to be appropriate, as it is obvious that Tesla is not necessarily neutral in this case. After all, the warning already mentioned in the facts of the case, according to which the “autopilot system” cannot detect all objects and at best does not brake in front of stationary vehicles, stands out here. This circumstance was demonstrated with full force on 17 March 2016 at 10:32 near Kernenried. However, the following sentence in the evaluation report was apparently decisive for the appellant’s testimony: “The vehicle was following a lead vehicle until approximately 1-2 seconds prior to the accident when the lead vehicle slowed and then changed lanes moving out of the vehicle’s path.”

This sentence really makes one sit up and take notice. If this were the case, a vehicle in front would have been able to avoid a collision with the signal trailer only by a very narrow margin, before M. ___ collided with the trailer immediately afterwards with his Tesla. But the given time interval can hardly be correct. For the report also states that the system for controlling the distance between the vehicle and the trailer was switched on. M. ___ also stated – although there are doubts as to whether he can actually remember in detail – that the distance to the vehicle in front was “normal”. However, this means that at least a minimum distance of two seconds between the vehicle in front and the vehicle behind should be assumed. The report also states that four seconds before the collision, the automatic braking system had given a braking impulse because the vehicle in front had slowed down. A sufficient distance was therefore obviously maintained. However, the information is contradictory: if the Tesla was supposed to have followed the vehicle in front up to one or two seconds before the collision, but the distance was at least two seconds, the vehicle in front would also have collided with the signal trailer or at least touched it. However, this was not the case. It would not even be on record that the vehicle in front drove over the road cones

and skidded away. The statements in the report are therefore extremely irritating for the court and it does not necessarily believe the statement that the appellant’s Tesla followed a vehicle in front for another one or two seconds before the accident.

If one were to refer to the report by Tesla Motors Switzerland GmbH, the question would arise as to who was driving this ominous vehicle in front, or what kind of vehicle it was. Surprisingly – this has already been mentioned – the police report does not mention another vehicle at all. Such a vehicle was first mentioned in the public prosecutor’s questioning of the appellant on 23 August 2016, and only after a supplementary question by the defence counsel (pag. 73, pp. 119 ff.). However, the appellant’s statement that the driver of the vehicle in front had stopped, that he had also spoken to the police and had inquired how he was doing was proved correct inasmuch as the police, in an addendum of 23 December 2016, did after all provide the personal details of R. ___ A. ___, who had driven a VW Touran in front of the appellant as the driver of a passenger car.

The court – since at the time of the referral not even a protocol questioning of this important witness had taken place – summoned R. ___ A. ___ to the main hearing. Here he made a good, trustworthy impression. He seemed honest and sincere. With regard to the past time he understandably could not remember all the details, but he described the course of events plausibly and without contradiction. He contradicted the statements of the appellant and the report of the Tesla evaluation (whereby, as shown, the former was probably based primarily on the latter) clearly, without hesitation and without any recognizable signs of lying. Whether the appellant, after he had overtaken witness A. ___ on the left, really continued driving for another ten seconds and in doing so had a “lead” of 100 to 150 meters on A. ___, is to be left open at this point, it corresponds to my general life experience and is known to the court that estimates of time and distance in dynamic processes, especially in road traffic, are always subject to considerable uncertainty. In any case, however, the court believes witness A. ___ that he changed lanes in

time, the appellant then overtook him with his Tesla on the left and only afterwards – whether after seven or ten seconds – did the collision with the signal trailer take place. A.____ appeared credible, his statements are credible and there is no evidence to contradict his account, with the exception of the Tesla evaluation report discussed.

In addition, A.____ stopped, as he explained in the main hearing, because all the other cars had driven on and he thought that it was necessary to determine whether the driver had injured himself (pag. 116, line 7 ff.). This also speaks in his favour. If he had had a “guilty conscience” or felt guilt in any way (e.g. because he himself would have run over the road cones, which according to the information in the Tesla evaluation report should have been the case), he would not have stopped, waited for the police and given his personal details, but would have continued to drive like all other road users at that time.

On a related note, it would be another question whether the driving behaviour of the A.____ in front of the appellant could relieve him in any way, because of course every driver must choose his distance to the vehicle in front in such a way that he himself can fulfil his duty of care at any time. The court assumes, however, that this question does not arise at all, since the assertions of M.____s are protective assertions which are not based on own conscious experience but on the Tesla evaluation report.

Still to be discussed is the question of whether, in the final phase before the collision, a car other than the A.____s might have been in front of the Tesla. It should be noted, however, that the appellant’s statement that the vehicle in front was a van or bus (pag. 110, items 19 f.) corresponds to the fact that A.____ drove a VW Touran (although this was not, as the appellant claimed, a “very large, very wide” vehicle, but only a relatively large personal vehicle). It is also agreed that the windows were tinted. With regard to the colour, however, the accused referred to a blue vehicle (pag. 110, no. 18), whereas witness A.____ stated that he had been driving a white VW Touran with tinted windows (pag. 116, no. 12 f.). This difference can no

longer be resolved. A.____ also stated for the record that no other cars were in the fast lane before the Tesla (pag. 117, pg. 25).

In consideration of all these circumstances, the court assumes that the car A.____ was the last car which had been in the fast lane before the appellant’s Tesla. When A.____ changed to the right in front of the construction site in the course of the lane swinging to the right, the appellant overtook him on the left and a few seconds later – at the moment of the collision without braking – crashed into the signage trailer. The decisive factor here is that M.____ was of course responsible at all times for being able to comply with his duty of caution, no matter how long another vehicle had been in front of him. It was his responsibility to be sufficiently attentive and to keep sufficient distance to any larger vehicle in front in order to maintain an overview of the lanes and to be able to see the swinging and, above all, to be able to see and avoid the standing signalisation trailer in good time. Obviously this was not the case. M.____ would already be reproached if he carried out a braking or evasive manoeuvre and, due to delayed reaction, still collided with the trailer. That he collided without braking is almost unbelievable. One does not even dare to imagine the consequences if employees of the depot were still on or near the vehicles.

Furthermore, according to the Swiss Federal Supreme Court, M.____ would also have had to stop or swerve in time if instead of a large, clearly visible signal trailer, there had simply been “only” a person lying on the road.

Based on this assessment, the court considers it established that P.____ M.____ was inattentive as a driver for a not only very brief moment before the construction site in Kernenried, which led to him not fulfilling his duties of caution, not controlling the vehicle and disregarding an accident. In addition, he had previously carried out several tasks during the journey which impaired the operation of the vehicle by making internet enquiries on his mobile phone and sending a Whatsapp message.

III. LEGAL ASSESSMENT

1. Gross violation of traffic rules

According to Art. 31 (1) SVG, the driver must constantly control the vehicle in such a way that he can fulfil his duties of caution.

‘To master’ means to ensure that the vehicle does nothing that the driver does not want. In BGE 76 IV 53 f. the following definition was applied: ‘Mastering the vehicle requires that the driver remains the master of the machine, so that he can act on it at any time in the manner demanded by the situation, reacting expediently to any danger without loss of time.’

Although this decision may be relatively old and the expression may seem a bit antiquated, the holding still remains valid and unrestricted in the age of ‘autopilots’, lane assistants and independent braking systems. In particular, the driver of the vehicle must be able to ‘safely drive his vehicle even in an unforeseeable, difficult traffic situation’.

Probably the most important requirement for mastering the vehicle is the attention that the driver has to devote to the road and traffic. He has to record and process the information (in particular also signals and markings) received by him in order to act on the vehicle and react appropriately and without loss of time to any danger (Basler Kommentar zum Strassenverkehrsgesetz, Andreas Roth, N 1 zu Art. 31). The level of attention demanded by the driver depends on all the specific circumstances, namely traffic density, local conditions, time, visibility and foreseeable sources of danger. In order for the driver to be able to devote himself unrestrictedly to his duties as a driver, Article 3 (1) of the VRV expressly prohibits him from carrying out operations that make the operation of the vehicle more difficult. About 90 per cent of the driver’s information is taken from the visual system (with the remainder mainly via the ear and the organ of balance); this is therefore of paramount importance (René Schaffhauser, Grundriss des schweiz. Strassenverkehrsrechts, Band 1, Rz 542). It follows that the view of the driver in the moving car must never, not even for a few seconds, be averted

from the road and traffic. The vehicle must be driven in this way at all times and without the slightest restriction on visibility.

Anyone who violates the traffic regulations of the Road Traffic Act (SVG) is guilty of a simple traffic violation according to Art. 90 (1) SVG. Anyone who provokes or accepts a serious danger to the safety of others through gross violation of the traffic regulations fulfils the requirements of Art. 90 (2) SVG. According to the case law of the Swiss Federal Supreme Court violating a traffic rule is objectively proved within the meaning of Art. 90 (2) SVG, if the offence is described as severe according to the specific circumstances, whereby the outward appearance of the traffic violation, its extent and its scope for road safety must be taken into account (BGE 106 IV 49, 106 IV 385 ff.). Accordingly, a violation of basic, important traffic regulations which is particularly prone to accidents (BGE 106 IV 388 ff., 118 IV 86, 118 IV 189 and 191, 118 IV 290, 121 IV 232, 121 IV 237) is a criminal offence, 122 IV 175), and is a traffic violation which goes beyond the scope of the usual or ordinary (BGE 118 IV 189 and 191). The further requirement of serious danger to the safety of others does not presuppose that an accident occurs or someone is specifically endangered; according to settled jurisprudence, the creation of an abstract danger (BGE 106 IV 49, 118 IV 189, 121 IV 237, 122 IV 175) is sufficient, from which (conversely) it cannot be deduced that every concrete danger is based on a gross traffic violation (BGE 106 IV 49). However, the Swiss Federal Court requires (at least) requires an ‘increased negative threat’, whereby the determination of the degree of danger as concrete, increased abstract or abstract only depends not on the transgression traffic rule, but on the situation in which the transgression occurs. The essential criterion for the assumption of a serious or heightened abstract danger is the proximity of the reality of the danger; the general possibility of realizing a danger is therefore sufficient only if, due to special circumstances (such as time of day, traffic density, visibility), the occurrence of a concrete hazard or even

an injury is near. The increased abstract danger thus presupposes the obvious possibility of a concrete danger or injury (BGE 114 IV 66, 118 IV 288, 121 IV 232, 122 IV 175, 123 IV 91 f. and 130 IV 40).

Subjectively, the case of Art. 90 (2) SVG requires, according to the case law, reckless or otherwise bad behaviour, i.e. gross negligence in the case of negligence (BGE 130 IV 32 E. 5.1, 126 IV 192 E. 3, 123 IV 88 E. 2a). This is to be answered in the affirmative if the perpetrator is aware of the general danger of his irregular driving style. However, gross negligence may also be present if the offender has acted contrary to the duty of other road users and thus acted in an involuntary negligent manner (BGE 130 IV 32 E. 5.1). In such cases, gross negligence must be affirmed if the driver's actions fails to consider the danger to other road users, and is based on recklessness (BGE 118 IV 285 E. 4 with instructions).

The above mentioned traffic rules speak of the 'driver' of the vehicle (Article 31 (1) SVG) and of the 'driver of the car' (Article 3 (1) VRV). The appellant was travelling with a Tesla model S. As mentioned earlier, this vehicle has an autopilot function (primarily for highways), which not only keeps the speed or automatically adapts to the lower speed of a preceding vehicle, but also remains in the lane autonomously. When the turn signal is used, the vehicle also changes lane independently (see the Tesla homepage). It is a 'semi-automated vehicle'. The appellant has used the autopilot function according to the evidence during the journey and also immediately before the accident. This could raise the question of whether he is still considered the 'driver' in the sense of road traffic legislation or not. The concept of the driver is not defined in the law. According to federal court case law, driving a vehicle consists of serving it, in particular setting it in motion and directing it. Basically, the steering wheel guides the vehicle, but in certain situations a driver does not sit behind the steering wheel: for example, a passenger who engages in the steering operation of the steering wheel, e.g. by pulling the handbrake or turning the steering wheel (BGE 128 IV 272 m.w.H.).

The fact that a Tesla driver is also considered a 'driver' in the sense of road traffic legislation results from the normative force of the fact that if this person were not to be qualified as a vehicle driver, the vehicle would not be under control of a human. There is an international agreement (called the 'Vienna Agreement'¹), which a large number of countries have concluded with each other in the desire to facilitate international road traffic and increase road safety by the adoption of uniform traffic rules. This Vienna Convention provides, in Art. 8 para. 1, that every vehicle must have a driver when it is in motion. The Swiss SVG is also based on the assumption that every motor vehicle has a driver. If a semi-automated vehicle such as the Tesla S is registered in Switzerland, it must therefore have a driver. Otherwise, the license in Switzerland would not have been granted. The granting of registration in Switzerland therefore entails the consequence that the person behind the wheel must be regarded as a driver within the meaning of the Road Traffic Act, even if the vehicle is travelling with 'autopilot'. These are therefore the same rules for the appellant as for other motorists. The technical auxiliary systems ('Traffic-Aware Cruise Control' and 'Autosteer') thus do not release the appellant from the duties he has as a driver (vgl. Christof Riedo / Stefan Maeder, Die Benutzung automatisierter Motorfahrzeuge aus strafrechtlicher Sicht, in: Thomas Probst / Franz Werro (Hrsg.), Strassenverkehrsrechts-Tagung 21. - 22. Juni 2016, Stämpfli Verlag AG, Abschnitt III./B./2., S. 91-93).

Nevertheless, as the evidence shows, the appellant has not mastered his vehicle due to lack of attention. Especially on the highway, inattentiveness can be fatal even for a few seconds because of the high speeds that are driven. The appellant could not swerve in good time (lane change) or brake in time in front of a clearly visible obstacle, a signal trailer of the motorway yard. For this reason, he caused a head-on collision with high property damage, which only by luck and coincidence has cost no human lives. By

¹ Convention on Road Traffic, Vienna, 8 November 1968.

failing to control his vehicle for lack of attention, the appellant violated one of the most basic and important traffic regulations in an objectively severe manner. It is a traffic violation that goes far beyond the scope of ordinary negligence. What happened to P .___ M .___ cannot happen to a responsible driver: A head-on collision with a clearly visible obstacle on the highway where the driver fails to brake must not happen to any driver, his failure weighs heavily. It goes without saying that such driving, as the appellant demonstrated, is particularly accident-prone, and in fact an accident has occurred.

Subjectively, it can be assumed that negligence is involved, but given the specific circumstances, it is clearly a case of gross negligence. The appellant should have been aware of the general danger of his driving style. Incomprehensibly, he obviously did not consider the endangerment of other road users contrary to duty, which must be described as reckless. The suspected false confidence of the appellant in his 'autopilot', as suspected by the court, cannot relieve him in this regard, but must be considered in the context of sentencing.

After both objective and subjective facts have been fulfilled, M .___ is guilty of gross violation of traffic rules and punished accordingly. There are no exclusions or justification reasons.

2. Simple traffic violation

According to the evidence, the appellant, on the journey between Sursee and Kernried, repeatedly performed operations that made the operation of the vehicle difficult, so he searched on his mobile telephone on the internet for an address and sent a WhatsApp message. Article 3 (1) VRV stipulates that the driver must pay attention to the road and traffic. He must not perform anything while driving, which makes the operation of the vehicle difficult. As already mentioned, this traffic rule directly serves to ensure the principle of Art. 31 (1) SVG, according to which the driver must constantly control the vehicle in such a way that he can fulfil his duties of caution. It is undisputed that the appellant has violated this rule

several times through his actions. In principle it does not matter if he drove with 'autopilot' or not. Even though the appellant allowed his car to be driven by 'autopilot', he was obliged to take corrective action at all times. For this purpose his full attention was always required, which, however, was undoubtedly affected by his actions. Taken alone, these actions clearly do not fulfil the qualification of gross violation of traffic regulations clearly prior to the accident. P .___ M .___ is therefore guilty of and punishment for multiple simple traffic violations.

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