

ARTICLE

The Effect of Parents' Violation of Duty to Care on the Amount of Child's Claim for Damages: A Comparative Study

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Introduction

A mother and her 3-year-old child were traveling together by car when they had an accident. The accident occurred due to the third party's fault, but the seriously injured child was not wearing a seat belt. Here, there is no doubt that the third party is liable for compensation, but how will the fault of the mother who contributed to the child's serious injury by not making him wear a seat belt be evaluated? The same question is also valid for the case where a 4-year-old boy, traveling on a train with his mother, falls out of the wagon after opening its door while his mother is not 'closely involved' with him. Does the mother's fault affect the compensation due to the child? Should it be accepted that the father of the 22-month-old child, who fell from the upper platform of the 1.5-meter slide to the ground and got injured, neglected his duty to care and therefore 'contributed' to the damage? If so, can the manufacturer of the slide, as the liable party, assert that some of the damage to the child is caused by the father's violation of his duty to care and, therefore, s/he her/himself cannot be held liable for the whole damage? Can the father, who sent his hyperactive 5-year-old child to school only in the company of his 9-year-old sister, be considered negligent and liable if the child got hit by a scooter when he suddenly jumped onto the road?

The common ground of the questions raised above (based on some Swiss and German Federal Court judgments explained in detail below) is the limits of the parents' duty to care and the effects of its violation on the amount of the child's claim for damages. In other words, from the legal point of view, the common question that arose in all the cases is whether it is appropriate and/or necessary to make a deduction from the compensation to be paid to the child by the third party-tortfeasor where parents¹ violate their duty to care at the time when the harmful act occurs? Before explaining the topic in detail, it is essential to underline the conflict of interests here: the injured child's main interest is to compensate for all the damage s/he suffers. On the other hand, the tortfeasor is interested in maintaining his freedom of action by avoiding over-compensation. Therefore, the main challenge is to find the golden mean.

1 The duty to care may have been violated by one parent or by both. Accordingly, *parent's* and *parents'* duty to care is used interchangeably in this study without affecting the legal outcome.

In general, the question presented above can be answered in three ways. First, the parent's fault may not be considered in calculating the amount of the compensation paid to the child ('independence approach'). Such an approach would align with legal principles of legal personalities and assets in addition to the aim and legal policy regarding the protection of the child. On the other hand, this approach may be criticized for disregarding the practical reality of the indivision of the parents and their children. In addition, from the perspective of conflict of interests, disregarding the fault of the parent may be deemed as being far too 'pro-children' at the expense of the tortfeasor.

Another way of thinking falls into the other end of the scale. It considers the child and the parent as a single legal unit by not differentiating the parents' fault from the child's ('attribution approach'). In other words, this approach attributes the fault of the parent to the child and, thus, reduces the amount of compensation paid to the child by the third party. This approach brings the practical results of the compensation to the foreground. From the conflict of interests perspective, this approach may be considered favouring the tortfeasor at the expense of the injured child.²

The last – and in a sense, the middle – way of thinking is to take the fault of the parent(s) into account while calculating the amount of compensation due to the child under some pre-defined circumstances, such as the possible legal relationship between the tortfeasor and the child that exists before the tort ('conditional attribution' approach). The goal of this approach is to balance the parties' interests in the concrete case based on the notion of 'legal representation': the parents' fault can be attributed to the child only if the parents represent the child in the concrete case, i.e., when there is a legal relationship between the child and the tortfeasor before the tort, established by the parents as legal representatives. The main criticism of this approach may be about its pre-defined conditions, which lack providing justice in each case.

The research approaches the problem of determining the effects of the negligence of parental supervision on the amount of compensation paid to the child in a comparative way. Since each represents one of the three approaches stated above, the relevant provisions and court practice of Anglo-American,³ Swiss-Turkish and German systems will be analysed.

The independence approach: The parents' fault is independent of the child's

It is accepted in English law that parents and persons acting on behalf of them (*in loco parentis*) are under the duty to care for children. Accordingly, they must take reasonable precautions to keep children safe and supervise them (Mullis and

2 To the knowledge of the writer, currently, this approach is not followed by any jurisdictions – at least not *directly*. However, this approach is included in the scope of the research since it was followed by the early cases of the Swiss Federal Court and is still being followed by Swiss-Turkish laws indirectly.

3 Within the scope of this study, the 'Anglo-American system' refers to the English law and the prevailing practice accepted by the majority of the states of the USA.

Oliphant, 2011; Steele, 2014).⁴ This duty includes protecting children against dangers they can or are at least expected to foresee under the circumstances of the concrete case.⁵ The parent(s) cannot be absolved from this burden of custody nor impose it on the defendant:

The responsibility for the safety of little children must rest primarily on the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land (Mullis and Oliphant, 2011).⁶

Aside from the parents' duty to care, the concept of "contributory negligence" is also well-known in English law. Until the early 1900s, it was considered merely a plea/defence for the debtor.⁷ Then the Law Reform (Contributory Negligence) Act of 1945 of the United Kingdom regulated that courts shall *ex officio* reduce the amount of compensation in order to balance the liabilities of claimant and defendant. This rule replaced the defence of contributory negligence, which prevented the claim for compensation entirely (Steele, 2014). The relevant part of this is that English law does not impute the parents' negligence in exercising their duty to care to the child and, therefore, does not consider the parent "contributory negligent" when the child is injured. In cases where the parent breaches the duty of care, the courts hold the parent liable jointly and severally with the tortfeasor. The principle was laid out in the well-known case of *Froom v Butcher*. Since she did not use a child seat suitable for her 3-year-old child in the car, the Court concluded that the mother was responsible for 25% of the damage suffered by the child as the result of the accident caused by the third person. Consequently, the mother is held liable against the child for the 25% of the total damage. In other words, if the third

- 4 For example, the teacher can be held responsible if the child is injured while walking around a busy street by himself after class. *Barnes v Hampshire CC* [1969] 1 WLR 1563. Similarly, for a decision in which the local authority was held responsible for the damage suffered by the driver, whose truck overturned in order to avoid hitting the young child and who was injured, on the grounds that he had not secured the school playground and caused one of the young children to cross the road. *Carmarthenshire CC v Lewis* [1955] AC 549; *Palmer v Cornwall* [2009] EWCA Civ 456.
- 5 See e.g., Lord Phillips CJ, *Perry v Harris* [2008] EWCA Civ 907; *Hughes v Williams* [2013] EWCA Civ 455.
- 6 *Phipps v Rochester Corp* [1955] 1 QB 450. On expanding the scope of the parent's duty to care while on the property of others, see *Bourne Leisure Ltd v Marsden* [2009] EWCA Civ 671.
- 7 The first appearance of contributory negligence as a common law defence against negligence was in a very early case of *Butterfield v Forrester* (11 East. 60 103 Eng. Rep. 926 (K.B. 1809)). The Court explains: 'a person is not to throw himself upon an obstruction and get damages or make it the fault of another; and if he doesn't use common and ordinary caution to be in the right, he can only have himself to blame. One person being in fault doesn't dispense with another's using ordinary care with himself.'

party were not deemed at fault, the mother would be liable for all the damage her child suffered (Steele, 2014).⁸

The duty of parents to protect minor children is also accepted in US law.⁹ Most states have rendered decisions similar to English courts (Johnson and Hargrove, 2006).¹⁰ Likewise, the majority of the states' court practice clearly separates parents' and child's fault in cases where a third party harmed the child while his/her parents were neglecting their duty to care (Goldberg et al., 2021).¹¹ Although the legislators generally refrained from regulating contributory negligence, the majority of the US jurisprudence has reached a consensus on the 'both ways' rule on the imputation of negligence to another. Under the 'both ways' rule, imputation of the negligence of someone to another is possible only if the other is vicariously liable for the negligent person's tort (Emanuel, 2010). As §5 of the Restatement Third puts, "The negligence of another person is imputed to a plaintiff whenever the negligence of the other person would have imputed had the plaintiff been a defendant".

8 *Froom v Butcher* [1976] QB 286, 292.

9 'Parent-child tort immunity doctrine' was recognized throughout the US in the late 1800s to preserve family harmony. Although the doctrine which prevents the child from suing his/her parent for his torts was adopted by many courts (e.g., the infamous case of *Roller v Roller* of the Washington Supreme Court in 1905, which concluded that a daughter could not sue her father for rape due to the doctrine of parent-child tort immunity), as a result of heavy criticism from various courts and commentators made the majority of states to abolish the doctrine either wholly or partially. See, R.P. Eclaeva, 'Liability of Parent for Injury to Unemancipated Child Caused By Parent's Negligence - Modern Cases', 6 *American Law Reports 4th* (1981), p. 1066; J. DeWitt Gregory et al., *Understanding Family Law* (LexisNexis, 2013), p. 247-248. See *Gibson v Gibson* (3 Cal. 3d 914 (Cal. 1971)) for the historical perspective of the immunity doctrine. While some states have abolished the immunity in favour of a 'reasonable parent' standard, others differentiate the torts based on the involvement of parental supervision: 'For example, if a child is injured in an automobile accident caused by the negligence of a parent, because such a negligent act does *not* involve parental discretion or authority, the parent *can* be held liable for the child's injuries in certain jurisdictions. However, if the child is injured while the parent is exercising parental discretion and authority, even in the realm of a parent's negligent supervision of the child, then the parent would *not* be held liable for the child's injuries.' DeWitt Gregory et al., *Understanding Family Law*, p. 248-249. Although few, some states accept that 'no tort claim exists based on negligent parental supervision'. See, for example, the cases of the Washington Supreme Court: *Zellmer v Zellmer* 164Wn.2d 147,188P.3d497 (2008) and *Smelser v Paul* C.93076-7 (2017), available at: <https://cases.justia.com/washington/supreme-court/2017-93076-7.pdf?ts=1499355268>.

10 The provision of § 314A entitled 'Special Relations Giving Rise to Duty to Aid or Protect' has been added to Restatement Third. In the explanations of this provision, it is stated that if the owner of kindergarten (B) sees that child (A) is seriously ill but does not take any measures for the treatment of the child, he will be responsible to the family of the child. For example, *Munn v Hotchkiss School*, 165 A.3d 1167, a 15-year-old boy was bitten by an insect during a school trip in the mountainous region, resulting in neurological damage to his body. As a result of the complications, the child permanently lost his ability to speak. The Court held the school responsible for failing to inform the child and his family about the insects, which are common in the area, and for not recommending wearing appropriately. As it is known, although 'Restatements' are not binding, they are essential in terms of showing the general trend. J.C. Goldberg et al. *Tort Law* (Wolters Kluwer, 2021).

11 For example, in *Wymore v Mahaska County Iowa* 1889, the Court stated explicitly that 'The child cannot be negligent and it cannot authorize another to be such; therefore, it is unreasonable to make him liable for the negligence of the parent'. *Wymore v Mahaska County*, 78 Iowa 396.

In the scope of our study, the 'both ways' rule means that any fault attributable to the parents does not reduce the child's claim against the third person ('independence approach').¹² Since children are not liable for their parents' torts, under the 'both ways' rule, the parent's fault cannot be imputed to children (Emanuel, 2010; Emanuel, 2015). The legal consequence of the parent's fault is the parent and tortfeasor being jointly and severally liable against the child (as a creditor) for the damage the child suffers (Emanuel, 2015).¹³

The (indirect) attribution approach: the fault of the parent is a ground for deduction from the compensation due to the child

Unlike the independence approach that puts the child's interests in the foreground, Swiss-Turkish law follows the 'attribution approach' stated above – albeit *indirectly*. Under Swiss and Turkish laws, the judge has broad discretion in determining the amount of compensation. Art. 43/I of the Swiss Code of Obligations (OR) is as follows: "The court determines the form and extent of the compensation provided for damage incurred, with due regard to the circumstances and the degree of culpability."¹⁴ The provision is exactly adopted in the Turkish Code of Obligations (TBK) as Art. 51/I.¹⁵ Following that, OR Art. 44/I introduces the grounds for reducing or lifting the compensation: 'Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it

12 However, in the past years, different approaches were adopted. The opinion on attributing the fault of the parent to the child was put forward in *Hartfield v Roper* judgment in 1839 (21 Wend. 615). The Court explained: 'the plaintiff [the child] was wrongfully on the road and the negligence of those in charge of him amounted to a criminal neglect. It was their duty to take charge of a child of such tender years and their negligence must be imputed to the child.' This approach has been followed in several states, including Massachusetts, Maine, California, Maryland and Kansas, but confined later. W.J. Schultz, 'Law of Imputed Negligence – Parent to Child', 350 *Historical Theses and Dissertations Collection* (1897), p. 12-13. Some states have never adopted, and some others have repudiated the approach of *Hartfield v Roper* in a short while. Schultz, p. 17; E. A. Dudek, 'Infants- Negligence-Imputing Parent's Contributory Negligence to a Child Non Sui Juris' 36 *Marquette Law Review* (1952), p. 70 ff. For a criticism of this approach, see C.F. Beach, *Counter Negligence: A Treatise on the Law of Contributory Negligence or Negligence as a Defense* (Baker, Voorhis & Company, 1892), Sections 128-129.

13 'a kid is injured in a playground accident, due in part to Guard's failure to supervise rough playing between Kid and Ted, another child. The accident was also due in part to a negligent failure of supervision by Dad, Kid's father, who was also present. Kid has suffered \$ 10,000 damages, and sues Guard for this sum. Kid can collect the entire \$ 10,000 from Guard, without reduction for any percentage of fault due to Dad. That's because (1) Dad would not be vicariously liable for Kid's negligence if Kid were a defendant in an action brought by Ted (...); (2) consequently, under the 'both ways' rule, Dad's fault won't be attributed to Kid, and can't reduce Kid's recovery against either Guard or Dad; and (3) therefore, dad and Guard are jointly and severally liable, and Guard can be required to pay the whole amount. (Guard could then seek contribution from Dad.)'

14 www.fedlex.admin.ch/eli/cc/27/317_321_377/en.

15 www.mevzuat.gov.tr/MevzuatMetin/1.5.6098.pdf.

entirely.’ This provision is also adopted in TBK as Art. 52/I with a minor difference.¹⁶ In light of these provisions, the foremost question is *whether parents’ negligence concerning the duty to care can be attributed to the child* in cases where the child is harmed. If the answer is in the affirmative, parents’ fault can be considered a ground for reducing compensation pursuant to OR Art. 44/I and TBK Art. 52/I, as the provisions mention ‘the circumstances attributable to [the person suffering damage]’.

As a first step, it is crucial to state that the question above may only be answered affirmatively if its practical results are put to the foreground. In one of its early judgments on the subject, the Swiss Federal Court made such consideration by stating ‘the parent will primarily benefit, at least indirectly, from the compensation to be paid to the child’¹⁷ and therefore accepted the mother’s culpable violation of her duty to care as a ground for deduction from the compensation due to the child ‘in accordance with practical concerns’.¹⁸ Some writers also adhered to this approach (von Tuhr and Peter, 1984; Kessler, 2015; Brehm, 2013).

However, the Swiss Federal Court changed its point of view with its judgment on 2 February 1905.¹⁹ In this judgment, the Court stated that the parent’s fault cannot be attributed to the child in tort cases, unless clearly foreseen by the law.²⁰ Its reasoning was based on parents’ actual *representation* of the child in the concrete case. Unlike legal transactions, the Court stated that the parents do not *represent* the child in cases where the child is harmed because of a third party’s tortious act. Since there exists no legal representation in these cases, it follows that there cannot also be a legal assumption to extend/attribute parents’ fault to the child. In other words, it is accepted by the Court that the parents’ fault cannot be considered as a ground for deduction in the scope of OR Art. 44/I in tort cases (Honsell et al., 2013; Oftinger, 1940; Moreno, 2015).²¹

The Court has adhered to this approach in many decisions since then. For example, in a case dated 2 May 1969,²² the arm of a 3-year-old child, who crawled under the closed barriers of the railway intersection, was crushed under the wagons passing by. The Federal Court stated that the fault of the mother, who was at home and

16 While the cases attributed to the injured party are clearly included in the scope of the OR, only the ‘injured’ person is mentioned in the TBK. The provision is expanded through interpretation.

17 ‘Für diese Anrechnung des Mitverschuldens der Eltern bezw. der Mutter spricht endlich noch der rein praktische Gesichtspunkt, dass es in erster Linie die Eltern sind, welchen die zu zahlende Entschädigung, wenigstens mittelbar, zu gut kommt.’ BGE 24 II 205 (www.servat.unibe.ch/), p. 214.

18 BGE 24 II 205 (www.servat.unibe.ch/).

19 BGE 31 II 31 (www.fallrecht.ch/), p. 31 ff.

20 BGE 31 II 31 (www.fallrecht.ch/), p. 34-35.

21 See e.g. Zürich Commercial Court (*Handelsgericht des Kantons Zürich*) HG110004-O 03.03.2014 (www.gerichte-zh.ch/); BGE 9C_903/2008, 21.01.2009 (www.bger.ch/), par. 5.4. In terms of traffic accidents, the well-established practice is also in line with the abovementioned principles. For a judgment that states that the amount of compensation was deduced on the faulty behaviour of the parents since it weakens the causal link between the perpetrator’s act and the harm, see BGE 61 II 90 (www.servat.unibe.ch/). In this case, the father allowed his child to drive without a driver’s license and insurance. The boy had an accident. For counterarguments, see. H.N. Nomer, *Haksız Fil Sorumluluğunda Maddi Tazminatın Belirlenmesi* (Beta, 1996), p. 118.

22 BGE 95 II 255 (www.servat.unibe.ch/).

therefore not exercising her duty to care 'properly' at the time of the accident, could only be considered relevant where it was severe enough to cut the causal link between the perpetrator's act and the damage occurred. As this condition was not fulfilled in the present case, the Court decided that full compensation should be paid to the child.²³

Another judgment of the Swiss Federal Court in the same direction was rendered at the 'ski accident' case dated 18 September 2014.²⁴ The 11-year-old plaintiff, who went to a ski slope to ski with her parents and brother, slipped 100 meters, entered the area on the side of the slope where the snow was soft, lost control, and fell. She hit her head on the iron marker used to mark the runway area and was seriously injured. The critical part of the compensation lawsuit brought against the runway operator is that the Federal Court reversed the state court's judgement, which reduced the compensation on the ground that the child's parents violated their duty to care.

In line with Swiss law, the prevailing opinion in Turkish doctrine argues that the fault of the parent in breach of the duty to care cannot be *attributed* to the child and, therefore, cannot be considered as a reason for deduction from compensation within the scope of the *fault of the injured party* in terms of TBK Art. 52/I (Tandoğan, 2010; Eren, 1975; Aral, 1980 Cf. Nomer, 1996). Similarly, the well-established practice of the Turkish Court of Cassation (*Yargıtay*) accepts that the fault of the parent cannot be attributed to the child in cases where a third party harms the child. For example, in the judgment dated 18 December 2018, the 3rd Civil Chamber of the Court of Cassation²⁵ stated expressly:

[T]he failure of the legal representatives to fulfil their duty to care cannot be attributed to the minor (...) as his own fault. (...) The fact that the compensation is temporarily paid to the legal representative, (...) does not change this outcome (...) since the compensation becomes a part of the child's own assets (see also Nomer, 1996).

It is essential to underline that what has been explained so far is common under Swiss-Turkish and Anglo-American law. As a matter of fact, if the Swiss-Turkish practice was limited to this, the Swiss-Turkish law could have been included in the scope of the 'independence approach', which is the most 'pro-children' one in the abovementioned sense. However, the Swiss-Turkish system reverses its 'pro-children' position by considering the parent's fault in *determining the*

23 BGE 95 II 255 (www.servat.unibe.ch/) par. 15-18. See also, BGE 71 I 48 (www.servat.unibe.ch/) p. 55 ff.; BGE 33 II 497 (www.servat.unibe.ch/) 500; BGE 56 II 396 (www.servat.unibe.ch/), 401; BGE 58 II 29 (www.servat.unibe.ch/), 35; BGE 60 II 218 (www.servat.unibe.ch/), 224; BGE 63 II 58 (www.servat.unibe.ch/), 62; BGE 81 II 159 (www.servat.unibe.ch/), par. 18.

24 BGer 4A_206/2014, 18.09.2014 (www.bger.ch/).

25 2017/869, 2018/12895, 18 December 2018.

compensation amount under OR Art. 43/I (TBK Art. 51/I)²⁶, using it as a *criterion to determine the degree of the perpetrator's fault*. Both the Swiss and the Turkish courts assume that the sum of all related parties', i.e., the child, parent, and the perpetrator's, fault equals 100. Then they assess how much can be attributed to the perpetrator. This implicitly and indirectly means that the parents' fault in carrying out their duty to care reduces the compensation to be paid to the child: as the fault of the parent increases, the share of the perpetrator from the total fault decreases. So, for instance, if the parents' fault is determined 20 out of 100 (20%), the perpetrator's will be 80% (since the sum of the faults should be 100 in the concrete case). If there are no other circumstances to be considered in the assessment of compensation, then, for 100 units of damage, 80 units of compensation will be awarded to the child. As a result, the fault of the parent will constitute an *indirect* ground for deduction from the compensation to be paid by the perpetrator to the child.²⁷ For the child to receive the remaining compensation, s/he must sue the responsible parent, which does not happen in most cases due to close family bonds.

The approach accepting the parent's fault as an indirect ground for deduction is also applied in Swiss-Turkish law where the parents violate their duty to care *after* the damage has occurred. Accordingly, if the parent has not taken the necessary action to reduce or prevent the damage caused by the act of the third party, this will also be considered as a factor reducing the perpetrator's fault in calculating the compensation. A judgment of the Swiss Federal Court dated 23 October 1990²⁸ can be given as an example. In this case, the mother called the paediatrician's office – who had already examined the child and prescribed a treatment – and stated that the child was now suffering from severe vomiting and diarrhea. She wanted to bring her child in for an examination. The doctor's assistant refused the mother's request and said she should continue applying the given treatment and not call until 26 March. However, the child's condition worsened gradually, and at 07:15 on 24 March, the child completely lost consciousness. Thereupon, the parents took the child to the paediatrician's office, but they waited for 3-4 hours for the office to open. Although the child's life was saved at the last moment, permanent brain damage occurred due to long-term dehydration. A lawsuit was filed against the doctor by the child. The Swiss Federal Court ruled that the breach of the obligation to provide complete information and disclosure by the paediatrician's assistant

26 In Swiss and Turkish laws, the judge has broad discretion in deciding the amount of compensation. OR Art. 43/I (TBK Art. 51/I) reads as follows: "The court determines the form and extent of the compensation provided for damage incurred, with due regard to the circumstances and the degree of culpability."

27 For instance, the Swiss Federal Court considered the fault of the masseuse (perpetrator) milder because of the gross fault of the parent in interrupting the treatment in the doctor's office and taking his child (who fell at the Mount Salève) to the masseuse for the treatment of her swollen ankle and leg. However, the child was suffering from *tuberculous arthritis*. The masseuse was held liable for treating a patient without taking suspicious symptoms into account and persisting in the massages despite the absence of improvement. After the masseuse's 'treatment', the child's suffering had become intolerable, and his whole leg was inflamed. The medical report later revealed a permanent partial incapacity of 20%. BGE 59 II 37 (www.fallrecht.ch/).

28 BGE 116 II 519, *Sammlung der Entscheidungen des Schweizerischen Bundesgerichts*, p. 519-525.

constitutes a breach of contract. However, the parents were also considered at fault for taking their unconscious child to the office before the regular working hours and making him wait there even though there were other open healthcare facilities. As a result, the Court stated that although the behaviour of the parents was not so severe as to cut the causal link between the perpetrator's act and the damage suffered by the child, it should be *taken into account* in determining the amount of compensation to be paid to the child. In short, the Court considered the parents' fault in carrying out their duty to care as a *factor in determining the paediatrician's fault* and therefore deducted from the compensation due to the child under OR Art. 43/I.

Similar examples can be found in Turkish judicial practice as well. As seen in Swiss and Turkish law, although the parent's fault is not attributed to the child in cases where the parent violates his/her duty of care, since this fault is taken into account as a factor in determining the fault of the perpetrator, it *indirectly* causes a reduction from the compensation due to the child. Therefore, albeit *indirectly*, it may be stated that the Swiss-Turkish law follows the 'indirect attribution' approach.

The conditional attribution approach: parents' fault is attributed to the child if there is a pre-existing legal relationship between the child and the perpetrator

German law neither distinguishes the fault of the child and the parent as does the 'independence' system nor regards the parent's fault as a ground for deduction from the compensation like the 'indirect attribution'. It determines the consequences of the parent's breach of duty to care according to the existence of a legal relationship between the child and the perpetrator *before* the tortious act has taken place.

Unlike OR and TBK, BGB does not contain a provision that gives the judge a wide range of discretionary power in assessing the compensation amount. § 254 and § 278 BGB are the relevant provisions here. The former regulates the contributory fault of the claimant and states that the 'fault on the part of the injured person' shall be decisive in ascertaining the amount of compensation to be paid. The last sentence of this provision foresees the analogous application of § 278 BGB, thereby

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including the injured party's legal representatives²⁹ to his/her 'part'. The provisions read as follows:

§ 254 BGB Contributory negligence:

(1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party. (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.

§ 278 BGB Responsibility of the obligor for third parties:

The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation, to the same extent as for fault on his own part. The provision of § 276 (3) does not apply.

When the scope of the abovementioned provisions are evaluated together, it appears, *prima facie*, that under German law, the fault of the parents can be attributed to the child in certain cases where the child and the parent can be considered as the same 'part', i.e., the cases where the parent legally represents the child. In these circumstances, the fault of the parent is considered directly as the fault of the injured child and thereby causes a reduction in the compensation to be paid to the child in terms of § 254 BGB. However, a closer look will reveal that § 278 BGB and the situation we are examining have two main points of divergence: first, § 278 BGB is about the debtor's liability ('The obligor...'). But in the cases we are examining, the child is not a debtor but a creditor. However, since § 254 BGB regulates that § 278 BGB will be applied *by analogy*, it is accepted that § 278 BGB

29 Parents, who, as a rule, are the child's legal representatives, are in the scope of these provisions (Schaub, 2021; Dauner-Lieb, 2021; Stadler, 2021; Petersen, 2018). The legal guardians, foster families, and adopters are also in the scope. In this respect, the important thing is to determine who is responsible for the care of the child in the concrete case. Since the mother and father are under the duty to care regardless of custody, they are included in the scope of this provision. Even if it is not possible to transfer the duty of care to another person as a whole, fulfilling this duty may be temporarily left to others. The typical examples are babysitters. These persons are not legal representatives within the meaning of BGB, but in accordance with the order introduced by the provisions of §§ 254, 278 BGB, it should be accepted that those who have taken over the care of the child as a result of a contract are included in the scope of this provision. See, W. Weimar, 'Muss sich das Kind als Verkehrsoffer eine Verletzung der Aufsichtspflicht durch Verwandte anrechnen lassen?' 1953 *Juristische Rundschau* (1953), p. 295. Compare W. Wussow, *Unfallhaftpflichtrecht* (Deutscher Anwaltverlag, 2021), p. 295.

In this context, 'legal representative' in § 278 BGB should be interpreted broadly. However, it is not possible to accept those who fulfil this duty without the consent of the legal representative as legal representatives. See, Weimar, p. 296.

can also be applied in cases where the child is the creditor (Fikentscher and Heinemann, 2017).

The second point of divergence is also about the wording ('the obligor'). § 278 BGB seems to require the existence of an obligor, that is, *an already established* debt relationship. However, in most cases we examine, the legal relationship between the tortfeasor and the child establishes *following* the tortious act (*after* the tort takes place). Regarding this point of divergence, the prevailing opinion and the well-established practice of the German Federal Court accept that although the ground of the legal relationship is not important (including the relationship arising from *culpa in contrahendo*),³⁰ § 278 BGB is applicable *only* in the cases where there is *an existing* legal relationship severe enough to establish a duty to care between the third party and the child.³¹ Thus, it should be inferred that *debt relations between the perpetrator and the child arising purely from tortious acts* are excluded from the scope of the § 278 BGB, and accordingly, in cases where there is no pre-existing legal relationship between the child and the perpetrator, the fault of the legal representative (in our case: parent) cannot be attributed to the child (Stadler, 2021; Fikentscher and Heinemann, 2017).³² This assumes that in the establishment of a pre-existing relationship the parent acts as the child's legal representative, whereas such representation does not occur in mere torts. Also, according to the German understanding, for attributing the parents' fault to the child, which means a worsening of the child's position due to the deduction in compensation, the child's position must first be elevated. In other words, such attribution is only permissible if, in the concrete case, there is a pre-existing relationship between the child and the perpetrator that benefits the child, which was made possible through the legal representation of his/her parent(s). Based on these two grounds, the prevailing opinion in German doctrine and judicial practice recognizes that attribution of fault is possible *if, and only if*, a legal relationship between the child and the

30 It can even be a relationship falling under scope of public law. H. Lange and G. Schiemann, *Schadenersatz* (Mohr Siebeck, 2003), p. 599; BGH Urteil vom 16.04.1964 - III ZR 83/63, NJW 1964, 1670.

31 R.G., Urteil vom 09.05.1939 - VII 251/38 -, RGZ 160, 310-317; BGH, Urteil vom 17. 4. 1980 - III ZR 96/78 (Hamm) NJW 1980, 2078; BGH Urteil vom 12.11.1991 - VI ZR 7/91 para. 4a. BGH, Urteil vom 01-03-1988 - VI ZR 190/87 (Düsseldorf). In this judgment, Federal Court concluded that the rules written at the park entrance are insufficient to build a legal relationship between the perpetrator and the child in the sense of § 278 BGB, par. 2a. The cases where the relationship between the child and the third party is established by a contract between the parent and the third party for the child's benefit is also included in the scope of § 278 BGB (Eckardt, 2008).

32 See, German Federal Court BGH, Urteil vom 8. 3. 1951 - III ZR 65/50 (Düsseldorf): '*Bei unerl. Handlungen hat es daher das Verschulden dieser Personengruppen bei Entstehung eines Schadens dem Geschädigten nicht nach § 278 angerechnet.*' (www.beck-online.de). See also, BGH, Urteil vom 01-03-1988 - VI ZR 190/87 (Düsseldorf): '*Nur soweit sich ein Mitverschulden für den eingetretenen Schaden auf die Phase bezieht, in der der Verletzungstatbestand bereits verwirklicht ist, kommt demnach eine Zurechnung nach §§ 254 II, 278 BGB in Frage.*' (www.beck-online.de) par. 2b. Compare Lange and Schiemann, *Schadenersatz*, p. 605 ff. In addition, in the case-law of the German Federal Court, a distinction is made according to whether the duty to care regarding the endangered legal entity is on the injured party or not. If the duty is voluntarily transferred to a third party, a deduction is made from the compensation for the damage caused as a result of his fault since it is unacceptable for someone to get rid of his/her obligations by transferring it to someone else.

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perpetrator already exists before the tort (Schaub, 2021; Dauner-Lieb, 2021; Knöpfler, 2015; Stadler, 2021; Oetker, 2019; Petersen, 2018; Weimar, 1953).³³

To illustrate this with a few examples:

In a case before the German Federal Court in 1953,³⁴ a 4,5-year-old boy traveling on a train with his mother fell on the rails due to the opening of the wagon's door. According to the plaintiff child's claim, the door was opened on its own as it was not closed properly. The defendant railway company, on the other hand, claimed that the child had opened the door himself by playing with its lock while his mother was violating her duty to care and demanded a deduction in compensation. The Court stated that the railway carriage contract concluded between the mother and the railway operator is a contract for the benefit of the child, and the duty to care (of the railway operator) arising from this contract involves the child, as well. In return, the child must fulfil the obligations expected from him in order not to incur any harm. Since a 4,5-year-old child cannot be expected to take precautions against dangers, it should be taken into account that the obligation to take precautions in this regard will arise within the scope of the mother's duty to care. If the mother violates this duty culpably, this fault can be attributed to the child and therefore considered a ground for deduction from the compensation paid to the child. The Court also stated clearly that the contractual relationship between the perpetrator and the child fulfilled the 'existing relationship' condition necessary to implement § 278 with reference to § 254 BGB.

Similarly, in another case that came before the German Federal Court in 1957,³⁵ an 8-year-old plaintiff went on a trip organized by the Child Protective Services Agency of the city of F (*Jugendamt der Stadt F.*) with the permission of his mother, who was his legal representative. 76 children were traveling in a wagon reserved for them on a scheduled train. At some moment, the officer of the Institution left for the train's toilet and left the front door of the wagon open. The plaintiff-child fell off the train through this open door and suffered brain damage. In the lawsuit filed by the child against the railway company, the Court stated that although the child is not a party to the contract, there is a railway carriage contract concluded between the Child Protection Services Agency and the railway company for the benefit of the child. The child, as a passenger, has the right to claim compensation if the railway operator violates its obligations arising from this contract. On the other hand, the obligation to abide with the passenger security rules cannot be imposed on persons who do not have the necessary maturity and foresight. In this incident, it is not possible to claim that the 8-year-old child has such maturity or foresight. The legal representative is obligated to protect the child from potential dangers. In the incident, although the railway carriage contract was not concluded with the legal representative (child's mother), since the child's care and supervision

33 Therefore, § 278 is accepted as a *Rechtsgrundverweisung* norm: a norm that extends the legal ground, not constitutes one. On the formation and development process of the principle in the German Imperial Court and doctrine, see. P. Finger, 'Mitwirkendes Verschulden und Haftung für Dritte', 10 *Juristische Rundschau* (1972), p. 406-413.

34 BGH, Urteil vom 29. 4. 1953 – VI ZR 63/52 (Frankfurt) NJW 1953, 977.

35 BGH, Urteil vom 28. 5. 1957 – VI ZR 136/56 (Stuttgart) NJW 1957, 1187.

throughout the journey was left to the Child Protective Services officer, the fault of this officer in the occurrence of the damage is included in the child's sphere of risk. It should not be possible for the child, who benefits from the contract, to avoid liability if the obligations arising from this contract are not fulfilled for a reason rooted in his sphere of risk. Therefore, as a result, the officer's fault was attributed to the child and caused a reduction in compensation.

Another example is a case that the German Federal Court ruled in 1988.³⁶ In this case, the platform bars at the top of the slide in a children's playground were made with such broad gaps that a small child could slip between them and fall. A 1 year and 10 months old boy, while his father was standing on the left side of the slide, fell from the gap on the right side (from a height of 1.5 meters) to the asphalt floor of the playground and injured his arm and head. In the lawsuit, the defendant claimed that it was the first time such an accident had occurred since 1964, so the main reason for the accident could only be the violation of the father's duty to care. The defendant also asserted that the condition of a pre-existing legal relationship within the meaning of § 278 BGB was established due to the presence of a sign indicating the rules at the entrance of the playground and therefore, the father's fault is attributable to the child. The Court ruled that the defendant was at fault because the asphalt paving of the park's floor did not comply with the relevant legislation. It then continued that putting a sign explaining the rules was not enough to establish a legal relationship between the defendant and the people who entered the park. Therefore, the Court concluded that the father's fault could not be attributed to the child since a legal relationship within the meaning of § 278 BGB was not established *before* the incident.

As can be observed, German law widely accepts that the fault of the parent may be attributable to the child in cases where the parent violates the duty to care. However, for such attribution, a legal relationship must be established between the child and the perpetrator *before* the tortious act.

It should be noted that some writers criticize the position of the Federal Court. Some writers argue that in cases where the child is harmed, s/he can never be held responsible for his/her representatives' fault since s/he does not derive any benefits from the behaviour of his/her legal representatives (Looschelders, 2021; Looschelders, 1999; Larenz, 1987; Lange and Schiemann, 2003). On the other end of the scale, there is also a view that accepts that the child should be held responsible for the fault of the legal representative in any case – regardless of the existence of a legal relationship between the child and the perpetrator – based on the 'legal sphere' (*Rechtssphäre*) theory embodied in the BGB (Finger, 1972).³⁷ However, these views remain a minority.

36 BGH, Urteil vom 01-03-1988 – VI ZR 190/87 (Düsseldorf) NJW 1988, 2667.

37 The author claims that in the light of § 831 BGB, the German system accepts the theory of the legal sphere. Accordingly, both the injured and the perpetrator are responsible for the fault in their legal spheres. The fault of the legal representative should be attributable to the represented. In general, the theory of the legal sphere refers to the legal subject's legally protected rights and interests. See also D. von Schenck, *Der Begriff der "Sphaere" in der Rechtswissenschaft* (Duncker & Humblot, 1977), p. 72. Today, this concept is specifically used to extend liability in order to identify the assets that will ultimately be liable for the damage. See von Schenck, p. 75.

Evaluating the approaches

Determining the effects of the fault of the injured persons and the third parties related to compensation is and should be seen as a matter of legal policy (Baysal, 2012).³⁸ Therefore, one should refrain from oversimplifying the situation by just declaring one or the other approach entirely appropriate or not. As stated above, in cases where the parents violate their duty to care, the injured child's main interest is to compensate for all the damage s/he suffers, while the perpetrator has the interest to maintain his freedom of action by avoiding over-compensation. In this dilemma, the Swiss-Turkish law's indirect attribution approach places the burden of the parents' fault on the child – albeit indirectly – by ultimately regarding the parent's fault as a ground for reducing the amount of compensation to be paid to the child. Although the German approach tries to balance the abovementioned interests by leaving the burden on the child in some cases and on the perpetrator in others (therefore attributing the fault conditionally), the artificiality of the criterion used ('pre-existing relationship') may not be overlooked easily. Furthermore, such a criterion merely depends on the peculiarity of BGB's abovementioned provisions, meaning that it cannot be regarded as a value-based legal policy judgment that can be generalized.

The author is of the opinion that the fault of the parent(s) should not affect the compensation to be paid to the child, directly or indirectly, just as the Anglo-American approach suggests. In this regard, Swiss-Turkish and German laws should change their point of views and stop attributing the parent's fault to the child (indirectly by taking the fault of the parent into account while determining the percentage of the tortfeasor's fault or directly when there is a legal representation of the child by the parent). Moreover, they must take a step further and concretize *the liability of the parent(s) towards the child due to the violation of his/her duty to care*: in cases where the child is harmed as a result of an act or omission of a third party, if it is observed that the parent did not adequately protect or take care of the child, that is, *violated the duty to care*, then, *the parent and the perpetrator should be held jointly and severally liable for the damages*.

The rest is in line with the current systems of Swiss-Turkish and German laws: the child should be able to demand compensation for all the damage from either party.

38 See also J.W. Glannon, *The Law of Torts* (Wolters Kluwer, 2020), p. 167:

'Tort duties are not like chemistry's Periodic Table of Elements. Nature's elements (they tell me) have a physical existence quite apart from anything we might think about them. Chemists have identified them, but (with perhaps a few high-tech exceptions) they have not created them. Tort duties, on the other hand, do not exist in nature; they are made up by judges because they conclude that a duty ought to exist under the circumstances. [L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. *Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334, 342 (Cal. 1976). "[I]t should be recognized that 'duty' is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Prosser & Keeton* at 358. If a court concludes that society will be better off if store owners exercise due care to assist injured customers, it will create such a duty; if a court concludes that bystanders should not be legally bound to render aid in an emergency, it will refuse to create a duty to intervene, and so on.'

If one party pays more than his/her share, s/he should claim recourse from the other(s). The judge should determine the shares in the internal relationship in each case based on their respective degrees of fault/contribution under Swiss-Turkish law (OR Art. 43/I and TBK Art. 51/I). Under German law, § 426 BGB is decisive on the final shares in the internal relationship. These final shares will be determined according to each tortfeasors' fault in fault liability, and each tortfeasors' causal contribution in cases of strict liability (Heinemeyer, 2022). In our case, the judge will analyse the weight of the parent's and the tortfeasor's fault in the concrete case and ascertain who should, in which amount bare the final burden of the damage. Typically, it is expected that the tortfeasor's final share exceeds the parent's. However, there may be some situations where the main fault caused the damage belongs to the parent. In these cases, the parent's final share will be higher than the tortfeasor's.

The author believes that the independence approach has five points of strength. First and foremost, it ensures the harm of the child is fully compensated, independent of the fault of the parents. Regarding the fault of the parent(s) as a ground for deduction from the compensation to be paid to the child and then accepting that the child can demand the remaining amount from the responsible parent means that in most cases, this amount will not be paid to the child due to family bonds as explained above. Therefore, in a sense, the child is forced to settle for the amount that corresponds to the perpetrator's share. The proposed approach ensures that the child receives full compensation in any case.

This approach is also theoretically more consistent because it considers and respects the independence of the child's assets from the parents'. Since the child has his/her own assets that are protected by law against his/her family's interventions, this independence should not be allowed to be impaired, even indirectly. There is no dispute that the compensation for the damage the child suffered is directly included in his/her assets. Therefore, attributing the parents' fault to the child by considering it as a criterion in determining the perpetrator's fault when calculating the compensation ultimately leads to a deduction thereof, thus resulting in a mix of the abovementioned assets.

Besides, in every legal system, the legislator aims to protect *the child* when regulating the parents' duty to care (Aebi-Müller and Niederberger, 2018). The cases in which the duty to care aims to protect *the third parties* (from the child) is/ should be regulated separately.³⁹ In these cases, the legislators accept that the parent should watch over the child so that s/he does not harm others, and if the child causes such harm, the legislators *assume that* the parent has violated his/her duty to care. Except for these clear instances, the parents' duty to care is aimed *exclusively* at protecting *the child* (Lange and Schiemann, 2003). In this context, the author believes that it is not appropriate to burden the child with the parents' violation of their duty to care in terms of tortious acts committed against the child by taking this violation into account in determining the amount of compensation due to the child. Otherwise, a legal institution that aims to protect the child would be implemented in a way that results in the opposite. In order to 'punish the

39 See, e.g., Turkish Civil Code Art. 369: the liability of the head of the household.

criminal not the victim' (Woodhouse, 1996), the approach proposed should be adopted.

Another strength of the approach proposed concerns the principle of legal certainty. One should bear in mind that the scope and limits of the parents' duty to care are rather unclear. In fact, according to Hegnauer, who is referred to as the 'father of child law' in Swiss law, the uninterrupted execution of this duty is 'a utopia [and] a slight or gross violation of this duty is inevitable' (Hegnauer, 2007). The fact that the scope of the duty is uncertain, and its violation inevitably makes it difficult to determine the exact degree of the parents' fault. Therefore, if the parent's fault is directly or indirectly taken into account in determining the amount of compensation paid to the child, it will inevitably jeopardize legal certainty. One should be extra hesitant in adopting such an approach in a child-related matter, considering their vulnerable position.

It may be claimed that in cases where there is an actual overlapping of the assets of the child and the parent, the proposed approach will take back the amount already included in the other one.⁴⁰ Although this argument seems to hold water in some respects – at least, *prima facie* – it cannot be deemed correct upon closer examination. For one thing, as stated above, the child's and the parents' assets are legally separate, even if they practically overlap in some cases. On the other hand, in the concrete case, it may be necessary to protect the child's assets from the parents, as well. The interpretation of the child's assets as 'the other pocket of the parents' assets' means melting the child's and the parents' assets in the same pot, which ultimately purports to undermine the purpose of provisions aiming to protect the child's assets against the parents. In addition, it should always be taken into account that parents do not even form economic integrity among themselves in all cases. For example, in a case where the child whose parents are divorced and whose custody is left to the mother is harmed by a third party while the father is violating his duty to care, even if it can be said that the assets of the mother and child *de facto* constitute a whole, the same is not true for the father and the child. If the Swiss-Turkish law's 'indirect attribution approach' is accepted and the father's fault is indirectly taken into account as a ground for deduction from the compensation to be paid to the child, then the burden of one of the assets will be imposed to another unlawfully.

Finally, the proposed approach has a particular advantage in cases where the parents are insolvent. It is stated above that the most crucial advantage of the proposed approach is to enable the child to receive the full compensation for the damage s/he suffered without needing a separate compensation claim from the parents. If the approach is adopted, the ultimate burden of the parents' insolvency will be left with the perpetrator (and not the child) as s/he will at least for some time return empty-handed from his recourse claim after s/he has satisfied the child. But in the meanwhile, the child's health and welfare will be secured, bearing in mind that the compensation's most essential elements are hospital – and if necessary special care – fees as well as loss of (future) labour. This result is also in line with the idea that the entire society is ultimately responsible for protecting the

40 See Swiss Federal Court's judgment of 24 II 205 (www.servat.unibe.ch/).

children. Therefore, as accepted in the Anglo-American system, it should ultimately be the responsibility of *society* to keep children away from harm⁴¹ as well as to compensate injured children as quickly and completely as possible. The cases where the parent is in financial distress should *a fortiori* be included in this scope. In the author's proposal, the idea of society here is initially embodied in the perpetrator, who culpably harmed the child in the first place, but is entitled to a recourse after compensating the injured child. Any delay in such recourse that may occur due to the parents' insolvency should be disregarded in favour of tending the injured child's needs.

As a result, for all the reasons explained above, in the author's opinion, in cases where the child is harmed and the parent is at fault in fulfilling his/her duty to care, the child's assets should be evaluated independently of the parent's. Therefore, the parent's fault should not be attributed to the child. Anglo-American and Swiss-Turkish laws are on the right track in this sense. However, Swiss-Turkish law takes back what it gives by taking the parents' fault into account in determining the perpetrator's fault and thereby indirectly reducing the compensation due to the child. Therefore, as explained above, the 'independence approach' should be followed by accepting the joint and several liability of the parent and the tortfeasor. In this equation, only the child's fault, if any, should be considered as a ground for deduction from the compensation. The fault of the parent(s) should only be decisive in the (internal) relationship (recourse relationship) between the perpetrator and the negligent parent. The author believes that the proposed approach is the most theoretically consistent and realistic way to protect an injured child.

Conclusion

The parents' duty to protect minor children is no longer disputed in the modern world. Even though the criterion of determining the fault of the parent(s) differs, in all modern legal systems, the parent(s) are held liable for violating their duty to care. However, the answers of the legal systems vary when it comes to assessing the fault of the parents when the child is injured by a third party while the parent(s) is (are) violating his/her (their) duty to care. Although the relevant discussions have their origins in 'the dusty pages of time' (Dudek, 1952), there seems to have been no settled recovery in the minds of (*at least*) the European courts and scholars. The author is of the opinion that in cases where the child is harmed, the theoretically consistent way to protect the child is to adopt a three-steps-solution. First, the independence approach should be adopted; therefore, the parent's neglect of duty to care should not be imputed to the child. Moreover, the parent who violates the duty to care should be liable *to* the child jointly and severally with the tortfeasor, providing full compensation to the child. Finally, the liability of the parent and tortfeasor should be reconciled by the judge by weighing their degrees of fault in the concrete case. Aside from various others, the main strength of this approach is

41 'It is in the nature of children to be careless and thoughtless on occasion, and society must be ever aware of the need to exercise extraordinary caution when children are present'. *Appelhans v McFall* 757 N.E.2d 987 (Ill. App. 2001), app. denied, 766 N.E.2d 238 (Ill. 2002).

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placing the ultimate burden of protecting children on society – which the author believes represents the ideal balancing of interests.

Conflict of interest

The author reports there are no competing interests to declare.

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