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# The Principle of Trust for Exceptions to the Non-Regression Clause in the Case of Delict of Negligence

## 1. Introduction

The Estonian Penal Code describes the cases in which a person is to be held responsible for the consequences of the acts committed directly by said person and the cases in which contributing to an act committed by another person is punishable. A delict of negligence and intentional delict are governed differently by the Penal Code. These are two distinct types of delict, which are subject to separate sets of rules for determining the grounds for liability. The above is based on the fact that, while the person in the case of an intentional delict has decided to commit an offence, a delict of negligence is characterised by a careless and irresponsible act that realises the elements of an offence.\*<sup>1</sup> Sections 21 and 22 of the Penal Code establish the commission of an offence in the form of participating, aiding, or abetting but only if the person's acts are intentional. The phrasing of the Penal Code indicates also that the commission of a joint criminal offence is possible only in the case of intentional acts. In addition, it is stated that the commission of an offence by intermediation can take place only if the person taking advantage acted intentionally, foreseeing the formation of the elements of an offence.\*<sup>2</sup> The answer to the associated questions appears to be simple, but the issue of the scope of the duty of care remains.

In the event of carelessness, the principle of a single offender applies, on the basis of which anyone who commits an act covered by the description of the elements of an offence of a delict of negligence by violating the duty of care is an offender.\*<sup>3</sup> It can also be stated that the legislator intended to apply liability only in specific, well-defined cases where the relevant person is an accomplice in the commission of an offence by another person by dint of carelessness. This is, for example, evident from Section 419 of the Penal Code, which articulates the liability for the negligent storage of a firearm if said firearm has been used to commit an offence. If there is no specific provision of the law indicating otherwise, the person is not held liable, as any liability for negligence would become indefinable otherwise and would be in conflict with the intentions of the legislator. This approach cannot be supported, as negligence is defined with reference to violation of the duty of care and this person is to be held liable if said violation leads to a consequence specified by law.

<sup>1</sup> J. Sootak, P. Pikamäe. *Karistusseadustik. Komm väljaanne (Penal Code. Commented Edition)*, 4th ed. Tallinn: Juura 2015, §18/ 2.

<sup>2</sup> *Ibid.*, §21/ 2.1.

<sup>3</sup> *Ibid.*, §20/ 3.

The duty of care entails displaying the level of care required from anyone and necessary for communication in the relevant society. The standard for the duty of care may consist of the general level of care expected from all people as dictated by moral rules or set standards or may, on the other hand, manifest itself in the form of standards governing a specified profession, relationship, or aspect of life. Even though a general definition for a violation of the duty of care is specified in Estonian criminal law, there is no comprehensive list of the standards pertaining to that duty of care and foreseeable from an objective perspective.<sup>\*4</sup> This consideration reveals one of the issues with the delict of negligence: how to determine which acts are in conflict with the duty of care and foreseeable from an objective perspective. Next, one may ask whether a diligent and responsible person should make sure that his acts do not facilitate violation of legal rights on the part of other persons or, instead, this specific person's duty is restricted to his own acts. At first glance, it could be said that the above-mentioned question is answered by the non-regression clause, in line with which a person's intervention within a chain created by the person who caused the original threat excludes the possibility of accusing the person who caused the original threat. The answer here too is not simple, though, because there are exceptions to the non-regression clause and it is not always applicable. One should bear in mind that the principle of definition is applied in penal law, in line with which there must be clear and comprehensive delineation indicating in which cases a person's liability arising from penal law follows. However, the dogmatics of penal law offer no clear solution for how to define the duty of care; neither is this foreseeable from an objective perspective. These issues are subject to debate in legal science.<sup>\*5</sup> Therefore, certain principles are employed in the dogmatics of penal law that specify how the duty of care and objective predictability are substantiated. These rules involve the principle of trust, permissible risk, and the principle of division of duties. The principle of trust and the principle of division of duties specifying the former should limit the range of cases in which a person shall be held liable for delict of negligence that follows upon an offence caused by another person on the. This article addresses the meaning of the principle of trust, and then the discussion examines the effect thereof on liability if the person who originally caused the threat acts out of negligence yet the threat caused by that person is actualised in the form of an act violating legal rights by another person is realised in either delict of negligence or an intentional delict. The article does not discuss cases in which injured parties have contributed to the damage caused to them.

## 2. The principle of trust

The principle of trust has grown out of the Traffic Code and the principle of mutual behaviour of the persons participating in traffic – all people involved must observe said code and act carefully so that they could hope that others will behave in the same manner.<sup>\*6</sup> The principle of trust has been confirmed in Estonian Supreme Court practice as expressed in decision no. 3-1-1-52-16:

It can be considered to be a violation of the duty of due diligence if the offender has failed to exhibit the due diligence required in society. A person may be accused of a failure to exhibit due diligence in the case of material delict only if the consequences of the offence were foreseeable by the offender from an objective perspective. The assessment of whether the consequences were foreseeable from an objective perspective should include application of the principle of trust, on which basis the offender may presume that other persons act lawfully. This presumption is only applicable, however, if the offender has no reason to assume the opposite.

The principle of trust is applied not just in traffic but also in situations of division of duties<sup>\*7</sup>, as well as in general communication between people.<sup>\*8</sup>

<sup>4</sup> R. Schmitz. *Nullum crimen sine lege und die Bestrafung fahrlässigen Handels.* – FS Für Erich Samson. C.F. Müller 2010, pp. 181–182.

<sup>5</sup> *Ibid.*, p. 181.

<sup>6</sup> H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (eds). *Strafgesetzbuch. Leipziger Kommentar*, Vol. 1: 'Einleitung', §§ 1–31. Berlin: De Gruyter 2011, §15/ 224d.

<sup>7</sup> W. Joecks, K. Miebach (eds). *Münchener Kommentar zum Strafgesetzbuch*, 3rd ed. Munich: C.H. Beck 2017, §15/ 143.

<sup>8</sup> U. Murmann. *Grundkurs Strafrecht : Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte*, 4th ed. Munich: C.H. Beck 2017, p. 170.

Two significant questions to address arise from the principle of trust: firstly, in which cases is there a reason to trust, and, secondly, where is there a reason to doubt? In light of the above, the question of whether the principle to be accorded priority is the principle of trust or, instead, the principle of distrust has been raised in the professional literature.<sup>\*9</sup>

If a person follows the rules, he can, for the most part, also rely on others acting in accordance with those standards. For example, a driver can trust that other drivers in the flow of traffic will observe the required distance between vehicles and execute driving manoeuvres based on this trust. A surgeon performing a surgery can rely on the anaesthesiologist having performed the profession's duties properly, and the surgeon is not required to check whether the anaesthesiologist has done everything as required.

A person who fails to follow the rules cannot reasonably trust others to comply with them. For example, someone exceeding the permitted speed limit cannot offer a defence based on the argument that the ensuing traffic accident would not have occurred if others had observed the rules. That said, while this person cannot appeal to the principle of trust in this situation, it does not immediately mean that he is responsible for the outcome – it is necessary to examine whether all other criteria for accusing said person of a delict of negligence are met.<sup>\*10</sup>

Furthermore, the principle of trust highlights those circumstances in the case of which grounds for trust are not present even if the person follows the rules. For example, if it is clear that another person is not following the traffic rules or if there are children involved in the traffic situation, who can well be expected to behave in an unpredictable manner, such conditions should be taken into consideration and the case cannot be solved solely on the basis of the fact the person in question followed the rules himself.

A significant feature of the principle of trust emerges from the reasoning above, in line with which a person cannot view his acts in isolation from other people – the acts should be assessed in conjunction with the acts of others.<sup>\*11</sup> Thus, on one hand, the principle of trust limits the extent of the care expected, because it is not necessary to check every single action of another person. On the other hand, the principle of trust also establishes the obligation to assess whether attention should be paid to the actions of others and one's own behaviour should be adjusted accordingly.

As one returns to the question posed above as to whether the principle that matters is that of trust or that of distrust, the characteristics both of those situations in which there is a reason to trust and of those in which there is not are highlighted. However, it is still important to emphasise the aspect of trust *per se*, which demands not that one doubt at all times but that one do so only when there is specific reason. This indicates that it is not reasonable to proceed from general distrust; in contrast, distrust is justified only when there are grounds for doubt.

Thus, the principle of trust specifies the obligations of a person that must be considered in ascertaining the scope of responsibility.<sup>\*12</sup> Specifically, the principle of trust aids in identifying those situations in which it is necessary to determine the liability of all persons involved in an act.<sup>\*13</sup> Accordingly, the principle of trust fulfils the function of helping specify that, in addition to our own behaviour, we have an obligation to pay attention to the actions of others and to the meaning such actions give to the acts of a specific person. Next, we will analyse the extent to which people should make sure that their acts cannot be ingredients in an offence committed by another person, whether intentionally or as a result of negligence.

### **3. The contribution of a negligent act to another person's intentional act that causes an infringement**

It was pointed out above that the core issue in such cases is the application of the non-regression clause and the extent of the effects of the principle of trust. There are three approaches in theory of penal law, each of which has implications in defining the exceptions to the non-regression clause. Under the theory of adequacy, the person who caused the original threat is responsible if the act of a third party intervening in

<sup>9</sup> W. Joecks, K. Miebach (eds), §15/ 142.

<sup>10</sup> C. Roxin. *Strafrecht. Allgemeiner Teil*, 4th ed., Vol. I. Munich: C.H. Beck 2006, p. 685.

<sup>11</sup> W. Joecks, K. Miebach (eds), §15/ 124.

<sup>12</sup> U. Murmann, p. 169.

<sup>13</sup> *Ibid.*, p. 170.

the chain of causality can be objectively predicted on the basis of general overall experience.<sup>\*14</sup> Secondly, with regard to the theory of interruption of the connection for attribution, the significance of the impact on the chain of causality is decisive – intentional intervention by a third party excludes the liability of the person who started the chain if the third party has significantly changed the causality or created a new chain of causality.<sup>\*15</sup> Finally, the theory of limited scope of liability may be highlighted, on which basis the principle of trust is the immediate starting point.<sup>\*16</sup> G. Jakobs has stated that, even though we know that people occasionally make mistakes, we can, to some extent, trust others not to commit errors.<sup>\*17</sup> Therefore, it is not appropriate to apply an abstract suspicion that if a specific object or circumstance can, in principle, be used to commit an offence, one should question the motives behind another person's behaviour since there exists a likelihood of a criminal plan being realised. Were such suspicions to form a suitable standard, it would not be possible to sell such products as a knife or poisonous substance, since there is always a risk of these items being used to commit an offence. Likewise, criminal law cannot place people under the obligation to verify and determine the motives for another person's behaviour on each and every occasion, as this would create general distrust, complicating communication and restricting freedom to choose his or her area of activity<sup>\*18</sup> – which is a value protected by most countries' foundational laws.

On the other hand, neither should an atmosphere of general indifference be created, as it should be taken into consideration that, as a rule, liability for the offences committed in consequence of negligence is established only in the case of the most significant legal rights, such as the rights to human life; health; and, under certain conditions, property. The question is one of identifying the cases wherein a person can trust that his contribution will not be used to commit a crime and those in which he is required to entertain doubts in this regard. The theory providing the underpinnings of criminal law primarily specifies the following criteria. Firstly, it highlights that dangerous items, such as a knife, may not be handed over to a person who is incapable of guilt. Also, there is not reason to trust the other person if the first person is under specific obligation (a guarantor's obligation) to prevent damage from arising or if the other person's preparedness to commit a crime has been obvious from the beginning.<sup>\*19</sup>

The specific obligations arising from legislation that render it incumbent upon a person to prevent the realisation of damage via the outcome are related primarily to handling dangerous objects and thereby ensuring security. This encompasses poisons and weapons, for example. It is important to specify that the regulations related to the above-mentioned items are indeed designed to prevent the problems that could arise from unlawful handling of these and to guarantee safety of the life and health of other people with regard to the dangerous items. The literature describes a case from German court practice in which a person sold a weapon to an unknown party over the 'dark web', who then used it in an act of terrorism. The person selling the weapon did not know what it was going to be used for; it may have been acquired for self-defence or for purposes of collection, but there was no reason to believe that it might be used in an offence. The dispute involved the liability for causing a death through negligence on the part of the person who sold the weapon. This person was accused of causing a death through negligence as, pursuant to Germany's Weapons Act, people must prevent third parties from gaining access to the weapons at their disposal. The aim of this provision is to prevent situations in which third parties could use such a weapon to cause harm to other persons. In a situation wherein someone fails to observe the rules set forth in the legislation, there is no reason to trust that these will be obeyed by others.<sup>\*20</sup> It is important to stress that a person is under obligation to prevent a specific threat. This can be illustrated by citing an example in which an apartment building is set on fire and the residents are unable to exit the building because one of the residents, in disregard of the fire-safety rules, has left a bicycle in the stairwell, thereby blocking the exit to the people inside such that the residents perish. In this case, the person leaving the bicycle in the stairwell has violated rules that were designed to ensure safe exit from the building in the event of a fire. It is important to specify that the actual

<sup>14</sup> B. Heinrich. *Strafrecht - Allgemeiner Teil II: Besondere Erscheinungsformen der Straftat, Unterlassungs- und Fahrlässigkeitsdelikt, Irrtums-, Beteiligungs- und Konkurrenzlehre*, Vol. II, p. 77.

<sup>15</sup> *Ibid.*

<sup>16</sup> U. Murmann, p. 174.

<sup>17</sup> G. Jakobs. *Strafrecht, Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre. Lehrbuch*. 2th wd. de Gruyter 2011, p. 174. – DOI: <https://doi.org/10.1515/9783110906424>.

<sup>18</sup> U. Murmann, p. 174.

<sup>19</sup> *Ibid.*

<sup>20</sup> C. Fahl. *Die Strafbarkeit des Verkaufens von Waffen im Darknet wegen fahrlässigen Tötung*. – *Jus* 2018, pp. 532–533.

situation would not be different if the fire had been a result of lightning striking the building, so long as the bicycle still obstructs the exit. The question of the liability of the resident who blocked the exit would arise in this case as well. Now, consider the example of a person leaving rubbish next to the bins, which then gets used by an arsonist as fuel. In this case, the first person has violated the requirements related to waste disposal, but these rules are not designed directly to prevent arson. The German courts have established that a person may trust that others will not take advantage of hazardous situations he has created.<sup>\*21</sup>

The other element highlighted is this: the commission of an offence by the other person must be recognisable. What does this entail? According to Jakobs, the fact of the contribution being usable exclusively for commission of a crime is a relevant criterion. Also, it has been suggested that the decision to commit an offence must be recognisable.<sup>\*22</sup> C. Roxin finds that a person can be accused if preparedness for the act can be identified. Preparedness for an act is a better distinguishing characteristic than a decision to commit an offence, in that the latter involves the processes occurring within the person, while external identifiable factors should be assessed for determination of preparedness for an act.<sup>\*23</sup> If proceeding from the perspective of preparedness for an act, one next needs to consider how preparedness should be identified – i.e., whether it can be determined on the basis of the behaviour of a specific person or, the specific situation at hand. In this case, recognisable clues about a potential offence must be provided by objective facts. Yet precisely which foundations should be used for ascertaining potential preparedness for a crime remains indistinct: from the most general perspective, either the specific situation or the person's behaviour may indicate this. No further criteria have been specified after all these should be determined separately in each specific situation. Even though many definitions have been proposed, there is still no consensus on when there exists sufficient indication predictive of commission of an offence.<sup>\*24</sup> In any case, it can be stated that if a person's act is harmless on its own, that person is not required to make further efforts to find out how that act could be taken advantage of by someone else, and it is certainly not possible to proceed from merely the general possibility of that person's contribution being used to commit an offence. A combination of numerous completely normal acts may be required before another person is able to commit an offence. By the same token, specific knowledge of potential that would be characteristic of an accomplice cannot be present in this case. At this point, we may highlight for comparison the Supreme Court's description of predictability as a feature of negligence in Subsection 11.3 of the decision in case 3-1-1-52-16. According to the decision an event can be deemed predictable if the likelihood of its occurrence, from the perspective of assessment by the person committing the act, is higher than a merely theoretical level proceeding from the specific circumstances.

Next, I would like to give an example for which it has been determined in the legal literature that the person creating particular initial conditions is responsible for causing a death through negligence.<sup>\*25</sup> Person A visits a bar with B, a friend who is in a bad mood, and A decides to lift that friend's spirits by secretly adding two shots of strong alcohol to B's cocktail. The two then exit the bar together, and A leaves B at a taxi rank near a park with a bad reputation at 2 o'clock in the morning. The friend falls victim to an assault and dies. In this case, there were certainly indications that B could end up falling victim to a crime, such as helplessness due to intoxication and presence at this specific location.

From the standpoint of recognition of preparedness for an offence, this is substantially similar to predictability as a characteristic of the delict of negligence. Resolutions of the Supreme Court (principally, resolution 3-1-1-79-10) show that the objective duty of care is a separate characteristic in addition to predictability and the preclusion thereof among the objective elements of the offence. In the example provided above, it may be highlighted that a person's prior negligent behaviour (administering strong alcohol to a friend without the friend's knowledge) is sufficient on its own to fulfil the requirements for negligence. In another example, one can draw such a conclusion from the fact that information communicated by a person is used to commit a murder even though communication of that information is not itself prohibited, if, in the case in question, both the other person's preparedness to commit a crime and the potential of the information in question being used to commit a crime are obvious. In these cases, there are no breaches

<sup>21</sup> W. Joecks, K. Miebach (eds), §15/ 151.

<sup>22</sup> G. Jakobs, p. 578.

<sup>23</sup> C. Roxin, pp. 688–689.

<sup>24</sup> U. Kindhäuser. *Strafgesetzbuch. Lehr- und Praxiskommentar*. Baden-Baden, Germany: Nomos 2017, Vorbemerkung zu 13 /170.

<sup>25</sup> *Ibid.*

of obligations other than that related to the other person's readiness for such an act and the use of the first person's contribution for this purpose being clear.

The prevailing opinion in penal-law theory in this regard is that violation of the duty of care is not confined to solely what is manifested in the form of disregarding specific rules – violation of the general obligation to act diligently and prevent damage to other persons' legal rights is sufficient. In this case, the person violates the obligation to refrain from endangering and damaging the legal rights of other people by the first action. Therefore, the duty of care stems from the possibility of determining whether a person's acts may result in impinging on the legal rights of other people.<sup>\*26</sup> On the basis of the above, it can be stated that a person has violated the duty of care if engaging in rapid manoeuvres with a trolley in a supermarket and thereby hitting a child, who suffers a serious injury. Quick manoeuvring of a shopping trolley is not prohibited, but if there is a reason to believe that this may result in injuring another person in a specific situation in a store, this act constitutes a violation of the duty of care. Proceeding from this reasoning, one can conclude that predictability is a significant criterion in the substantiation of a violation of the duty of care, and, in fact, the professional literature has posed the question of whether predictability alone might not be sufficient in this case.<sup>\*27</sup> On the other hand, it has been concluded that the requirement of identifying a violation of the duty of care separately is justified, as this shows the involvement of violation of a norm for which a person can be justly accused, while mere potential dangerous acts are not punishable. Violation of the duty of care and predictability are, however, directly connected.<sup>\*28</sup> With regard to the former, other criteria in addition must be taken into consideration in substantiation of a violation of the duty, such as permissible risk.

Therefore, with regard to substantiating a violation of the duty of care on the basis of the obviousness of the preparedness of another person for an act and for putting the results of the first person's behaviour to use to that end, it can be stated that such a definition of violation of the duty of care is no different from that applied in a situation in which a person's violation of his duty of care is articulated in terms of honouring the general duty of care to refrain from acts that may damage the legal rights of others.

However, in this case it has to be taken into account that the person concerned must, in addition to the meaning of his own acts, consider their interaction with other persons' conduct and assess them accordingly. Certainly, one has a greater responsibility to analyse and assess one's own actions: there is no obligation to examine the actual meaning and purposes of each of those actions by others separately. Taking into consideration that there is already a problem in conceptualising foreseeability in addition to the more difficult-to-define criterion – that related to identification of a person's readiness to act negligently – makes it more difficult to understand, particularly when one bears in mind that the lack of identification is already blamed on negligence. From the foregoing, one concludes that this determination should be limited to the criteria that permit one to formulate what kind of behaviour on other people's part demonstrates particular diligence. It is necessary also to formulate the criteria to be applied in assessment of the cause of the deliberate consequence in cases of a third party's complaint against the initial causator.

The conclusion that an act committed for reason of negligence, when the consequence is caused by a party committing an intentional offence, is punishable raises the question of whether this fundamentally renders participation by negligence punishable. The latter outcome should be prevented by the fact that the delict of negligence is a separate type of delict, of which a person can be accused only if there are characteristics of carelessness present. When a person has contributed through negligence and all prerequisites for the delict of negligence are present, holding said person liable is justified if the consequence comes directly as a result of another person's intentional offence.<sup>\*29</sup> This reasoning is illustrated by the example of poor fire safety described above, in which the resident who left a bicycle in the stairwell disregarded the fire-safety rules: irrespective of the origin of the fire – an act committed by another person or a lightning strike – the act of leaving the bicycle there is of exactly the same nature.

Because the current prevailing opinion in penal-law theory is that the non-regression clause is not absolute (i.e., there are exceptions to the clause), an intentional act of a third party is found not to exclude the possibility of accusing also the person who caused the original threat, if the prerequisites for a delict of negligence are present. It is important to highlight that the characteristics of negligence, with regard to

<sup>26</sup> H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann, §15/ 171.

<sup>27</sup> V. Krey, R. Esser. *Deutsches Strafrecht Allgemeiner Teil*, 5th ed. Kohlhammer, Germany: 2012, p. 570.

<sup>28</sup> *Ibid.*

<sup>29</sup> C. Roxin, p. 686.

predictability, and the consideration of permissible risk and objective attribution should exclude excessive liability.

## 4. Negligent contribution to another person's negligent act

All of the discussion above addressed situations in which the third party committed the offence intentionally. There are also cases in which the third party interferes in the chain of causality negligently and the offence too is committed through negligence.

Firstly, this may occur in situations in which both parties violate the duty of care and there is a cause-and-effect relationship between their acts and the outcome. Primarily, this takes place when several persons are involved in a joint work process and the principle of division of duties, which is specified in line with the principle of trust, is applicable additionally in the situation at hand. The remainder of this section highlights how the principle of trust applies in the cases of horizontal and of vertical division of duties.

In the case of horizontal division of duties, the two persons hold equal positions in a joint work process and neither has a direct obligation to supervise the other person or inspect his actions/output.<sup>30</sup> The general principle that one person may rely on the duty of care being observed by the other person if the first person too observes it applies in this case. Thus, one cannot not fulfil one's duty and rely on this non-fulfilment being detected by the next person in the line when the next person acts properly. For example, the design and construction of a house requires teamwork, wherein the architect and the engineer must take into consideration the safety requirements and cannot count on the owner who issues the building permit detecting something that they may have not taken into consideration. On the other hand, the representative of the commercial undertaking performing the construction work must act if discovering that the building design documentation is not compliant with the safety requirements. Under the principle of trust, someone cannot count on his potential mistakes being detected by someone else. The mistakes made by the other person cannot be ignored either. The significant aspect here is that a person is not required to check the work of another person 'just in case'. Everyone is responsible, above all, for fulfilling his own duties; however, one may not be indifferent with respect to a mistake or a discovery of something else that is significant in relation to proper completion of the work process. These principles, outlining when there are grounds for inspection, can be found in Supreme Court practice as seen in Subsection 9 of judgment 4-17-1195 of the Criminal Chamber of the Supreme Court, in which it is highlighted that,

among other things, the principle of trust cannot be used if it is obvious from the moment of agreeing on the division of duties that such division of duties will not ensure the proper performance of the duties (e.g., the division of duties assigns a duty to a person who is not prepared to perform the duty in question or is unable to perform the duty). The principle of trust also cannot be used if circumstances arise in the course of implementation of the division of duties that would give a board member acting with the care of a diligent entrepreneur grounds for doubting the proper fulfilling of the duty divided. If circumstances arise that indicate the improper performance of a duty, other board members, who should be aware of that fact if they act with the care of diligent entrepreneurs, must also take further steps to ensure proper fulfilling of the duty.

Next, I would like to explain the situation of vertical distribution of duties, which entails a hierarchical relationship. The relationship of subordination may be permanent or a one-off set of circumstances, arising in a specific situation. Even though the person who holds a higher position in the hierarchy has both inspection and supervision obligations, that person may rely on the subordinates performing their duties properly. This conclusion is predicated upon the person holding the higher hierarchical position having carried out three tasks: choosing the personnel carefully and making sure that these people have the skills required to perform their duties; secondly, assigning the duties and giving the orders in such a way that they are clear and are commensurate with the abilities of said individuals; and, thirdly, honouring his organisational

<sup>30</sup> L. Eidam. Zum Ausschluss strafrechtlicher (Fahrlässigkeits-)Verantwortlichkeit anhand des Vertrauensgrundsatzes – ein Überblick. – JA 2011, pp. 914, 916.

obligation to ensure the functioning of the work process, which calls for availability of the required tools and personnel.<sup>\*31</sup>

To describe the manner in which the above-mentioned obligations may be violated, I offer the following example. Consider a case in which a commercial undertaking is involved in providing care to people. This care institution has a dedicated department whose director is responsible for drawing up work schedules for the care employees, selecting the personnel, and dividing the duties among those employees. The head of this department fails to take into consideration the requirements related to work hours and rest time and also tasks the employees with taking care of so many people that they have no time for responding to complaints. The employees take issue with this organisation of the work, but the head of the department claims that this has functioned before and hence will also function in the future. One day, a carer makes the mistake of administering the wrong medicinal product to a person in his care, which results in that person's death. In this case, the head of the department too can be held liable for causing a death through negligence, on account of having violated the duty of care in performing the duty assigned: organising the work of the department and ensuring the proper performance of the duties entailed. Because of having violated the duty of care, the department head had no reason to trust that his subordinate would perform their duties properly.

This example brings out the point of focus from which a particular error has arisen. Thereat, the head of the department has an important role to play with regard to the tasks not being carried out correctly. When a job is arranged in this way, mistakes become inevitable. This justifies the conclusion on root causer's responsibility.

Now, a new question arises, of how far it is possible to go in this manner in a vertical chain – at issue here is the liability of the supervisor of the head of the department, in turn, and even the board members of the commercial undertaking. The answer is rooted in the duty of diligence: were these persons responsible for organising the functioning of these processes, and were they aware of the potential deficiencies or were there clear indications pointing to the deficiencies? If the answers to these questions are in the affirmative, the respective persons are liable. All those who have violated the duty of diligence are liable for the delict of negligence. This is in accordance with what was expressed in Supreme Court decision 3-1-1-13-17: the fact that the consequence could have been caused by the actions of several people that together match the elements of the offence provides grounds for investigating all of these individuals for the offence while, at the same time, not exempting any of the violators of health or safety requirements from liability. The principle of trust cannot be relied on if the relevant person fails to show interest in the duties that he is tasked with and to give sufficient attention to them. It is important to highlight that this person must have sufficient reason to believe that the processes are functioning well: he has made his own reasonable contribution, and there are no signs that something is wrong. In addition, it is important to stress that this person shall not disregard any errors or failures, let alone justify doing so by pointing out that these fall under the immediate duties of other people. If it emerges in the process of distribution of duties that something is wrong, this must be pointed out and the principle of trust cannot be applied, as there is no longer good reason to believe that the actions of the other people involved can be relied upon.

Furthermore, the criteria for the delict of negligence and, in the event of a delict of negligent inaction, the criteria for the delict of inaction should be taken into consideration. Namely, the duty of care that characterises the delict of negligence is not equivalent to the obligation of a guarantor that is characteristic of the delict of inaction.

One might also consider the foundation on which a person is determined to be under an obligation to inspect or be attentive. Should this be specified in a specific job description or act of law, or can it be derived from how the process functions? The answer to this question can be found by looking at Supreme Court ruling no. 1-15-6223, according to which both what constitutes good medical practice and the code of ethics of medicine should be examined in addition to the therapeutic guidelines. This shows that the question is not limited to rules in written form; rather, all requirements that govern the issue are significant. Also, professional literature highlights that, alongside specific norms, the process for the work and the actual formation thereof should be examined.<sup>\*32</sup>

<sup>31</sup> A. Schönke, H. Schröder. *Strafgesetzbuch Kommentar*, 30th ed. Munich: C.H. Beck 2019, §319/ 8.

<sup>32</sup> W. Joecks, K. Miebach (eds), §15/ 114–116.

## **5. The principle of trust in the structure of the delict of a negligent offence**

Finally, one could investigate which element of the structure of delict the principle of trust belongs to. Taking into consideration the fact that the rule arising from the non-regression clause is amended in consequence of that principle, one finds indication of it being an element by which the criteria related to objective attribution are defined. However, one finds that it is a means of characterisation, which defines an act that violates the duty of diligence. The above must be agreed with, as the principle of trust reveals when the duty of diligence is violated, by answering ‘what is the required extent of diligence?’ and ‘when is there a reason to pay attention to the behaviour of other people?’ both. Therefore, the non-regression clause must be assessed in light of the duty of care too. The assessment of permissible risk should be carried out in terms of the duty of care, as, even though this is assessed for objective attribution in the case of an intentional delict, one should keep in mind that the delict of negligence is a separate delict with its own structure.

## **6. Conclusions**

It is possible that a person can be liable for the delict of negligence if the consequences are brought about by a third party. It is important to determine when non-diligent behaviour by the person whose action was the initial cause can be blamed for an offence committed by another person, in consideration of the fact that there are already issues with the delict of negligence: how to determine what acts are in conflict with the duty of care and foreseeable from an objective perspective. The principle of trust represents an attempt to ascertain the cases in which it is justified to punish an individual’s negligence that results in a contribution to an offence committed by another person. This assists in creating fairer systems, considering all persons’ roles and the chain of responsibility, because not always the act constituting the immediate cause is decisive. The contribution of the chain-launcher can be crucial.