

The purpose of protective norm in tortious liability arising from a breach of statutory duty

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Abstract: This article examines the function and assessment of the protective purpose of a provision in tort liability, arising from the breach of a statutory duty, through the lens of Estonian and German law. Liability for breach of a statutory duty represents a key, yet conceptually complex form of tort liability. The difficulty lies in determining which legal provisions qualify as protective norms and what the protective purpose of such a norm entails in a specific case. Since neither the Estonian *Law of Obligations Act* nor the German *Civil Code* provides explicit guidance on these questions, it becomes necessary to develop interpretative criteria that delineate the scope of protection. As liability for breach of a protective provision may result from both acts and omissions, and as such norms may derive not only from statutes but also from regulations, local ordinances, or European Union law, the potential sources of liability are highly diverse and assign importance to establishing clear criteria for determining the protective purpose of such norms and, as a related matter, identifying which norms may qualify as protective norms in the first place. Drawing on Estonian and German case law, legislative materials, and legal

doctrine, the article proposes a set of criteria for assessing a norm's protective purpose—emphasising the provision's wording, legislative intent (*ratio legis*), and the foreseeability of harm to a reasonable person. These findings aim to offer practical guidance for identifying and evaluating protective provisions.

Keywords: *breach of statutory duty, causation, Estonian tort law, German tort law, protective norm, protective purpose, tortious liability, unlawfulness*

1. Introduction

Tort law regulates liability for, and compensation in respect of, unlawfully caused damage. General tort liability is regulated by Sections 1043–1055 of the Estonian *Law of Obligations Act 2001* (hereafter LOA).¹ The grounds for holding a person who caused the damage liable include, *inter alia*, cases where the damage was caused by a breach of a statutory obligation (Section 1045(1)(7) of the LOA). The same follows from § 823(2) of the *Civil Code (Germany) 2002* (hereafter BGB).²

In cases of tortious liability based on the breach of a legal obligation or protective norm, it is often difficult to predict whether a court will regard a particular provision as a tortious protective norm. It is even more challenging for the parties to foresee how the court will determine the scope of that provision's protective purpose.

For example, Section 199(1) of the *Penal Code (Estonia) 2001* (hereafter PC) provides for punishment for taking another person's movable property for the purpose of unlawful appropriation—that is, theft. Although this provision could be interpreted as a tortious protective norm, it immediately raises the question of which types of damage it is intended to protect the victim against. Does its protective purpose also extend, for example, to loss of income incurred because the theft of the item prevented the victim from performing a contractual obligation to their contractual counterparty? The law does not provide a clear answer to this question.

The main purpose of this article is to identify the criteria that should be used

¹ Estonian laws are available in English at www.riigiteataja.ee.

² BGB is available at <https://www.gesetze-im-internet.de/bgb/index.html>.

to determine a norm's protective purpose. A related question is whether a given norm can be regarded as a tortious protective norm. These questions are examined through a comparative analysis of Estonian and German legal scholarship and case law, supplemented by relevant comparative literature. While the theory of the protective norm is firmly established in Estonian tort law, the methodological framework for its application—both in identifying qualifying norms and in defining their protective scope—remains fragmented. This article therefore seeks to systematise that assessment by drawing on comparative insights from German law.

2. The structure of general tort liability in cases of a violation of a protective norm

General tort liability under the LOA is structured around a three-stage general tort framework. This means that, in addition to establishing the objective elements of liability (i.e., the tortfeasor has infringed the victim's legally protected interest), the unlawfulness of the act and the tortfeasor's fault must also be established in order to hold the person liable (Tampuu, 2017, p. 207).

In cases of tort liability based on a violation of a protective norm, the first step, within the framework of establishing the objective elements of liability, is to assess whether the tortfeasor has violated the protective norm imposed on them. The next step is to determine whether the victim has suffered harmful consequences, and the third is to determine whether there is a causal link between the violation of the protective norm and those consequences. If these conditions are met, it may be concluded that the causing of damage is presumably unlawful. In such cases, the theory of wrongful conduct (*Verhaltensunrecht*) applies.³

Section 1045(1)(7) of the LOA provides that damage is unlawful if it is caused by conduct that violates an obligation arising from law, while circumstances excluding unlawfulness are set out in Section 1045(2). Although the tortfeasor's objective fault has already been presumed when establishing the violation of the protective norm, the defendant's fault must also be assessed under Section 1050(2) of the LOA, which allows the subjective characteristics of the tortfeasor to be taken into account when assessing fault.

³ In cases where unlawfulness is induced by the harmful consequence, it draws from the result-based unlawfulness theory (*Erfolgsunrecht*) (Koziol, 2012, pp. 172–173).

When asking at what stage the protective purpose of the norm should be assessed, the starting point is that the theory of the protective purpose of the norm is applied primarily at the level of causation. This means that if a necessary cause of the damage has been established on the basis of the *conditio sine qua non* rule, it must then be assessed whether there is also causation in the legal sense. This is where the theory of the protective purpose of the norm comes into play (Tampuu, 2017, p. 215). At the same time, Section 1045(3) of the LOA stipulates that causing damage by violating an obligation arising from law is not unlawful if the purpose of the violated provision was not to protect the victim from such damage. In addition, Section 127(2) of the LOA provides that damage is not subject to compensation to the extent that the prevention of such damage was not the purpose of the obligation or provision whose breach gave rise to liability.

Whether the protective purpose of the norm should be regarded primarily as a matter of causation or unlawfulness is an intriguing dogmatic question, although it has limited practical significance. The relationship between causation and unlawfulness in cases involving the protective purpose of a norm is, to some extent, intertwined. Where the absence of a causal link is established by applying the theory of the protective purpose of the norm, the causing of damage will likewise not be regarded as unlawful under Section 1045(3) of the LOA.

The protective purpose of the norm must also be considered when determining the extent of the claim under Section 127(2) of the LOA. In practice, however, this step is usually unnecessary in cases of tortious liability based on the violation of a protective norm, as the same assessment will already have been carried out when determining the prerequisites for liability, whether under causation or unlawfulness.

In the case of liability based on a breach of a protective norm, it must be clarified through interpretation of the protective norm whether this specific norm imposed an obligation on the party causing the damage; whether it was intended to protect the specific victim; and whether it was intended to protect against damage of the kind that occurred in the given case. If a breach of a protective norm presupposes the fault (or a certain form of fault) of the person who caused the damage, this must also be established in order for there to be a breach of that protective norm. According to Helmut Koziol, the manner in which the damage occurred is also important because the risk that materialised must fall within the protective purpose of the norm (Koziol, 2012, pp. 277–278).

Since the burden of proving the unlawfulness of the act lies with the victim, the victim also bears the burden of proving the violation of the protective norm (Supreme Court of Estonia, 2007, para. 10). This includes proving the elements discussed previously that relate to the protective purpose of the norm. The Supreme Court of Estonia has repeatedly stated that the claimant must also prove that at least one of the purposes of the relevant provision was to protect the victim from the type of damage for which compensation is being claimed (Supreme Court of Estonia, 2012, para. 11; 2018b, para. 14(1); 2024, para. 28).

3. Protective norms under current tort law

A protective norm may either require a person to take certain action (giving rise to liability for omissions) or prohibit certain conduct (liability for acts). According to Koziol, an omission is wrongful where a person is under a duty to take active steps to protect another from harm. At the same time, it is generally accepted across European Union Member States that there is no overarching, general duty to prevent harm to others (Koziol, 2012, p. 191). Duties to act—or to refrain from certain conduct—are therefore defined only for specific, narrowly framed situations.

By contrast, the *Principles of European tort law* (hereafter PETL)⁴ adopt a broader approach, with PETL Article 4:103 providing that:

A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between the parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty (European Group on Tort Law, 2005, Article 4:103).

This formulation reflects a wider recognition of duties to act than is generally found in national legal systems. The creation of such a far-reaching obligation

⁴ The *Principles of European tort law* (PETL) are a non-binding comparative model developed by the European Group on Tort Law. Their stated aim is to provide a common framework to support the enhancement, approximation, and potential future harmonisation of tort law in Europe. The drafters expressly emphasise that the PETL reflect a compromise between different national approaches, seeking to “bridge differences” and offer a coherent set of principles rather than prescribe binding rules. Although not part of positive law, the PETL have occasionally served as an analytical reference or inspiration in legislative drafting and case law, which explains their relevance in comparative discussion.

to prevent harm to others is, however, debatable. For instance, if a person notices a deep hole on a dimly lit sidewalk, that person A is, according to Estonian law, under no duty to warn person B, who is approaching from the opposite direction. At the same time, it could be said that warning person B would require minimal effort and could prevent serious injury or even death—a situation that might, under the PETL's balancing test based on the seriousness of harm and ease of prevention, give rise to a duty to act. This demonstrates the practical difference between the broader approach of the PETL and the narrower conception of duties to act in national legal systems.

One challenge associated with tort liability based on a breach of a protective norm is the difficulty individuals face in predicting whether, in a given case, the provision relied on by the claimant should be regarded as a protective norm at all. It is also difficult to identify the specific criteria on which such a determination should be based. The answer must be found through the interpretation of the relevant provision, that is, by assessing whether its purpose is to function as a protective norm for the purposes of tort liability. Accordingly, case law has provided guidance on the development and application of the criteria for determining protective norms and their purpose.

In Estonian case law, several provisions of the *Commercial Code (Estonia) 1995* (hereafter CC) have been considered to be tortious protective norms. For example, Section 167¹(1) of the CC, which prohibits influencing a member of the management body of a private limited company to act against the interests of the company, has been considered a protective norm within the meaning of Section 1045(1)(7) of the LOA (Supreme Court of Estonia, 2016d, para. 25). Provisions of the CC requiring a member of the management board to file for bankruptcy under certain conditions (Supreme Court of Estonia, 2005, para. 12), as well as those obliging the board to ensure the proper organisation of the company's accounting (Supreme Court of Estonia, 2015b, para. 19), have likewise been classified as protective norms, which, according to case law, are intended to protect the interests of the company's creditors (Supreme Court of Estonia, 2005, para. 12; 2016d, paras. 26–33; 2015b, para. 19).

The provisions of the *Code of Civil Procedure (Estonia) 2005* (hereafter CCP) have also been considered protective norms (Supreme Court of Estonia, 2018a, para. 17(1)). The Supreme Court of Estonia has found that Section 279(2) of the CCP constitutes a protective norm under tort law. The provision stipulates that if a person is in possession of information that

is important for the resolution of a case, they must, at the request of the court, prepare a document based on that information and submit it to the court. The Supreme Court of Estonia has explained that the purpose of the obligation to prepare a document containing correct information and submit it to the court pursuant to Section 279 (2) of the CCP is, *inter alia*, to protect the person who requested the collection of the document and other parties to the proceedings from damage which may arise as a result of them relying on the information contained in the document in a justified manner, in accordance with the purpose of requesting the document (Supreme Court of Estonia, 2018b, para. 14(1)). Protective norms can also be found in the *Code of Administrative Court Procedure (Estonia) 2011* (hereafter CACP) (Supreme Court of Estonia, 2016c, para. 17).

The Supreme Court of Estonia has also regarded certain provisions of the *Competition Act (Estonia) 2001* (hereafter CA) as protective norms, including those prohibiting the direct or indirect abuse of a dominant position in the goods market by one or more undertakings (CA, Section 16(1)–(6)). In the same judgement, the Court also classified Article 102 of the *Treaty on the Functioning of the European Union* (hereafter TFEU) (2012), which contains a similar prohibition on abusing a dominant position, as a protective norm (Supreme Court of Estonia, 2024, para. 25). In addition, provisions of the PC have been recognised as protective norms in case law (Supreme Court of Estonia, 2013, para. 17; 2016a, para. 18).

Estonian case law has held that provisions establishing the principle of good faith, namely, Section 6 and 76(2) of the LOA, and Section 138(1) and (2) of the *General Part of the Civil Code Act (Estonia) 2002*, do not constitute tortious protective norms (Supreme Court of Estonia, 2016b, para. 16; 2016c, para. 17). At the same time, certain provisions of the CACP, which likewise reflect the principle of good faith, have been treated as protective norms. The Supreme Court of Estonia has found that intentionally misleading the court, in breach of Sections 28(1) and (2) of the CACP, may qualify either as a breach of a statutory obligation within the meaning of Sections 1045(1)(7) and (3) of the LOA, or as intentional conduct contrary to good morals within the meaning of Section 1045(1)(8) of the LOA (Supreme Court of Estonia, 2016c, para. 17). Under Section 28(1) of the CACP, a party to the proceedings must exercise its procedural rights in good faith. Pursuant to Section 28(2), the Court must not permit a party, or its representative or adviser, to abuse procedural rights, unduly delay the proceedings, or mislead the court.

Estonian legal scholar Tambet Tampuu (2017, p. 243) has rightly found that since a breach of a contractual obligation does not in itself constitute a tort,

the legal norm regulating the terms of the contract cannot be presumed to be a protective norm. At the same time, he has also argued, somewhat controversially, that a tortious protective norm can be found in Section 1055 of the LOA, which regulates the prohibition of harmful activities (tortious negatory claim) (Tampuu, 2017, p. 245). He gives an example of a situation where person A places a container of hazardous waste on person B's immovable property without permission and where person B bears the costs of removing the waste. It could be argued that in this situation, person B could instead file a claim for reimbursement of expenses against person A based on the provisions on *negotiorum gestio* (LOA, Sections 1018 and 1023(1)).

It should be added that, although Section 1045(1)(7) of the LOA refers to an obligation "arising from law", the relevant obligation may also stem from a legal instrument other than a statute in the formal sense. For example, the *Tallinn City Public Order Regulation 2025* (hereafter TCPOR) requires the owner of an immovable to ensure the safety of a structure, including removing snow and ice (such as icicles) as well as any loose stones, tiles, or similar objects that may fall, and, where necessary, ensuring safe passage on sidewalks and roadways while the hazard exists and during its removal (TCPOR, Section 8(6)). A breach of this provision may likewise give rise to liability under Section 1045(1)(7) of the LOA.

As discussed, case law provides the most concrete guidance for identifying protective norms. While in Estonian law, the concept of protective norms is still only gradually, and rather slowly, being concretised in judicial practice, in Germany this area has, due to its longer historical development and the resulting wealth of case law, evolved into a significantly clearer and more systematic body of doctrine. The leading commentaries on § 823(2) of the BGB (for example, Münchener Kommentar zum BGB, BeckOGK, and von Staudinger) contain extensive catalogues, with references to explanatory case law, indicating which provisions are treated as protective norms and which fall outside that category (Wagner, 2024, § 823, paras. 687–699).

In German law, the starting point for defining a protective norm is Article 2 of the *Introductory Act to the Civil Code (Germany) 1896*, according to which a "law" within the meaning of the § 823(2) of the BGB is any substantive laying down a duty or a prohibition (Hau and Poseck, 2024, § 823, para. 268; Federal Court of Justice of Germany, 2024, para. 23; 2023b, para. 32). Therefore, similarly to Estonian law, the catalogue of protective norms is not limited to so-called formal laws, but also includes subordinate legal acts (regulations,

statutes, and local government rules). It has been clearly established in case law that the origin of the law—federal, state, local government—is irrelevant; what matters is the individual protective purpose of the norm (Wagner, 2024, § 823, paras. 593–594). For example, local regulations stipulating the obligation to clear snow have been considered protective norms in a situation where the norm is aimed at protecting pavement users (Higher Regional Court of Cologne (Germany), 1996, paras. 655, 656; Higher Regional Court of Celle (Germany), 1998, para. 604). Furthermore, the branch of law to which the norm belongs is also irrelevant. Protective norms may originate from criminal law, administrative law or civil law, including the provisions of the BGB itself (Hager, 2021, § 823, para. G 23).

In the context of European Union (EU) law, German legal scholarship and case law have taken the view that the qualification of an EU norm as a protective provision depends primarily on whether the norm has direct legal effect for individuals. EU regulations generally fulfil this requirement in full and may therefore qualify as protective norms within the meaning of Section 823(2) of the BGB. The situation is different in the case of directives. Directives are addressed primarily to the Member States and lack horizontal direct effect, with the consequence that individuals cannot claim damages from one another on the basis of a breach of a directive, even where the Member State has transposed the directive incorrectly or with delay. The BGB commentaries likewise emphasise that EU legal norms attain significance as protective norms particularly where this is necessary to safeguard the effectiveness of EU law, namely in situations where, without tort-law protection, EU law would become practically ineffective or unenforceable (Wagner, 2024, § 823, para. 625).

According to the BGB commentaries, customary law and judicial law can be recognised as protective norms only if they rest on a statutory basis and clearly define the behavioural obligations of their addressees; mere general “social norms” or broad judicial clauses, by contrast, do not qualify as protective norms (Hager, 2021, § 823, para. G 11). The commentary further states that, for a provision to qualify as a protective norm, it is decisive that the relevant legal norm is directed at protecting a specific person or a determinable group of persons. A norm cannot be regarded as a protective norm if its purpose is confined to ensuring the general public interest or if it merely regulates the internal organisation of the state or its institutions. The status of a protective norm presupposes that the provision affords individual protection—not merely incidentally or as a side effect—but in a manner specifically aimed at safeguarding the interests of a particular person

(Hau and Posec, 2024, § 823, para. 266). Such individual protection must arise from the norm's own scope of protection, as the scope of application of protective norms must not become unreasonably broad (Hager, 2021, § 823, para. G 19).

In German case law, it has historically and consistently been emphasised that liability for damages under § 823(2) of the BGB depends primarily on whether the provision invoked by the claimant is, in terms of its purpose, directed at protecting individual interests (i.e., the interests of third parties). Over decades of judicial practice, the German Federal Court of Justice has relied on a stable formulation for defining a protective norm, one that brings together all the essential elements:

A protective law within the meaning of § 823(2) of the BGB is a legal provision which, by its purpose and content, is at least also intended to protect individuals or identifiable groups of persons against the violation of a specific legal interest. What matters is not the actual effect of the provision, but its content and purpose, and whether, when enacting the statute, the legislature intended—or at least in part intended—to provide individual legal protection to the extent asserted by the claimant as the infringement. It is sufficient that the provision protects an individual interest as part of serving a broader public interest. (Hau and Poseck, 2024, § 823, para. 277; Federal Court of Justice of Germany, 2013, para. 64; 2023b, para. 2261).

In addition to requiring an individual protective purpose, German law also emphasises that a protective norm should exhibit a certain degree of “specificity”. In general, it is not sufficient for a norm to express only general principles; the nature of the protected legal interest, the character of its potential infringement, and the group of persons intended to be protected must be clearly discernible from the norm and sufficiently specific (Hau and Poseck, 2024, § 823, para. 277).

More importantly, the norm must contain a specific command or prohibition that directly serves its protective purpose. The protected interest must not be safeguarded only indirectly—for example, through potential interventions by public authorities—but the norm must confer on the affected person the right to rely on it in private law relationships and to protect themselves against those who infringe their legal interest (Hau and Poseck, 2024, § 823, para. 277).

If the scope of protection of the norm is identifiable from its purpose and

structure, it is not an obstacle if a specific obligation or prohibition must be clarified administratively on a case-by-case basis. According to case law, the effect of a protective norm may also extend to cases where the application of the norm requires a measure regulating the specific case, provided that the individual element of protection is already provided for in the norm itself (Hau and Poseck, 2024, § 823, para. 277).

A comparison of Estonian case law with the more developed German doctrine shows that courts in both jurisdictions tend to treat similar categories of statutory duties as protective norms. In German law, the duty to file for insolvency under the *Insolvency Code (Germany) 1994*, competition rules under the *Act Against Restraints of Competition (Germany) 1958* (Wagner, 2024, § 823, para. 691) as well as Article 102 of the TFEU (Wagner, 2024, § 823, para. 688), procedural duties under the *Code of Civil Procedure (Germany) 1950* (Wagner, 2024, § 823, para. 691) and local regulations requiring the clearing of snow and ice (Wagner, 2024, § 823, para. 692) have been recognised as protective norms aimed at safeguarding identifiable groups such as creditors, competitors, road users, or other litigants. Estonian courts have attributed the same protective function to structurally comparable provisions previously discussed in this article, including Section 167¹(1) of the CC, Section 279(2) of the CCP, Section 16 of the CA, Article 102 of the TFEU, as well as Section 8(6) of the TCPOR. This alignment indicates that Estonian jurisprudence already recognises the same types of protective norms as those identified in German law, which in turn supports relying on the German criteria when defining the contours of Section 1045(1)(7) of the LOA.

Compared with Estonian law, German law has addressed the concept of protective norms in much greater depth, for understandable reasons, and general criteria for assessing such norms have developed there. German legal doctrine could offer Estonia a valuable model for shaping the criteria for protective norms and for interpreting Section 1045(1)(7) of the LOA. In particular, when defining protective norms in Estonian legal practice, attention should, as a starting point and as a general rule, be focused on (1) determining the obligation or prohibition contained in the norm; (2) identifying the individual protection objective by asking whether the norm is aimed at protecting specific persons or a group of persons rather than merely serving the public interest; and (3) assessing the specificity of the norm by examining whether the nature of the protected legal interest, the character of the infringement, and the group of persons to be protected can be identified with sufficient clarity from the norm.

4. The protective purpose of the protective norm and the criteria for its assessment

Legal literature has noted that the theory of the protective purpose of a norm is a widely recognised concept in both continental European and common-law systems. While the theory is usually employed to limit the liability of the tortfeasor, it may also be used in the opposite manner, that is, to extend that tortfeasor's liability (Winiger *et al.*, 2024, pp. 313–314). Limiting liability means that atypical and unforeseeable damage may be excluded from compensation by determining the protective purpose of the norm.

The broad recognition of this theory is further illustrated by Article 3:201 of the PETL, according to which the attribution of damage to the person responsible depends, among other things, on the protective purpose of the violated norm.

It has been observed that the theory of the protective purpose of a norm is, in general, simply one aspect of the teleological interpretation of a norm, which is why it is, in principle, also applicable to the provisions on strict liability in the LOA (Koziol, 2012, p. 277). The Supreme Court of Estonia has held that the assessment of the unlawfulness of the defendant's act under Section 1045(1)(7) and (3) of the LOA must be carried out separately for each type of damage claimed by the plaintiff. To establish the unlawfulness of causing damage, it is sufficient that at least one of the objectives of the protective norm was to protect the victim from the type of damage for which the victim seeks compensation from the defendant (Supreme Court of Estonia, 2018a, para. 17(1)).

The problem is that it is often difficult to predict how the court will interpret the protective purpose of a specific norm. The inherent unpredictability of a norm's protective purpose is clearly illustrated by the Estonian Supreme Court's position: it found that the claim for lost income by a party seeking interim relief was not covered by the protective purpose of Section 391(1) of the CCP.⁵ A few years later, the Supreme Court of Estonia changed its view and held that, in light of the first sentence of Section 377(1) of the CCP, the protective purpose of Section 391(1) includes protecting the defendant also against the occurrence of loss of income as damage (Supreme Court of Estonia, 2020, para. 14).

⁵ This provision stipulates that the party requesting security for the claim is obliged to compensate the other party and third parties for any damage caused by the security for the claim.

A violation of a protective norm may also allow compensation for pure economic loss, that is, it may extend tort liability (Supreme Court of Estonia, 2015a, para. 25).⁶ This applies where the protective norm is intended to protect the victim also against pure economic loss (Supreme Court of Estonia, 2011, para. 17).

In one case, the claimant suffered loss because he had rented a bus to transport passengers and the bus was involved in a traffic accident due to the roadside not meeting the statutory requirements. As a result, the claimant was obliged to compensate the bus owner for repair costs, towing costs, and the rental costs of a replacement bus. To obtain compensation, the claimant brought an action against the Republic of Estonia as the owner of the road. The circuit court found that the defendant, as the road owner, had culpably violated the provisions of the *Road Act (Estonia) 1999* (hereafter RA) (Sections 10(1) and 25(2)), which required the defendant to ensure that the road could be used safely and that it complied with the relevant road condition requirements. These provisions were regarded as protective norms within the meaning of Section 1045(1)(7) and (3) of the LOA. The Tallinn Circuit Court (2017) noted that although the claimant was not the owner of the bus and the loss was purely economic, it follows from the protective purpose of the violated provisions that the claimant's loss, in the above-mentioned respects, is compensable. It should be added that, under other provisions of tort law, the claimant's claim would not have been upheld.

The above raises the question of which criteria should be used to determine the protective purpose of a protective norm. First, an attempt must be made to identify its purpose, the *ratio legis*, through interpretation of the norm. The explanatory memorandum to the law may assist in this, although such memoranda generally do not provide information on what types of damage are intended to be compensable in the event of a violation of the norm. Koziol has observed that the theory of the protective purpose of a norm begins with the question of what kind of damage the legislator has reasonably sought to prevent by enacting the specific rule of conduct. Rules are not created to prevent damage that falls below any meaningful threshold of probability (Koziol, 2012, p. 277). Therefore, the principle of reasonableness is also important when assessing the protective purpose of a norm. In addition, legal literature has noted that the historical background of the norm may also be relevant (Winiger *et al.*, 2024, pp. 311).

According to the Supreme Court of Estonia, the protective purpose of a norm encompasses protection of the victim against damage that is typically

⁶ In tort law, purely economic loss is not generally subject to compensation.

associated with the particular breach. In determining the protective purpose of a norm, one must, amongst other things, take into account the extent to which the harmful consequence was foreseeable to a reasonable person. In particular, compensation for consequences that bear too remote a causal relationship with the Act is limited (Supreme Court of Estonia, 2018b, para. 15(1); 2006, para. 13). This means that the foreseeability principle is at least indirectly used as a criterion by which liability can be limited in Estonian tort law.

As previously mentioned, the key consideration in assessing the protective purpose of a norm is whether the damage claimed represents a typical consequence of the breach or, instead, an atypical, rare, or accidental outcome. Determining the protective purpose of the norm may exclude atypical damages as unforeseeable ones from compensation.

A practical illustration of this distinction is found in Estonian case law concerning damage caused by defective road conditions. In the previously mentioned case involving a rented bus that ended up in a traffic accident due to non-compliant roadside conditions, the claimant was obliged to compensate the bus owner for, amongst other things, repair costs, towing costs, and replacement bus rental costs (Tallinn Circuit Court, 2017). However, the Circuit Court declined to award the claimant's additional expenditure of 1,763 euros for new ferry tickets. The Court interpreted the protective purpose of the RA provisions by drawing an analogy with the limits on compensation set out in the LOA concerning damage to property. Under those rules, only damage connected to repairing the damaged property or ensuring its replacement use is compensable. Because the ferry-ticket expenditure was not functionally linked to either the repair of the damaged bus or the procurement of a replacement vehicle, the Court held that this loss fell outside the protective purpose of the breached norms (Tallinn Circuit Court, 2017, para. 71). This additional part of the judgement illustrates how, even where pure economic losses such as repair-related costs fall within the protective scope of a norm, more peripheral or logistically incidental losses—such as the cost of new ferry tickets—may be regarded as too remote or atypical to justify compensation.

According to § 823(2) of the BGB, it is essential that the purpose of the norm be to protect the victim from the very danger that materialised and from the type of damage that occurred. Therefore, when determining tortious liability, attention must always be paid to the protective purpose of the norm, and in practice, examining and establishing that protective purpose

is often of decisive importance for determining liability (Wagner, 2024, § 823, para. 611).

The BGB commentaries note that when determining the protective purpose of a norm, it may be significant whether the wording of the legal provision clearly refers to a specific legal interest, danger or type of violation and is directed at preventing that particular kind of violation. Case law often relies on the text of the provision and tends to deny the existence of a protective norm where the allegedly protected interest does not appear from the provision either as the object of the violation or as the object of a specific risk (Wagner, 2024, § 823, para. 614).

The BGB commentaries also identify three dimensions for assessing tortious liability arising from a violation of a protective norm, which essentially correspond to Section 1045(3) of the Estonian LOA. Whether a violation of a protective norm may give rise to a claim for damages depends on whether:

- a) the violated protective norm was established for the protection of certain persons (personal sphere of protection);
- b) the injured interest and the resulting damage fall within the scope of protection of the norm (material sphere of protection);
- c) the protective norm is intended to protect precisely this specific legal interest against the kind of violation that actually occurred (modal sphere of protection) (Wagner, 2024, § 823, paras. 620–622).

In most cases, however, it is not possible to determine whether a particular norm qualifies as a protective norm solely on the basis of its wording or interpretation. It is often necessary for the court to provide an additional, independent assessment from the perspective of tort law. What becomes decisive is the so-called objective purpose of the norm within tort law more generally. Although the starting point is always the text of the norm and the interpretative rules, further analysis focuses primarily on the general aims of tort law and the role of § 823(2) in the liability system as a whole (Wagner, 2024, § 823, para. 623).

The decisive question is whether the liability that follows from recognising a norm as a protective norm is reasonable and acceptable within the general framework of the liability system. According to case law, this is so where it can reasonably be assumed that the legislator “has considered it possible to link tortious liability to the violation and thereby to offer the victim corresponding relief with regard to the burden of proof and the extent of

liability” (Federal Court of Justice of Germany, 2019, para. 13; 2020, para. 34).

Thus, in addition to identifying the protective purpose, German law also emphasises that liability must fit into the overall structure of the tort law system. This means that even if a norm is clearly intended to protect an individual interest, liability under § 823(2) of the BGB may nevertheless not be justified (Wagner, 2024, § 823, para. 625). This is particularly the case for abstract endangerment offences, where the norm does not require the occurrence of a specific and actual danger to the protected legal interest but prohibits conduct that is typically likely to increase the risk. In such situations, it is not possible to reasonably balance the protective purpose of the norm with the offender’s freedom of action or with the general public interest, since liability would follow without any assessment of an actual or specific danger (Wagner, 2024, § 823, paras. 625, 684).

This consideration is also important in relation to pure economic loss, which is generally not compensated in tort law. Here, the permissibility of liability must be assessed in light of the entire regulatory context and the purposive structure of the norm (Hau and Poseck, § 823, para. 266).

Liability may also be limited where other sanctions are already provided for in the event of a violation of the norm and the addition of a claim for damages would render the role of § 823(2) disproportionate or lead to an unreasonable expansion of liability. The legislator’s choices may likewise indicate this: where the legislator has expressly provided for compensation for damage or other financial obligations only in certain situations for a particular norm, this directly suggests that not every violation should automatically give rise to a tortious duty to compensate for damages (Wagner, 2024, § 823, para. 625; Federal Court of Justice of Germany, 2021, para. 51).

Although both Estonian and German law are based on the theory of the protective purpose of the norm when determining tortious liability, the German approach appears more systematic and structured. German law has developed a clear three-dimensional analytical framework (the personal, material, and modal spheres of protection), supplemented by the requirement to assess whether liability would be consistent with the tort law system as a whole. The “consistency with the system” check allows liability to be limited even if the norm protects an individual interest, whereas the imposition of a tortious sanction would not be justified from a legal policy or dogmatic perspective.

Estonian law essentially contains the same assessment criteria in Section 1045(3) of the LOA, but current case law indicates that the results of the assessment may be unpredictable or even contradictory. Therefore, Estonian law could benefit from a more structured assessment framework that would proceed in the following stages when resolving individual claims:

- 1) The personal, material, and modal spheres of protection should be assessed within the meaning of Section 1045(3) of the LOA—that is, whether the infringed rule is intended to protect a certain class of persons, whether the interest impaired and the type of loss claimed fall within the rule's protective scope, and whether the rule is aimed at preventing precisely the kind of infringement and risk that materialised in the case at hand;
- 2) It should be examined whether the loss claimed is a typical consequence of such an infringement, or rather an atypical, rare, or accidental outcome; and
- 3) Finally, one should consider how the resulting extension of tort liability fits within the tort law system as a whole—namely, whether recognising the provision as a protective norm (and attaching tort liability to its breach) is reasonable, proportionate, and coherent in light of the broader structure and objectives of tort law, including the existence of alternative sanctions and the generally limited compensability of pure economic loss.

Furthermore, Estonian case law makes it clear that the assessment must be conducted separately for each type of loss claimed, requiring the same sequence of analysis to be applied distinctly to every category of damage put forward by the claimant.

5. Conclusion

Tort liability arising from a breach of a protective norm plays an important role in both Estonian and German tort law. At the same time, this aspect of tort liability is not without problems. The question of which legal norms can be considered protective norms in tort law can be answered primarily through case law.

In light of current case law and legal literature, it is possible to distinguish some of the more important characteristics of protective norms. A protective norm can be any substantive legal norm, not just a law in the formal sense. A protective norm must be directed at protecting a particular person or

a clearly identifiable group, and not merely at serving the general public interest. In addition, the norm must be sufficiently specific and contain a clear obligation or prohibition of conduct.

For the sake of legal certainty, the protective purpose of statutory provisions on which no judicial position has yet been taken must also be examined. This is needed, among other things, so that victims can determine whether they have grounds to pursue a claim for damages. To assess the purpose of a specific protective norm, the first step is to try to ascertain the intention of the legislator (*ratio legis*) from the explanatory memorandum to the law or other sources (e.g., the historical background of the norm). If the explanatory memorandum to the law provides no guidance, it must be assessed whether the purpose of the provision is to protect the specific injured party, and precisely against the type of damage that occurred in the present case. The assessment should be based on the principles of reasonableness and foreseeability.

The theory of the protective purpose of the norm primarily has a liability-limiting function. It permits wholly atypical losses to be excluded from compensation and thus “lets the losses lie where they fall”. In determining the protective purpose of a provision, one must also consider the broader system of tort law and assess whether the liability resulting from treating the provision as a protective norm is reasonable and acceptable within the overall framework of the liability system.

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