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The Position of the Duty of Care in the Structure of the General Composition of Delict

1. Introduction

When one speaks about the liability stemming from violation of a duty of care, one cannot avoid addressing the definition of the position of the duty of care in the general composition of delict. Notwithstanding the circumstances of the damage behind the particular violation of the duty of care involved, we inevitably need an answer to the question of how to solve such cases in terms of methodology and what exceptions to general rules are involved in recognition of the duty of care in the general composition of delict. According to C. von Bar, recognition of the concept of duties of care creates several dogmatic issues in the system of elements of delictual liability, expressed by the difference of distinguishing among three levels: objective elements of an act, unlawfulness, and fault.[*1] In the author's opinion, this is not only a theoretical question, as the distribution of the burden of proof depends on the position in the delictual structure. The question of who is under the obligation to prove the facts significant for judicial proceedings may become a crucial factor for the outcome of the litigation and so is rarely of secondary importance for the parties to the proceeding. The importance of the distribution of the burden of proof is indicated by the fact that the setback of an action in court is often caused not by the complexity of the point of law but by the claimant's inability to convince the court of the facts on which the claim relies.[*2]

In this article, the author first attempts to find a motivated answer to the question of whether, in cases where determining the unlawfulness of the damaging of legal rights necessitates establishment of the violation of the duty of care by the tortfeasor, the latter should be proved by the injured party or violation of the duty of care by the tortfeasor should be assumed, with the tortfeasor therefore obliged to prove that the duty of care was fulfilled. Secondly, the author tries to answer the question of what a methodically applied model for the solving of a case of violation of the duty of care should look like.

Because several problems discussed below are not present in cases with similar aspects outside the Germanic law tradition, the references in this article to works by Estonian authors are supplemented primarily by views from the literature on the regulations of the *Bürgerliches Gesetzbuch*[*3] (BGB). In efforts to reveal the just delictual structure of the composition of delict, additional attention has been paid to the

1 C. von Bar. Verkehrspflichten. Reichterliche Gefahrsteuerungsgebote in deuchen Deliktsrecht. Cologne, Berlin, Bonn, & Munich: Carl Heyemanns Verlag KG 1980, pp. 112–113.

2 E. Karner. The function of the burden of proof in tort law. – H. Koziol, B.C. Steininger (eds). Tort and Insurance Law Yearbook. European Tort Law 2008. Wien & New York: Springer 2008, p. 68.

3 Available at http://www.gesetze-im-internet.de/bgb/BJNR001950 896.html (most recently accessed on 1.5.2012).

corresponding regulations of European model laws: the Draft Common Frame of Reference[*4] (DCFR) and Principles of European Tort Law[*5] (PETL), which are attempts to give a uniform direction to the development of European tort law.

2. The traditional general composition of delict and distribution of the burden of proof

To discuss the impact of recognising the concept of duties of care on the general composition of delict and the distribution of the burden of proof, one should first be reminded of the traditional general composition of delict and traditional distribution of the burden of proof. Similarly to the §823 (1) of BGB, Division 1 of Chapter 53 of Estonia's current Law of Obligations Act[*6] (LOA) states that generally the basis for liability caused by fault consists in three-level composition of a delict. On the first level of the composition of delict, the objective elements of an act—the act, the consequence, and the causal relationship—have to be established. The second level has to do with unlawfulness, and on the third level fault must be assessed.

The establishment of the elements of an act takes place in stages, methodically, in the order given above. If the objective elements of an act are absent, there will be no assessment with respect to unlawfulness and fault. If the objective elements of an act are present but there is no unlawfulness, the question of fault is no longer discussed.[*7]

Pursuant to the rule of distribution of the burden of proof recognised irrespective of the general and particular legal system, both parties to the dispute must prove the facts supporting their claims or objections.[*8] Enforcement of a claim by means of judicial proceedings is directed toward changing the *status quo*, but the purpose of property-protection and peace-keeping speaks to the general preference given to maintaining the *status quo* in the legal order. The prerequisite for the legal basis of the *status quo* acts as a barrier against constant obligation of its justification; accordingly, it is the duty of the plaintiff, on the basis of the principle of justice, to substantiate his or her having been offended before this is changed.[*9] This has been expressed succinctly by R. von Jhering, according to whom the burden of proof is the price to be paid in the proceedings for acquisition of the right.[*10]

In terms of the delictual structure, the legal orders seem to agree that, traditionally, the victim has to prove the existence of damage, a relationship between the damage and the putative cause thereof, and the facts crucial in establishment of the unlawfulness. The tortfeasor has to prove all the facts that might lead to his or her release from or alleviation of the liability. However, there is no common approach to the question of who must prove the fault of the tortfeasor as a prerequisite for liability, with certain subjective elements.[*11] The author finds that the issue of proving fault is particularly acute in cases of violation of a duty of care.

4 Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR). Outline edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). C. von Bar, E. Clive, H. Schulte-Nölke (eds). Munich: Sellier. European Law Publishers 2009. Available at http://ec.europa.eu / justice/contract/files/european-private-law_en.pdf (most recently accessed on 1.5.2012).

5 Principles of European Tort Law. Available at http://www.egtl.org/ (most recently accessed on 1.5.2012).

6 Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 21 (in Estonian).

7 T. Tampuu. Lepinguväliste võlasuhete õigus. Loengud (Tort Law. Lectures). Tallinn: Juura 2007, p. 159 (in Estonian).

8 I. Giesen. The burden of proof and other procedural devices in tort law. – H. Koziol, B.C. Steininger (eds). Tort and Insurance Law Yearbook. European Tort Law 2008. Wien & New York: Springer 2008, pp. 50–51.

9 Karner (see Note 2), p. 70.

10 R. von Jhering. Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 5. Aufl. Leipzig, Breitkopf und Härtel 1906, p. 206.

11 J. Lahe. Süü deliktiõiguses (Fault in Delict Law). Doctoral thesis. Tartu, Estonia: Tartu Ülikooli kirjastus 2005, p. 84 (in Estonian).

3. The impact of the concept of duty of care on the elements of the general composition of delict

3.1. Objective elements of an act

Liability based on violation of duties of care is first and foremost evident in cases wherein damage is done through omission or indirect acts. The author believes that this is the first major departure of these cases from the traditional structure of the general composition of delict, in which the cause of damage—the first of the objective elements of an act—consists in direct action. In cases of omission and indirect acts, the violation of legal rights can be reproached only if there has been a violation of a legal duty to behave differently.[*12] Therefore, in cases of violation of a duty of care, the elements of illicit acts depend not only on having caused the consequence of violation but also on the assessment of the behaviour of the person at fault.

In terms of consequence, the liability arising from violation of a duty of care does not differ from the liability seen in the traditional approach to the general composition of delict, because the elements of an act still rest on the consequence as main element. As with direct damaging, in the case of violation of a duty of care, the consequence also depends on whether the damage caused indicates violation of legal rights that deserve protection.

To ascertain the causality creating liability (*conditio sine qua non*), one should use a method involving replacement when adjudicating a case surrounding violation of a duty of care; here, the unlawful behaviour of the tortfeasor is replaced with lawful behaviour, followed by verification of whether the consequence would have been evident in the case of lawful behaviour. One must note that the harmful consequence affecting the victim can be deemed an unlawful causal consequence of the omission or indirect damage of the tortfeasor only if the tortfeasor had the duty to perform a certain act as would have prevented or alleviated the harmful consequence. In other words, the difference between direct damage to legal rights, on the one hand, and violation of a duty of care, on the other, consists in a causal relationship to the extent that the causality of the act for the purposes of *conditio sine qua non* is sufficient in the first case but in the second case liability for the consequence arises only if the behaviour was contrary to duty. One has to agree with the figurative expression applied by T. Raab, according to which verification of a causal relationship in the absence of establishment of a particular duty to act 'hangs in the air'.[*13]

In cases of omission or indirect acts, the determination of the liability-related causality does not differ from the case of direct damaging. Neither in the case of violation of a duty of care is the *conditio sine qua non* formula alone enough to limit the tortfeasor's liability and prevent harmful consequences in cases wherein an obligation to compensate for damage would be unreasonable or not recommended.[*14] Therefore, for creation of the obligation to compensate for damage, one has to assess whether damaging of legal rights has led to the damage for which compensation is sought in terms of the law of delict.[*15] The outcome of the lawful reason test traditionally has consisted first and foremost in various modifications of adequacy theory established by J. von Kries[*16] and theory addressing the purpose of the obligation.

3.2. Unlawfulness

When determining the unlawfulness, one has to keep in mind that legally relevant omission can be considered only if the person had a duty to act in a certain manner. The same applies to cases wherein legal rights are damaged by indirect acts, as they are considered unlawful only if the legal order prescribes different behaviour.[*17] In the Germanic legal tradition, this means that in cases of violation of a duty of care, the

12 B.S. Markesinis, H. Unberath. The German Law of Torts: A Comparative Treatise, 4th ed. Oxford & Portland, Oregon: Hart Publishing 2002, p. 81.

13 T. Raab. Bedeutung der Verkehrspflichten und ihre systematische Stellung im Deliktsrecht. Juristische Schulung. Zeitschrift für Studium und praktische Ausbildung. 42. Jahregang, Heft 11. Munich & Frankfurt am Main: Verlag C.H. Beck 2002, p. 1042.

14 H. Koziol, B.C. Steininger. European Tort Law 2003. Wien & New York: Springer 2004, p. 27.

15 See P. Schlechtriem. Võlaõigus. Eriosa (Law of Obligations. Special Part). Tallinn: Juura 2000, pp. 256–259 (in Estonian).

16 See M. Heidelberg. From Mill Via von Kries to Max Weber: Causality, Explanation, and Understanding. – U. Feest (ed.). Historical Perspectives on Erklären and Verstehen. Springer 2010, pp. 241–267.

17 Raab (see Note 13), p. 1041.

wrongful consequence theory is not applied to determination of unlawfulness and one can only rely on the wrongful act theory. Therefore, in cases of violation of a duty of care, if one is to establish unlawfulness, it is necessary to prove that the tortfeasor had a duty of care and that it has been violated.[*18] Thus, behaviour has to be assessed from the angle of contrariness to duty, meaning that unlawfulness and fault cannot be entirely separated in cases involving putative violation of a duty of care.[*19]

3.3. Fault

In determination of the fault, the question arises as to whether the violation of the duty of care exists only for unlawful behaviour or also serves as a basis for claiming that the tortfeasor behaved in a careless manner. The same question has been posed by von Bar, who finds that clear-cut distinction between fault and unlawfulness is complicated in cases of violation of a duty of care.[*20] In view of the definition of violation of a duty of care, which states that this violation represents failure to adhere to an obligation to behave in a legally binding and circumstantially relevant manner[*21], and in consideration of the definitions of carelessness provided for in the legislation, according to which a person who does not exercise the required care is acting carelessly[*22], it is not difficult to conclude that the definition of violation of a duty of care and that of carelessness are remarkably similar.[*23] This raises the question whether the victim who proves violation of a duty of care on the part of the tortfeasor proves the unlawfulness or fault of the act or both.[*24] One has to agree with Raab, according to whom the answer to this question lies in giving substance to the concept of carelessness or, to be more exact, drawing a distinction between the components of carelessness—extrinsic and intrinsic carelessness.[*25]

As intrinsic care is a subjective category, the question of a distinction between violation of the duty of care and carelessness boils down to the distinction between duties of care and extrinsic care. In other words, duties of care are composed of the requirements of extrinsic care, meaning that behaviour violating the requirements of extrinsic care is always understood as violation of a duty of care and, accordingly, unlawful.[*26]

Given that the duty of care coincides with only one element of carelessness—related to extrinsic care—the violation of a duty of care and fault are not considered to be coinciding elements and following of intrinsic care should be verified in subjective terms (i.e., on a separate level in the structure).[*27]

18 C. van Dam. European Tort Law. Oxford University Press 2006, p. 73.

19 Raab (see Note 13), p. 1047.

20 Bar (see Note 1), p. 112.

21 On the definition of the concept of the duty of care in German judicial practice, see, for example, BGH 28.4.1952, BGHZ 5, S. 378, 380-381; BGH 15.6.1954, BGHZ 14, S. 83, 85; BGH 30.1.1961, BGHZ 34, S. 206, 209. In Estonian judicial practice, see Supreme Court Civil Chamber decision 3-2-1-43-09 (in Estonian).

22 Subsection §276 (1) of BGB; §104 3) of LOA).

23 J. Lahe. The Concept of General Duties of Care in the Law of Delict. – Juridica International 2004 (IX), p. 113.

24 Lahe (see Note 11), p. 68.

25 Raab (see Note 13), p. 1048. 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. Intrinsic care refers to the endeavours and efforts that a person has to make to recognise and follow the requirements of extrinsic care.

26 H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied & Kriftel: Luhterhand 2001, p. 44.

27 E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaudte Handlungen. Schadenersatz. Schmerzengeld. 4., völlig überarbeitete und erweiterte Auflage. Cologne, Berlin, Bonn, & Munich: Carl Heyemanns Verlag 2002, p. 126.

4. The general composition of delict and distribution of the burden of proof when liability arises from violation of a duty of care

4.1. Distribution of the burden of proof when a duty of care has been violated

In view of the fact that liability arising from the violation of a duty of care leads to deviations in liability elements, the structure of the composition and distribution of the burden of proof cannot remain unaffected. According to B.S. Markesinis, the question of whether the establishment of the duties of care should belong to the level of behaviour, unlawfulness, or fault has been subject to some discussion, but significant difference do not result in terms of the consequent outcome.[*28] The author finds that such a position is acceptable only when one overlooks the issue of distribution of the burden of proof—i.e., which of the parties to the proceedings must carry the burden of proving the existence and violation of the objective behavioural standard in the event of violation of duties of care.

According to the method study based on the BGB, the burden of proof of the existence and violation of a duty of care should be imposed on the aggrieved party.[*29] However, in German judicial practice, the distribution of the burden of proof in cases of liability arising from violation of duties of care is not always so.[*30] According to von Bar, at least in cases involving violation of duties of care with regard to producer liability and environmental harm, German courts (in similarity to the consideration of the liability elements provided for in §§ 831–836 of BGB tend to show reliance more on the opinion that it is up to the tortfeasor to prove the lawfulness of his or her behaviour.[*31] This view is confirmed by Markesinis, who explains that in such cases the tortfeasor must prove the absence of extrinsic carelessness.[*32] In all other cases, the victim is subject to the burden of proving the existence and the violation of a duty of care. After the existence and violation of a duty of care have been established, the burden of proof is transferred to the tortfeasor for resolution of the question of fault or intrinsic carelessness, which provides a basis for creating the liability under §823 (1) of BGB.[*33]

According to the main rule laid down in §1050 (1), the LOA is based on the presumption of fault, which makes it impossible to use an approach that requires the victim to prove the violation of a duty of care by the tortfeasor. While both the LOA and other legislation provide for delict compositions wherein the obligation to prove the carelessness of the tortfeasor lies with the victim[*34], the author believes that in those cases where liability arises from violation of a duty of care, one should generally rely on the presumption of fault. The author finds that the burden of proof could be imposed on the victim only if the court finds that a particular duty of care can only be violated via intent or gross negligence and that the burden of proof of the tortfeasor's intent or gross negligence should be imposed on the victim. In the author's opinion, the specific nature of §1050 of LOA should not be suppressed by following the example of the BGB; on the contrary, it should be highlighted and viewed first and foremost in terms of its several advantages in imposing the burden of proof of lack of fault on the tortfeasor.

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28 Markesinis, Unberath (see Note 12), p. 86.

29 Raab (see Note 13), pp. 1050–1051.

30 R. Welser, B. Jud, C. Rabl. Grundriss des bürgerlichen Rechts. Band II. Schuldrecht. Allgemeiner Teil. Schuldrecht. Besonderer Teil. Erbrecht. 12., neuarbeitete Auflage. Wien: Manzsche Verlags- und Universitätsbuchhandlung 2000, pp. 300–301.

31 C. von Bar. The Common European Law of Torts, Volume 1: The Core Areas of Tort Law, Its Approximation in Europe, and Its Accommodation in the Legal System. Oxford: Clarendon Press 1998, p. 126.

32 Markesinis, Unberath (see Note 12), p. 88.

33 Bar (see Note 31), p. 126.

34 Therefore, for example, if violation of the protective provision (§1045 (1) 7) of LOA) presupposes intent or gross negligence, the victim has to prove the existence of said form of fault. The same applies if damage is caused as a result of intentional behaviour contrary to good morals (§1045 (1) 8) of LOA). In that case, the victim has to prove both intent and that the behaviour of the tortfeasor was contrary to good morals. Proving fault can also be a prerequisite for establishing unlawfulness in cases of special elements of delict, wherein the victim may be subject to obligation to prove all of the special elements of the act. For instance, in order for §84 (2) of the Law of Property Act to apply, the plaintiff must prove the bad faith of the defendant in possession of a thing. See T. Tampuu. Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Delict Law in the Law of Obligations Act. General Problems and Liability Based on the General Composition of Delict). – Juridica 2003/2, pp. 79–80 (in Estonian).

To see the advantages of the presumption of fault, one must first distinguish between the burden of proof of existence of a duty of care and the burden of proof of the violation of a duty of care. It can be stated that unlawfulness and extrinsic carelessness, which, according to the methodical study based on the BGB, represent a single unit when the liability is being established [*35], should be formally separated from each other so as to ensure compliance with §1050 (1) of LOA. Undoubtedly, the victim is subject to the burden of proof of the objective behavioural standard. This means that the victim must elicit the facts showing the existence of the duty of care of the tortfeasor in a particular situation and provide evidence thereof. The victim has to prove that the tortfeasor created or controlled a danger that was realised and that he or she was associated with a certain behavioural standard that required the tortfeasor to take all reasonably required, suitable, and affordable measures to protect the victim against the actualisation of the danger. The author believes that, pursuant to the provisions of §1050 (1) of LOA, the burden of proof of the victim does not involve the obligation of proving the violation of a duty of care and, in light of the causing of damage and after the victim has established the existence of a duty of care by the tortfeasor, the tortfeasor must be presumed to have violated a duty of care and behaved unlawfully. To be released from the associated liability, the tortfeasor may opt to prove the presence of facts precluding unlawfulness pursuant to §1045 (2) of LOA, having followed extrinsic care, i.e., the duty of care pursuant to §1050 (1) of LOA, or the presence of subjective facts releasing him or her from liability pursuant to §1050 (2) of LOA.[*36]

The author believes that the presumption of fault proceeds primarily from the fact that delictual liability is generally applied in cases in which damage caused by the behaviour of one person is imposed on another person without a prior legal relationship. In a delict situation, victim and tortfeasor are usually unfamiliar with each other before the event; they have no former legal relationship to rely on in terms of proof.[*37] Delict is generally a violation of rights taking place in a split second, unexpectedly, and progresses in such a limited time frame that no-one is able to pay accurate attention to what happens or, to be more exact, has happened.[*38] In addition, in a case of violation of a duty of care, there is no direct act by the tortfeasor, which makes it very difficult for the victim to gather evidence about what happened. Thus the violation of duties of care represents delicts that—owing to the systematic nature of the evidential difficulties—are in chronic need of evidential assistance. This, however, means that in such cases, reversal of the burden of proof based on the *res ipsa loquitur* doctrine in the court would be deemed a rule, not an exception. This being the case, the author believes it to be more logical and compliant with the wording of LOA §1050 (1) to apply the presumption of fault of the tortfeasor instead of constant doctrinal reversal of the burden of proof.

Imposing the burden of proof pertaining to adherence to extrinsic care on the tortfeasor involves stricter liability[*39], but it is justified in situations wherein the violation of the obligation that is the basis for a claim has been committed within the scope of risk or power of the tortfeasor, which is traditionally not fully understandable for the victim.[*40] One has to consider that in cases of violation of duties of care the victim has no access to the 'internal sphere' of the tortfeasor for possible explanation of potential non-compliance of the tortfeasor's behaviour with extrinsic care. For instance, in a situation in which A leaves a manhole uncovered and B falls in, A is held responsible for causing damage to B only if A violated a protection standard or duty of care. However, B has no access to A's 'internal sphere' for verification of whether A's behaviour complied with the duty of care. Therefore, if A states that he or she was not careless, because he or she provided relevant warning signs as prescribed, then—in the author's opinion—it would be more reasonable that A must prove his or her statements, instead of B refuting them. It is much simpler for A to prove the events that occurred in his or her 'internal sphere'—i.e., fulfilment of the duty of care—than for B to enter an unfamiliar 'internal sphere' and find evidence of the violation of a duty of care (through an omission or indirect act) on the part of A.

35 Raab (see Note 13), pp. 1050–1051.

36 Such an approach to the distribution of the burden of proof could be called 'separation of the burden of proof of existence and violation of the duty of care' or 'formal separation of unlawfulness and extrinsic carelessness'.

37 D.G. Mattiacci. The Core of Pure Economic Loss. Amsterdam Center on Law & Economics. Working Paper No. 2005-03, p. 169. See http://www.bepress.com/cgi/viewcontent.cgi?article=1124&context=gwp (3.4.2012).

38 Giesen (see Note 8), p. 53.

39 V. Emmerich. BGB Schuldrecht. Besonderer Teil. 10. völlig neubearbeitete Auflage. Heidelberg: C. F. Müller Verlag 2003, p. 254.

40 Schlechtriem (see Note 15), p. 272.

The author believes that one must adhere to the notion that 'an honest man has nothing to fear' and keep in mind that adhering to the duty of care—i.e., taking special measures to protect other persons after creating a danger or while controlling the danger—should facilitate the submission of evidence. The activities related to exercise of the duty of care are usually long-term and hence easier to prove. For example, in a danger area one can find a series of reliable witnesses to building of fences or erection of a warning sign, people who participated in building such fences or noticed the presence of a warning sign prior to the event of damage. The person with the duty of care may also collect evidence of execution of the duty of care or of precautions taken to avoid the actualisation of danger—e.g., taking a photo of the situation after building the fence or putting up a warning sign, or asking someone to witness the precautions taken. Understandably, because of the unexpected nature of the event for the victim, the latter has no equivalent measures to strengthen his or her position in the proceedings.

In addition to justified relief of the burden of proof of the victim, who usually represents an involuntary participant in the delictual relationship, the author believes that presumption of fault contributes to procedural simplification in the form of more reliable evidence. The requirement that the victim prove omission of an act by the tortfeasor essentially means the obligation of the victim to prove a negative circumstance. Not only is this unreasonable for the victim; the author finds that it also involves unnecessary procedural complexity for the court. It is clearly evident that it is easier to establish something that was done than something that was not done. This is due to the fact that an event or act committed can be reconstructed from the evidence, whereas an event that did not happen or an act never committed cannot.

In the end, imposing the burden of proof of the execution of the duties of care on the person who creates the risk would, in the opinion of the author, also contribute to the improvement of overall safety, as it would force the persons creating or controlling danger to pay greater attention. Forcing someone to consider possible liability by whatever means necessary has a preventive effect, which is one of the main objectives of the law of delict.

4.2. Substantiated general composition of delict when a duty of care has been violated

As the consideration of the concept of a duty of care adds further criteria both to objective elements of an act and to assessment of unlawfulness and fault, it is impossible to rely on the traditional three-level structure of the general composition of delict when verifying the prerequisites for delictual liability. Raab too finds that, as the question lies in causing or not causing indirect damage, attention should be paid to the violation of a duty of care already at the level of the objective elements of an act. The duty of care and its protective purpose form inseparable unity with the causality that creates liability, so they need to be verified together on the level of the objective elements of an act. The level of unlawfulness is used for assessment of the presence of facts precluding unlawfulness, and the level of fault involves ascertaining the presence of delictual capacity and following of intrinsic care.[*41]

According to Raab, in cases of violation of a duty of care pursuant to BGB regulations, the elements in the general composition of delictual liability should be set in methodical sequence on the basis of a two-level structure. The construction of the first level should begin with the objective structure of delict; here, on the basis of the evidence provided by the plaintiff, it is necessary to establish the consequence of the violation—i.e., violation of legal rights—and to assess the non-compliance of the behaviour with a duty of care. The latter presumes establishment of the violation of a duty of care, or extrinsic carelessness. This means that it is necessary to explain whether the defendant had a duty of care and whether it has been violated. A positive response to these questions enables us to conclude that the defendant has also violated extrinsic care and his or her behaviour was unlawful. Here also the facts that justify the behaviour have to be determined, which means for the defendant an opportunity to provide evidence that precludes unlawfulness. On this level, also the causality that creates liability consisting in explaining the causal relationship between the violation of a duty of care and violation of legal rights has to be established and the relationship between the damage caused and the purpose of implementing a duty of care, which means verification of whether the purpose of the duty of care was to prevent the damage that was caused to the plaintiff in the case at hand, has to be explained. On the second level of the structure of the general composition of delictual liability,

41 Raab (see Note 13), p. 1047.

the question of fault has to be assessed through determination of the delictual capacity and the following of intrinsic care[*42] through the evidence provided by the defendant.

As one compares the approach based on the BGB with the regulations of the model laws that serve as attempts to create uniform European tort law, it would, in the author's view, be an exaggeration to call the differences with the proposed method of solving a case of violation of the duty of care and the difference in the obligation of proof in the latter case fundamental. The similarities in the general composition of the delictual structure are due to the fact that, as in the BGB, neither the DCFR nor the PETL document draws a strict distinction between unlawfulness and extrinsic carelessness and they are viewed together as uniform grounds for liability.[*43] The joint view of unlawfulness and extrinsic carelessness is permitted not only through the fact that violation of the duty of care basically equals extrinsic carelessness but also because in both cases the general rule applies according to which the obligation to prove both the existence of the duty of care and the violation of it rests with the aggrieved party.

Article 1:101 of Book VI of the DCFR, which states the general rule for compensation for non-contractual damage, names legally relevant damage, which is defined in Article 2:101. This means that the violation of rights deserving legal protection is also primary in the DCFR in evaluation of conduct and hence has similarity to what is described in Article 4:102 of the PETL. Article 3:102 of Book VI of the DCFR, referring to extrinsic carelessness, is largely in accordance with the PETL approach. According to the approach of both model laws, it is necessary to evaluate whether the tortfeasor has violated a general objective standard of conduct. In this, the PETL approach takes into consideration factors stated in articles 4:102 (Section 1) and 4:103 and the DCFR's above-mentioned Article 3:102. An important provision with reference to the liability arising from violation of the duty of care is found in Section b of Article 3:102 of the DCFR's Book VI, which states that grounds exist for liability in behaviour that does not directly violate a certain provision of the law (the provision protected) but nonetheless is not in conformity with the level of due diligence to be expected from a reasonably cautious person under the circumstances in question. The stated view is largely consistent with the theory of the unjust conduct of the act. According to both model laws, it has to be evaluated whether the particular violator's behaviour can be blamed, which means the establishing of the existence of extrinsic carelessness (Article 4:102, Section 2 of PETL) as the last step in ascertaining liability. Unlike the PETL, Article 3:103 of the DCFR takes extrinsic carelessness into consideration only in view of the violator's age, ignoring other subjective factors arising from the violator as grounds for mitigating or excluding liability.

The author finds that neither BGB, nor DCFR or PETL methods are suitable for adjudication of cases based on the claim of violation of a duty of care pursuant to the LOA. The unsuitability arises from §1050 (1) of LOA, which provides for distribution of the burden of proof on the basis of the prevailing presumption of fault in cases stemming from violation of duties of care. As mentioned in §4.1, above, in order to adhere to §1050 (1) of LOA, one should formally separate unlawfulness and extrinsic carelessness despite their substantial similarity. Such a solution imposes the burden of proof of the existence of a duty of care on the victim, and the burden of proof of having fulfilled a duty of care rests with the tortfeasor. In consideration of the aforesaid and in line with the Estonian law of delict—i.e., the presumption of fault—the author proposes the traditional general composition of delict for adjudication of a case based on the violation of a duty of care, which could methodically be the following:

1) Establishment of the consequence of the offence: violation of the protected legal right, which is to be proved by the plaintiff.
2) Establishment of whether the defendant had a duty of care. Here the plaintiff has to prove that the defendant created or controlled a danger that was actualised and that he or she was, under the given circumstances, bound to a certain behavioural standard that objectively obliged him or her to take all reasonably necessary, suitable, and affordable measures to protect the defendant against the actualisation of the danger. In determination of the existence of a duty of care, the main focus is given to the degree of the offence, probability of damage and amount of costs, and efforts that would have been necessary to avoid or remove the danger. The greater the damage, the higher the probability of damage, and the lower the objective costs and the amount of effort required to avoid

42 *Ibid*., p. 1048.

43 G. Wagner. The Law of Torts in the Draft Common Frame of Reference. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394343 (most recently accessed on 1.5.2012); P. Widmer. Principles of European Tort Law, Text and Commentary. European Group on Tort Law. Springer, Wien, & NewYork 2005, p. 81.

the damage, the greater the likelihood that the defendant had a duty of care for avoiding or eliminating the danger.*[44]

3) Assessment of whether the behaviour violated the duty of care. Here, in light of the fact of causing of damage and on the basis of §1050 (1) of LOA, it must be presumed that the defendant has violated the objective behavioural standard proved to exist by the plaintiff and that the defendant's behaviour was unlawful. The defendant must provide evidence to disprove this presumption. For that, the defendant may prove that he or she had a foundation for justification of such behaviour (§1045 (2) of LOA) and/or provide evidence of following extrinsic care (§1050 (1) of LOA). If the defendant is unable to prove either the facts precluding unlawfulness or following of extrinsic care, one has to conclude that the defendant has violated a duty of care and that his or her behaviour has been unlawful.
4) The causality that causes the liability, consisting in explaining the causal relationship between the violation of the duty of care and the damage to the legal right (conditio sine qua non; §127 (4) of LOA), has to be established as the first stage of the causal relationship. For this, a replacement-based method has to be used, wherein the unlawful behaviour of the defendant is replaced by a lawful act to verify whether lawful behaviour would have prevented such consequences. As the second stage of the causal relationship the lawful reason for liability has to be clarified, consisting in the establishment of the relationship between the damage caused and the purpose of implementing a duty of care, which means verification of whether the purpose of the duty of care was to prevent the damage that was caused to the victim in this particular case. This has to do with the scope of protection in the case of the particular duty of care and the extent of the damage to be compensated for. In addition to determining the two stages of the causal relationship in order to follow the principle of double-causality, here attention has to be paid also to the two-level nature of the causal relationship. For this, in addition to determining the causal relationship between the violation of the duty of care and the unlawful consequence (liability inflicting causality) it has to be also determined if the unlawful consequence was the reason for the particular damage (liability fulfilling causality). The burden of proof of the circumstances of the causal relationship lies on the plaintiff on both stages and levels of the causal relationship, except when being firsthand different due to law or judicial practice.
5) Establishment of the delictual capacity of the defendant, lack of which must be proved by the defendant. A person is deemed to have delictual capacity if he or she is capable of understanding that the violation of a duty of care was unlawful (§1052 (2) of LOA).
6) Establishment of the following of intrinsic care by the defendant, which means proof of whether violation of objective care requirements by the defendant can be subjectively excused (§1050 (2) of LOA). If extrinsic care was not followed, failure to follow intrinsic care is presumed, but the tortfeasor is given an opportunity to prove otherwise.*[45]

It is important to follow the structure in order to ensure the logic of the determination and guarantee economical proceedings. Similar to the traditional general composition of delict, the scheme proposed by the author relies on the principle that the elements of an act are established in stages—in the order listed above. If any of the elements is missing, there will be no evaluation of the next element in the sequence.

Consideration of the concept of duties of care adds further criteria to both objective elements of an act and unlawfulness, incorporating these criteria therein, and promotes the establishment of extrinsic carelessness relative to that in the traditional general composition of delict. Therefore, in the case of the methodical scheme proposed by the author, it is impossible to place the elements of an act, unlawfulness, and fault on completely separate levels in the conventional way; furthermore, the author sees no practical need to do so. The proposed scheme however, allows for distinction among

1) Consequence,
2) Establishment of a behavioural standard,
3) Unlawfulness and extrinsic carelessness,
4) Causal relationship and the purpose of a duty of care, and
5) The level of establishing subjective components of fault.

44 Raab (see Note 13), p. 1044.

45 Deutsch, Ahrens (see Note 27), p. 126.

The structure of the general composition of delict provided for in the LOA is not limited to absolute legal rights. Besides the rights to life, physical and mental health, freedom, property, and similar rights, protection is granted for personality rights (§1045 (1) 4) and §§ 1046 and 1047 of LOA) and the right to established and functional economic activities (§1045 (1) 6) and §1049 of LOA). Violation of these rights is possible through the neglect of duties of care. These delicts are characterised by the fact that the unlawfulness seen in the general composition of delict must be established via a separate decision. If the delicts in question are based on the violation of a duty of care, then on the level of the establishment and violation of a duty of care further provisions should be applied to establish unlawfulness (§§ 1046, 1047 and 1049 of LOA) and take into account the factors covered in those provisions. Should the victim rely on the claim that the tortfeasor violated the particular duty of care intentionally (§104 (5) of LOA), the delict structure should consider the exception that the intent as the form of fault should be proved by the victim.

The only elements the tortfeasor should prove are any facts that preclude unlawfulness (§1045 (2) of LOA), delictual incapacity (§1050 (2) of LOA), and facts precluding intent (which, according to the theory of intent, include unawareness of the unlawful nature of the behaviour and, according to the theory of fault, incorrect understanding of the facts of the violation of law).[*46]

5. Conclusions

The methodical appearance of a delictual structure in the case of violation of a duty of care depends on the structural level at which the violation of a duty of care is verified. The position of control, in turn, depends on the criteria considered in establishment of the existence and violation of a duty of care and what deviations in elements may occur. Given that recognition of the concept of duties of care adds further criteria to the assessment of almost all elements of the general composition, the verification of answers does not allow relying on the traditional three-level composition of a delict. Difference between use of the BGB, DCFR, or PETL approach and the LOA approach is caused by §1050 (1) of LOA, which, unlike §823 (1) of BGB, relies on the presumption of fault of the tortfeasor. For one to follow the presumption of fault, unlawfulness and extrinsic carelessness must be formally separated, regardless of their substantial similarity. In this case, the victim has to prove the existence of a duty of care, and the tortfeasor has to prove adherence to a duty of care. The author believes that such an approach has several advantages for adjudication of cases based on violation of a duty of care. The main advantages are the removal of the duty to prove a negative fact on the part of the aggrieved party, the placing of the obligation of proof with the party in whose 'internal sphere' the facts that have to be proved are positioned, the facilitation of court proceedings, more reliable proof, and the preventive effect with respect to violation of duties of care.

46 I. Kull, M. Käerdi, V. Kõve. Võlaõigus I. Üldosa (Law of Obligations I. General Part). Tallinn: Juura 2004, p. 200 (in Estonian).