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The Concept of General Duties of Care in the Law of Delict

1. Introduction

The general composition of the traditional three-level delict distinguishes among the objective elements of an act (the act, consequence, and causal relationship between the act and the consequence), its unlawfulness, and fault. Unlawfulness as a prerequisite for delictual liability can often be derived from damage to the absolutely protected legal rights. In certain cases (to be detailed below), however, this is not possible. Therefore, the judicial practice of the Federal Republic of Germany has developed the concept of general duties of care for testing delictual liability. Other countries that have adopted the German delictual liability model (*e.g.*, Switzerland, Austria) apply the same concept, and the judicial practice of the Republic of Estonia also must adopt its principles.¹ The subject of this article thus mainly concerns the countries belonging to the Germanic family of law.²

The purpose of this article is to explain and analyse the main problems relating to general duties of care. The following issues are therefore discussed. The first part of the article focuses on why the concept of general

¹ Recognition of the concept of general duties of care is essential for the functioning of the delictual liability system. However, the concept is still unfamiliar to many Estonian lawyers, as the establishment of delictual liability under the Civil Code of the Estonian Soviet Socialist Republic (adopted on 12 June 1964 — ÜNT 1964, 25, 115; RT I 1997, 48, 775) did not require consideration for general duties of care.

² This is why the law of tort of countries in the Roman family of law or of common law is not the focus of this paper. The structure of tort liability as applied in these countries differs greatly from the German and Estonian model, and many of the problems discussed in the article do not exist outside the Germanic family of law; a broader comparative analysis would be a subject for a longer article. It should be briefly mentioned that in, *e.g.*, French law, tort liability rests on the concept of *faute*. Where the tortfeasor has acted in self-defence or in an emergency, his or her liability may be precluded because of the lack of *faute*. Neither French courts nor jurists make a distinction between unlawfulness and fault (see K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd ed. Oxford: Clarendon Press 1998, p. 619). The tort law of common law countries recognises three main elements — duty, violation of duty, and damage or injury — as the prerequisites for negligence liability (*ibid.*, p. 609). Thus, the tort law of all common law countries, in contrast to that of Continental Europe, is built on the duties that people have toward each other. In assessing whether a duty has been violated, it should be assessed whether the person has acted reasonably. See also C. von Bar. The Common European Law of Torts. Vol. 2. Oxford: Clarendon Press 2000, p. 249.

duties of care should be recognised at all — what its meaning in the law of delict is. The second part discusses the nature and substance of general duties of care. In the third part of the paper, the author tries to answer the question of how the derivation of unlawfulness from a violation of general duties of care affects the general structure and relationship of elements of delict.

The author considers the distinction between violation of general duties of care and neglect in the form of failure to exercise the care required in ordinary social intercourse, tackled in the last part of the article, to be the most intriguing issue discussed in this article. As a violation of general duties of care results in unlawful behaviour, the question of a distinction between carelessness and the violation of general duties of care can also be regarded as one of distinction between fault and unlawfulness.

In legal literature, unlawfulness and fault are often dealt with in the same chapter. This is so because these prerequisites for liability are often not clearly distinguishable. It is a question that has provoked discussion among the jurists of the Federal Republic of Germany for some time now. E. Deutsch has found that the relationship between rules of behaviour and care has not yet been fundamentally defined.³ It has been questioned whether the violation of a duty of care, which duty is specified in each particular case, and fault can be distinguished from each other at all.⁴ However, it has also been found that since § 823 of the German Civil Code (BGB) clearly distinguishes between unlawfulness on the one hand and intent or carelessness on the other, the law still understands carelessness as something different from unlawfulness.⁵ K. Zweigert also finds that although unlawfulness and fault are dogmatically clearly distinguished, discussion about the meaning and scope of the concepts of fault and unlawfulness has arisen lately.⁶

2. The concept of general duties of care in the law of delict

To offer insight into the meaning of general duties of care in the context of delictual liability, it should be noted at the outset that the literature on the tort law of the countries belonging to the Germanic family of law recognises two approaches to establishment of unlawfulness: the wrongful consequence theory and the wrongful act theory.

As mentioned in the introduction to the article, unlawfulness as a prerequisite for delictual liability can be established under the theory of wrongful consequence if damage has been done to the absolutely protected legal rights; to be more exact, damage to a legal right also indicates unlawfulness. According to BGB § 823 (1), such absolutely protected legal rights are those to life, the body, health, freedom, and property (*e.g.*, if A shoots B and B dies, the unlawfulness of the act can be derived by applying the theory of wrongful consequence because the life of B is an absolutely protected legal right and his death indicates unlawfulness). Similar legal rights are also protected under § 1045 (1) 1) – 3) and 5) of the Law of Obligations Act⁷ (LOA).⁸ The unlawfulness of a behaviour is indicated only if the consequence of the behaviour was the intent of the tortfeasor or if it is part of the course of the act, hence forming the direct consequence of the behaviour.⁹

Therefore, the legal theory and policy of the Federal Republic of Germany reached a common understanding some time ago that unlawfulness cannot always be established by reliance on the existence of a harmful consequence alone. It has been found that in the event of passive behaviour or acts of omission involving indirect damage to a legal right, where the harmful consequence is a more distant result of the behaviour in question (we may speak of indirect damage when the liability arises from a positive act that leads to the consequence not directly but via further circumstances, such as the behaviour of other persons or the victim

³ E. Deutsch. *Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung*. 2. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns 1995, p. 478.

⁴ F. G. v. Westphalen und andere. *Produkthaftungshandbuch*. B 1: Vertragliche und deliktische Haftung, Strafrecht und Produkt-Haftpflichtversicherung. München: C.H. Beck'sche 1989, p. 482.

⁵ D. Howarth. *Textbook on Tort*. Buttenworths, London, Dublin, Edinburgh 1995, p. 267.

⁶ K. Zweigert (Note 2), p. 599.

⁷ *Võlaõigusseadus* (Law of Obligations Act). Passed on 26 September 2001. – RT I 2001, 81, 487; 2003, 78, 523 (in Estonian).

⁸ Besides damaging the absolute legal rights, unlawfulness may also arise from violation of a personality right of the victim (LOA § 1045 (1) 4)), interference with the economic or professional activities of a person (LOA § 1045 (1) 6)), behaviour that violates a duty arising from law (LOA § 1045 (1) 7)), and intentional behaviour contrary to good morals (LOA § 1045 (1) 8)). In these cases, unlawfulness cannot be established only by the harmful consequence; rather, these are expressions of the wrongful act theory. In assessing the unlawfulness of an act, one should also take into account LOA §§ 1046–1049.

⁹ K.-H. Gursky. *Schuldrecht. Besonderer Teil*. Heidelberg: Decker & Müller 1990, p. 216.

him- or herself)^{*10}, the behaviour may be regarded as impermissible, and hence unlawful, only if there was a duty to avoid or divert the particular danger.^{*11} We can therefore speak in terms of a legally relevant omission only if the person had a duty to act. In order to recognise unlawfulness and hence the liability of the tortfeasor in such cases, judicial practice has developed the relevant legally binding duties of conduct, or the general duties of care.^{*12} The establishment of unlawfulness in such a manner is based on the wrongful act theory.^{*13}

To characterise the differences between direct and indirect damaging of a legal right (including omission), it should be noted that while indirect damaging of a legal right may also be possible through lawful and permitted behaviour, where direct damaging of a legal right is involved, the consequence is always contrary to the legal order (unless there are circumstances precluding unlawfulness).^{*14} In other words, the existence of a causal relationship between the act and the harmful consequence is sufficient for the creation of liability in a case of direct damage, but in a case of indirect damage, liability for causing a harmful consequence arises only if the behaviour was contrary to duty.^{*15}

The difference between the wrongful consequence and wrongful act approaches, according to B. S. Markesinis, lies in the fact that only the former treats unlawfulness and fault separately.^{*16} In essence, if the theory of wrongful consequence is applied, carelessness has to be evidenced on the level of fault. Where a legal right is damaged by socially adequate behaviour (*e.g.*, a doctor administers a poison instead of a medicine to a patient because the packages have been switched), this constitutes unlawful behaviour according to the theory of wrongful consequence but not according to the proponents of the wrongful act theory.^{*17} In any case, there is no great difference in the final result, as in the former case, the tortfeasor may be released of liability due to lack of fault and in the latter case, this may happen in an earlier test of unlawfulness.

Prof. T. Raab also states that the dispute between the proponents of the two theories is systematic and theoretical, or, rather, that the question lies in the meaning of carelessness in the tort law system. Raab finds that the application of a different theoretical approach is irrelevant to the resultant disposition of a claim. Even where a person has exercised the care required in ordinary social intercourse, the question of whether his or her liability has to be denied because the person acted lawfully or instead because there is no fault is irrelevant to the end result.^{*18}

3. Nature of general duties of care

The recognition of general duties of care and the further development of the concept has had (and still has) an important meaning in the law of delict of the Federal Republic of Germany: it leads to a significant extension of delictual liability. Duties of care are judicial requirements and prohibitions, established by judge-made law through the establishment of duties of conduct.^{*19} The content of a duty of care may be described as follows: when a person creates or controls a danger, the person must take all possible and

¹⁰ T. Raab. *Bedeutung der Verkehrspflichten und ihre systematische Stellung im Deliktsrecht*. – Juristische Schulung. Zeitschrift für Studium und praktische Ausbildung. 42. Jahrgang. Heft 11. München, Frankfurt am Main: C.H. Beck 2002, p. 1042.

¹¹ Extreme proponents of the wrongful act theory (who are in the minority) find that unlawfulness cannot be simply derived from the causing of a consequence that is not allowed by the legal order, even in cases of direct damage to the absolute legal rights set forth in BGB § 823 (1). They believe that unlawfulness can arise only from the behaviour of a person and can thus result only from a violation of a duty of conduct. However, even these extreme proponents make an exception for intentional causing of damage (J. Kropholler. *Bürgerliches Gesetzbuch. Studienkommentar*. 6. Aufl. München: C.H. Beck 2003, p. 582). Unintentional causing of damage is thus, according to the wrongful act theory, unlawful only if the behaviour was contrary to the care required in ordinary social intercourse (T. Raab (Note 10), p. 1045), *cf.* also K. Zweigert (Note 2), p. 599.

¹² T. Raab (Note 10), p. 1042.

¹³ The question of the establishment of unlawfulness may also be approached from another angle. Namely, the elements of liability may be exactly defined or drafted as a framework, with the establishment of unlawfulness depending on that. A defined or closed set of elements, such as damage to the body or property, leads to the establishment of unlawfulness where the presence of the composition or elements of an act is what implies unlawful behaviour. The case of a framework of open sets of elements is different (see LOA § 1045 (1), 4, and 6)), as a violation of these ‘framework rights’ is not evidence of unlawful behaviour. For example, giving a pupil bad marks may violate his or her personality right, but such a violation is adequate and tolerable in ordinary social intercourse (E. Deutsch, H.-J. Ahrens. *Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld*. 4. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns 2002, pp. 12–13).

¹⁴ T. Raab (Note 10), p. 1046.

¹⁵ *Ibid.*, p. 1048.

¹⁶ B. S. Markesinis. *A Comparative Introduction to the German Law of Tort*. Oxford: Clarendon Press 1986, p. 42.

¹⁷ J. Kropholler (Note 11), p. 582.

¹⁸ T. Raab (Note 10), p. 1045.

¹⁹ W. Fikentscher. *Schuldrecht*. 9. Aufl. Berlin, New York: Walter de Gruyter 1997, p. 760.

reasonable precautions to maintain control of the danger and prevent its actualisation as damage. Such a danger may be created by, *e.g.*, opening traffic (streets, roads, passages), a shop, a sports facility, etc.^{*20} As a rule, duties of care rest with the owners of the things in question, but the creation of a duty of care does not depend on ownership: it is the creation, maintenance, and control of the danger that is decisive.^{*21} It should be noted that the violation of a duty of care indicates unlawfulness.

It may be said on the basis of the above that duties of care are similar in character to a general clause.^{*22} A duty of care is automatically created within and by virtue of the law of delict.^{*23} It could be said that duties of care have created duties of conduct, which the legislator could also formulate as statutory duties.^{*24} In any event, duties of care could be specified by a legal provision^{*25}; *i.e.*, a duty of care may be prescribed by law (BGB § 823 (2) and LOA § 1045 (1) 7)), although it is usually not.^{*26} The legislature cannot be expected to set out all the duties of care by law. It could thus be said that duties of care are related more to BGB § 823 (2) than to § 823 (1).^{*27} It should be kept in mind that a duty of care may be both more lenient^{*28} and stricter than a statutory duty. In the former case, a person has to follow the duty set out in the legal provision in order to avoid liability; in the latter case, the person has to abide by duties of care, as the performance of a duty set out in the given provision might be insufficient for avoidance of liability. For example, if A falls into a ditch that B dug in compliance with all the public rules for digging operations, and A is injured, the liability of B is not precluded just because he followed the legal provisions. Only if the public law provides for a strict duty of conduct, from which deviations are not allowed, can B be released from liability, as any other manner of behaviour would in that case have resulted in sanctions under public law.

A person's awareness of a relevant danger is not a prerequisite for there to be a violation of a duty of care. Therefore, a person may be liable if he or she is aware of the source of the danger and does not eliminate it, but the liability can hold if the person is not aware of the source of the danger, because his or her behaviour may be unlawful since he or she did not duly fulfil his or her duty to check the thing in question to determine whether it entailed danger. For example, the owner of an immovable has a duty to check said immovable.^{*29}

The question of when a person's duty of care actually arises cannot be answered in a single way. One has to agree with Raab, who has suggested the following rule for finding an answer to the above question: the larger the potential damage, the greater the likelihood of damage, and the lower the costs of preventing damage, the more certainly one may say that a person has the duty of care to take the relevant precautions to prevent the danger from becoming actualised.^{*30} It should be noted that according to general recognition, a person has no duty of care with respect to unauthorised participants in ordinary social intercourse, such as thieves.^{*31}

The protection of another person has its limits; *i.e.*, duties of care do not require anything impossible. The precautions taken must be subjectively and economically reasonable.^{*32} Besides, it has to be established when testing the existence of a duty of care whether and to what extent the endangered person or later victim could recognise the danger and avoid its actualisation by acting cautiously.^{*33}

One could also ask whether the violation of a duty of care always consists of an omission or whether a duty of care can be violated also by active conduct. As a rule, duties of care are violated by omission, but this can also occur through active conduct; for instance, the creation of uncontrollable danger can be contrary to a duty of care.^{*34} The question has no great importance in practice because the consequence in terms of liability does not depend on whether the particular violation was a commission or an omission. Also, omissions can often be reduced to a prior positive act.

²⁰ E. Deutsch, H.-J. Ahrens (Note 13), p. 124; *cf.* P. Schlechtriem. *Völaõigug. Eriosa. 4. trükk.* (Law of Obligations. Special Part. 4th ed.). Tallinn: Juura 2000, lk 260 (in Estonian).

²¹ E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

²² *Cf.* V. Emmerich. *BGB – Schuldrecht Besonderer Teil. 8., neuarbeitete Aufl.* Heidelberg: C.F. Müller 1996, p. 282.

²³ E. Deutsch, H.-J. Ahrens (Note 13), p. 124.

²⁴ W. Fikentscher (Note 19), p. 760.

²⁵ E. Deutsch, H.-J. Ahrens (Note 13), p. 124.

²⁶ T. Raab (Note 10), p. 1046.

²⁷ W. Fikentscher (Note 19), p. 760.

²⁸ T. Raab (Note 10), p. 1046.

²⁹ *Ibid.*, p. 1042.

³⁰ *Ibid.*, p. 1044.

³¹ J. Kropholler (Note 11), p. 581.

³² E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

³³ T. Raab (Note 10), p. 1045. Even if the duty of care is recognised in a situation where the victim played a role in causing the damage, the compensation for damage can be reduced under both LOA § 139 and BGB § 254.

³⁴ E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

Lastly, it should be asked which legal rights the duties of care protect. Naturally, they protect absolute legal rights first (see BGB § 823 (1) and LOA § 1045 (1) 1) – 3) and 5)), for the wider protection of which duties of care were first developed as a concept in legal practice. However, the scope of protection of duties of care is no longer limited to absolute legal rights, and these duties may also protect other interests declared to be worthy of protection under the law of delict by precedent. It is disputable whether the avoidance of mere property damage could serve as a purpose of a duty of care.^{*35} The question is whether A, the owner of an immovable, is required to compensate for damage if a tree from his property falls onto the road and obstructs traffic such that B, who cannot use the road, is late for a business meeting and suffers economic loss (without his absolutely protected legal right being damaged). The author of this article believes that as a rule, this question should be answered in the negative in order to keep compensation claims within reasonable limits.

4. Position of violation of general duties of care in general composition of delict

When speaking about the violation of a duty of care, it is inevitable that we should define its position in among the general elements of a delict. As the violation of a duty of care indicates unlawfulness^{*36}, we may feel compelled to test the violation of duties of care by examining the level of unlawfulness. But this will not lead to a logical result. It may be concluded from the professional literature of the Federal Republic of Germany that the level of conduct or the causality that creates liability is the primary yardstick for establishing the level of violation of duties of care. The dominant opinion is that violation of a duty of care should be judged on the basis of the level of conduct.^{*37}

Raab also finds that if the question concerns indirect causing of damage or an omission, the violation of a duty of care has to be established at a logically prior stage, on the level of the objective elements of the act and not, as has been argued in some cases, on the level of unlawfulness.^{*38} He adds that a duty of care and its protective purpose form an inseparable unity with the causality that creates liability, which is why they have to be tested together on the level of the objective elements of the act. Only the assessment of the presence of circumstances that may preclude unlawfulness is thus left to the unlawfulness level.^{*39}

As a result of the above, it may be said that if the liability of the tortfeasor arises from a violation of a duty of care, the classical three-level general composition of a delict cannot be relied on in examining the prerequisites for delictual liability. One has to agree with Raab, who has offered the following logical order concerning the general composition or elements of delictual liability for cases of violation of duties of care: firstly, examination of the consequence of the violation of a duty or the violation of a legal right and, secondly, establishment of the presence of conduct contrary to the duty — *i.e.*, whether the person was under a duty of care and whether he or she has violated it. An affirmative answer to this question suggests that the person has also violated an extrinsic care obligation and his or her behaviour is unlawful. Here, the tortfeasor can also give evidence for the existence of circumstances precluding unlawfulness. The third level according to Raab is the level of causality creating liability, where an answer is sought to the question of whether there is a causal relationship between the violation of a duty of care and damaging of a legal right. The next step is to check whether the purpose of the duty of care was to prevent the particular kind of damage that the victim suffered in the case in question, and, finally, the tortfeasor has an opportunity to prove his or her lack of fault, particularly his or her inculpability or observation of intrinsic care.^{*40}

The author of this article finds that where one is dealing with the general composition of a delict as presented, there are essentially only two levels: the objective composition of the act and, second, fault. Still, the aforementioned prerequisites can be positioned in the general composition of a three-level delict; where this is done, the presence of circumstances precluding unlawfulness should be checked on a separate level pre-

³⁵ *Ibid.* The same question was asked by W. Fikentscher (Note 19), p. 760.

³⁶ It should be noted that besides unlawfulness, violation of a duty of care indicates fault in a similar manner to the violation of a protective provision (BGB § 823 (2) and LOA § 1045 (1) 7)). See also E. Deutsch, H.-J. Ahrens (Note 13), p. 14.

³⁷ W. Fikentscher (Note 19), p. 761. It should be noted also that causality creating liability lies in the realm of establishment of the causal relationship, where an answer is sought to the question of whether there is a causal relationship between the tortfeasor's conduct and the damage to the victim's legal right.

³⁸ It should be noted that even the 'finalist' teaching on behaviour does not distinguish between the elements of an act and unlawfulness. See G. Niebaum. *Die deliktische Haftung für fremde Willensbetätigungen*. Berlin: Duncker & Humblot 1977, p. 31.

³⁹ T. Raab (Note 10), p. 1047.

⁴⁰ *Ibid.*, p. 1048.

ceding fault. After these prerequisites have been established, the question of the scope of damage subject to compensation has to be decided, of course. Here we speak about causality completing the requirements for liability.^{*41}

5. Distinction between fault and violation of general duties of care

5.1. Formulation of the issue

In the case of damage to absolute legal rights, where unlawfulness can be derived on the basis of the theory of wrongful consequence, the prerequisites for delictual liability can be tested proceeding from the traditional three-level general composition of delict, in which unlawfulness and fault are clearly distinguishable. When the tortfeasor acts carelessly, both extrinsic and intrinsic care have to be established at the level of fault and not that of unlawfulness.^{*42}

In cases where the unlawfulness of an act arises from a violation of general duties of care, the question arises of the relationship between a violation of a duty of care and carelessness as a form of fault. Based on the above definition of violation of a duty of care and considering the definition of carelessness as provided in BGB § 276 (1), according to which a person who does not exercise the care required in ordinary social intercourse is acting carelessly, and LOA § 104 (3), according to which carelessness is failure to exercise necessary care, it is not difficult to conclude that the definition of violation of a duty of care and that of carelessness are remarkably similar.

Raab also finds that if we define a duty of care so that everyone has to behave as may be expected from a foresighted person within the framework of objective and subjective probability, it cannot be said that a duty of care is anything other than the care required in ordinary social intercourse.^{*43} It is clear that distinguishing between carelessness and the violation of a duty of care or the identification of the relationship between the two has relevance to the theory of tort law. However, the issue is also of practical relevance — *e.g.*, for just distribution of the burden of proof.

For example, if landowner A does not clean the pavement on his property and person B who legitimately walks on the pavement therefore falls and is injured, the unlawfulness of the conduct of A cannot be established (and even if it can, this would not be just or reasonable) on the basis of the theory of wrongful consequence. At the same time, we can surely say that A had the general duty of care of keeping the pavement clean, and if A violated this duty, his conduct is still unlawful on the basis of the wrongful act theory.

A problem arises when we ask whether the fact that A did not, *e.g.*, pick up a banana peel thrown on the pavement is evidence only of the unlawful conduct (or rather, omission) of A or whether it allows one to say that A acted carelessly. To put it another way, it is debatable whether B, who proves that A did not observe his duty of care, thus also proves the unlawfulness of the act or the fault of A, let alone both. We may also ask whether there is any room left for establishing carelessness as an element of fault, if the unlawfulness of a person's conduct arises from the violation of a general duty of care.^{*44}

Proceeding from the above, the question raised has two principal solutions. On the one hand, if we regard violation of the duty of care as identical to carelessness, we may say that general duties of care are formalised on the basis of, in essence, what kind of care a person has to exercise in ordinary social intercourse. In such a case, we cannot speak about unlawful conduct if the person has exercised the care required in ordinary social intercourse. On the other hand, if we regard the violation of the duty of care and carelessness as separate, we should identify the difference between them.

It should be mentioned that neither approach is quite correct. The solution lies in giving substance to the concept of carelessness or, to be more exact, making a distinction between failure to exercise extrinsic and intrinsic care.

⁴¹ In the event of the applicability of the traditional three-level composition of a delict, applicable if the unlawfulness of an act can be established on the basis of the theory of wrongful consequence, the prerequisites for liability are examined in the following order. First, the damage to the legal right or the harmful consequence, conduct, or act and the causal relationship (causality resulting in liability) have to be established on the level of the objective elements of the act. In such a case, unlawfulness is indicated, and only the existence of circumstances that preclude unlawfulness has to be established where unlawfulness is concerned. The culpability and fault of the tortfeasor are examined on the third, subjective level of the general composition, whereas under the BGB, fault has to be proved by the victim, while fault is presumed under the LOA (LOA § 1050 (1)).

⁴² T. Raab (Note 10), p. 1048.

⁴³ *Ibid.*, p. 1045.

⁴⁴ T. Raab has raised a similar question (Note 10), p. 1045.

5.2. Extrinsic and intrinsic care

As mentioned above, we have to distinguish between extrinsic and intrinsic care when speaking about carelessness. Extrinsic care is understood as consisting of the care requirements imposed on the average careful person by the legal order for the protection of third parties' legal rights in a specific situation.^{*45} Intrinsic care means the endeavours and efforts that a person has to make to recognise and follow the requirements of extrinsic care. Only a person who does not observe intrinsic care in addition to extrinsic care behaves in a reproachable and faultful manner.^{*46} It is largely held as true that mere failure to observe intrinsic care does not threaten a legal right and is therefore not a problem in terms of the law of liability, and is not unlawful.^{*47} Like extrinsic care, the intrinsic care requirements may be formulated in an abstract manner — *i.e.*, proceeding from the conduct expected of a similar person in a similar situation^{*48} — but we may also approach the issue from the absolutely individual angle.^{*49}

As intrinsic care is a subjective category, the question of a distinction between general duties of care and carelessness boils down to the distinction between duties of care and extrinsic care. One has to agree with Raab, who says that extrinsic care requirements are what make up duties of care. Therefore, behaviour that violates extrinsic care always constitutes a violation of duties of care and is hence unlawful.^{*50} The same conclusion was worded differently by Deutsch, who finds that if a general duty of care has been objectively violated, this constitutes failure to exercise extrinsic care.^{*51} Also, P. Schlechtriem states that as the duty of extrinsic care is taken to be objective and hence separate from the person who caused the damage, it largely overlaps with the so-called duties of care.^{*52}

It is thus not possible for a person to violate the duty of care required in ordinary social intercourse or extrinsic care without violating the duty of care, as the relevant care is not required in ordinary social intercourse in such a case. The question of whether extrinsic care requirements form duties of care or *vice versa* is practically irrelevant; *i.e.*, the care required in ordinary social intercourse becomes evident and established on the basis of duties of care.

5.3. Conclusions

It may be concluded from the above that a duty of care overlaps with only one element involved in carelessness, namely extrinsic care. Therefore, it may be said that a violation of duties of care and fault are not fully overlapping elements and that observation of intrinsic care has to be examined on the level of the general composition of a delict — *i.e.*, the level of fault. Fault as a prerequisite for the obligation to compensate for damage thus still has a meaning in the event of violation of duties of care.

Deutsch has also found that in the case of unlawfulness arising from the violation of duties of care, testing of the fault of the tortfeasor consists only of the assessment of the exercise of intrinsic care by the person^{*53}; *i.e.*, an answer is sought to the question of whether the person had to have recognised the relevant standard of behaviour and whether he or she was able to follow it.^{*54} This view is supplemented by Raab, who finds that if a person was not able to recognise in a specific situation which efforts the legal order required of him or her for avoidance of danger, or if the person could not exercise the duty of care for subjective reasons, the person is not guilty of behaviour involving fault.^{*55} If the damage is done to the absolutely protected legal

^{*45} The definitions of carelessness contained in, *e.g.*, BGB § 276 (1) and LOA § 104 (3) are based on violation of extrinsic care.

^{*46} T. Raab (Note 10), p. 1047. It should be noted that German authors who speak about intrinsic care, implying that individual abilities of a person exist in all cases, are currently in a minority. This means that many authors do not distinguish between extrinsic and intrinsic care in their writings, and many of those who do understand intrinsic care to refer to a person's culpability.

^{*47} E. Deutsch opposes this view, stating that as failure to exercise intrinsic care may still directly endanger the legal right of another person, such should be considered unlawful — *e.g.*, where an exhausted or intoxicated surgeon performs surgery. See E. Deutsch (Note 3), p. 465.

^{*48} See, *e.g.*, LOA § 1050 (2).

^{*49} E. Deutsch (Note 3), p. 468.

^{*50} T. Raab (Note 10), p. 1047.

^{*51} E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

^{*52} P. Schlechtriem (Note 20), p. 261.

^{*53} Naturally, the individual limitations of liability — *e.g.*, the person's culpability — have to be examined on the level of fault. It may also turn out on the level of fault that the liability of the tortfeasor is limited — *e.g.*, by a contract — to only gross negligence.

^{*54} E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

^{*55} It should be noted that where the tortfeasor acts in his or her professional capacity, he or she has to follow the standard of care of the relevant economic or professional group; *i.e.*, professional care is applied in this case, and exercise of intrinsic care does not release the person from liability. See, *e.g.*, P. Schlechtriem. *Võlaõigus. Üldosa. 2. trükk.* (Law of Obligations. General Part. 2nd ed.) Tallinn: Juura 1994, p. 107 (in Estonian); A. M. Dugalale; K. M. Stanton. *Professional Carelessness.* London, Butterworths 1982, p. 9.

rights listed in BGB § 823 (1), the fact that the person had to have recognised the specific duty of conduct does not suffice to establish the failure to exercise intrinsic care.^{*56} Intrinsic care has not been exercised if an average person had to realise that failure to follow the rule might lead to damage to an absolutely protected legal right.^{*57}

Failure to exercise extrinsic care also presumes failure to exercise intrinsic care, but the tortfeasor may prove the opposite.^{*58} This pertains to exceptional circumstances that may exempt a person from liability despite failure to exercise extrinsic care.

If we return to the case described in the posing of the problem, the facts of the case have the following implication. The fact that the banana peel was lying on the pavement is proof of the violation of a duty of care, and hence also of unlawfulness and the failure to exercise extrinsic care. Landowner A can still prove that he exercised the care required in ordinary social intercourse — *e.g.*, he cleaned the pavement three times a day — and this is all that can be expected of him. Therefore, the fact that the banana peel was lying on the pavement does not constitute a violation of a duty of care or failure to exercise the care required in ordinary social intercourse. However, if it is established that A did not exercise the care required in ordinary social intercourse — *e.g.*, he cleaned the pavement only once a week — the landowner can still prove that he was not careless because he exercised intrinsic care. For example, he could have fallen ill and was not able to arrange for the cleaning of the pavement — *e.g.*, by contracting with a third party to perform this duty — as he had no means of communication.

Where unlawfulness arises from a violation of a duty of care, the victim proves failure to exercise extrinsic care — an element of carelessness — by virtue of the violation of the duty of care. This raises the question of whether placing the relevant burden of proof on the victim is in line with LOA § 1050 (1), according to which the tortfeasor is the one who has to prove that he or she is not culpable for causing the damage. However, the author of this article sees no contradiction here, because proving the unlawfulness of an act is still the duty of the victim. In this case, the victim just proves the relevant element of fault together with the unlawfulness.^{*59} The tortfeasor has to prove that he or she exercised intrinsic care (see LOA § 1050 (2)). There is no problem in this aspect of the question according to the German BGB, since the victim has to prove the meeting of all the prerequisites for delictual liability one way or another.

According to the position of representatives of one branch of German tort law theory, the tortfeasor may be released from liability because of exercise of intrinsic care, so we could say that the difference at first glance between the BGB and LOA as regards the legal liability for violation of duties of care is largely illusory. As according to LOA § 1050 (1), the tortfeasor bears the burden of proving his or her lack of fault and under the BGB, the victim has to prove the fault, the victim actually has to prove the violation of extrinsic care in either case, while the exercise of intrinsic care has to be proved in either case by the tortfeasor. As LOA § 1050 (2) allows the tortfeasor to rely on subjective circumstances for being released from liability and BGB § 276 (1) makes it clear that carelessness is objective, the actual meaning of the term ‘intrinsic care’, often used in the legal literature of the Federal Republic of Germany, frequently includes the circumstances referred to in LOA § 1050 (2) amongst other things.

6. Conclusions

It may be said by way of summary that the issues of general duties of care and their violation, as dealt with in this article, have been a topic of discussion for many tort law specialists for years. The main subjects of dispute in the Federal Republic of Germany and the states that have adopted the German delictual liability model are the position of general duties of care among the elements of delictual liability, as well as the issues of distinction between general duties of care and the care required in ordinary social intercourse.

Despite the opinions presented in the article, the author admits that many of the issues discussed here have not been clarified yet in the course of disputes. The author looks forward to a continuing discussion on this subject. If this article makes any contribution to such discussions, the author considers this short piece to have accomplished its goal.^{*60}

⁵⁶ It should be noted that in the event of a violation of, *e.g.*, a protective norm (BGB § 823 (2), LOA § 1045 (1) 7)), intrinsic care is not exercised if the person recognised the duty of conduct but, while able to follow it, did not do so.

⁵⁷ T. Raab (Note 10), p. 1048.

⁵⁸ E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

⁵⁹ In principle, one could also ask why the burden of proof of non-violation of a duty of care should not be placed on the tortfeasor, if this is essentially the same as proving lack of culpability.

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