

concerning § 12 of the course

Case 1

(facts of the case)

A runs a coffee shop in an office district. In the early mornings, he does not work there himself, but rather his employee, student B. In winter, B also has the task of safely clearing the entrance area of all snow and ice before opening the coffee shop.

B is a very reliable, careful employee. But one early morning, he is not so fit because he has been partying all night. He ignores that dangerous black ice has formed at the entrance area, which is very slippery but very difficult to notice by passers-by. So he opens the coffee shop without taking any measures against the ice. Five minutes later, student C approaches, urgently in need for a coffee, but she slips on the ice, falls down and completely breaks her brand new glasses.

C wants A to reimburse her for the costs of a new pair of glasses because the entrance area of his coffee shop had not been cleared from the black ice, but A refuses to do so. He argues that she should have been more careful herself and that he, A, has done nothing wrong. He points out that not him but his employee B has been working in the coffee shop on this morning and that he, A, has chosen his usually reliable and careful employee carefully.

1. Does C have a claim against A for reimbursement of the costs of new glasses?
2. How is it if B forgot to clean the entrance area of normal ice that had formed in the night after snow had thawed during the day, but C did not notice the ice because she was looking at her smartphone?

Outline of the case solution

Subjects: Claims for compensation of damages under the law of obligations; defective performance: liability for the violation of a collateral duty; pre-contractual liability (*culpa in contrahendo*); contributory negligence.

A. Question 1: Claim for compensation of damages for breach of duty under sect. 280(1) phrase 1 BGB after C slipped on black ice

- Introductory sentences:¹ Since C slipped on the ice, fell down and broke her glasses in the entrance area of A's coffee shop when she was on the way to buy a coffee there, she may have a claim against A for compensation for the costs of new glasses, in the form of a *claim for compensation of damages for the breach of a duty arising from an obligation* under sect. 280(1) phrase 1 BGB. This is the case, if (I.) there is an obligation [Schuldverhältnis] between A and C, (II.) A has breached a duty arising from this obligation, (III.) A is responsible for this breach of duty, (IV.) the breach of duty has caused a damage and (V.) the claim is not excluded in the given case because C should have been more careful herself.

I. Obligation between C and A: (+)² (→ sect. 280(1) phrase 1 BGB)

1) Obligation arising from a purchase contract between C and A (sect. 433 BGB): (-)

- C wanted to buy but had not yet bought a coffee in A's coffee shop when she slipped on the black ice

2) Pre-contractual obligation (sect. 311(2) BGB): (+)

- an obligation with limited duties can already come into existence before an intended contract is concluded
- here: creation of a pre-contractual obligation by the *initiation of a contract* [Anbahnung] *by entering the business premises* (entrance area) of A's coffee shop (cf. sect. 311(2) No. 2 BGB)

II. Breach of a duty arising from this obligation: (+) (→ sect. 280(1) phrase 1 BGB)

- pre-contractual obligations are limited to collateral duties under sect. 241(2) BGB
- here: breach of a *duty of due diligence and protection*: to keep one's business premises in safe conditions, in order to avoid harm or danger to customers
 - sect. 241(2) does not oblige to prevent damage from customers at all costs, but to take measures that are necessary and reasonable (not out of proportion)
 - here : despite the danger caused by the slippery and difficult to notice black ice, *no measures were taken at all*:
 - neither was the entrance area cleared of the black ice,
 - nor was it closed, nor the customers warned of the black ice

¹ Note: The *introductory sentence* is essential because it *presents* without unnecessary explanations the *structure of the following examination*, which must follow the dogmatic structures of the relevant law. A precisely formulated introductory sentence may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers or heads of departments). If a single sentence would become too long and complicated, two introductory sentences may be appropriate.

² Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of major parts of the examination. Each major part needs to finish with a *concluding sentence*, that indicates clearly, which sub-question has been answered (in which context) with which result. This is important for the orientation of the reader.

III. Responsibility of A for the breach of the duty: (+) (→ sect. 280(1) phrase 2 BGB)

1) Responsibility of A for own fault (sect. 276(1) phrase 1 BGB): (-)

- here relevant: fault in the form of negligence
- A himself *did not act negligently himself* but had entrusted his employee B with the task of keeping the entrance area clear from snow and ice

2) Responsibility of A for the fault of his employee B: (+)

a) Fault of B (cf. sect. 276(1, 2) BGB): (+)

- here in the form of *negligence* (failing to exercise the care required in business dealings, sect. 276(2) BGB):
- B acted carelessly, failing to take any measures against the dangerous black ice, although this was obviously necessary and also reasonable to prevent harm from persons entering the entrance area
- the fact that he was not fit that morning, because he had been partying all night before, explains but does not exclude, justify or excuse his negligence

b) Responsibility of A for the negligence of B (sect. 278 phrase 1 BGB): (+)

- A is not only responsible for own fault but also for the fault of his *employee B* as his *vicarious agent*
- unlike in torts law (cf. sect. 831(1) phrase 2 BGB), carefully selecting and supervising the vicarious agent does not exempt the principal from liability
- so A's objection is irrelevant

IV. Damage caused by the breach of duty: (+) (→ sect. 280(1) phrase 1 BGB)

1) Damage: (+)

- damage is any involuntary impairment of assets, here: the *complete breaking of C's glasses*, which makes it necessary to buy new ones

2) Causality: (+)

- the breach of duty is the cause of the damage if, *according to general life experience, it is likely to bring about* an outcome of this kind (theory of adequacy [Adäquanztheorie])
- this is the case, since every year, numerous people slip and fall down on uncleared ice in shop premises and break their glasses, watches, smartphones, legs...

V. Claim not excluded for contributory negligence (sect. 254 BGB): (+)

- the claim for compensation for damages is excluded or reduced, if *fault on the part of the injured person* contributed to the occurrence of the damage
- this raises the question if C should have been more careful herself when stepping into the coffee shop's entrance area
- exclusion of the claim would presuppose that the damage was totally or largely caused by the claimant; this is evidently not the case
- moreover, there is no indication in the facts that C might have walked carelessly (e.g. too fast, inattentively or with inappropriate shoes)
- the *mere fact that C slipped cannot be interpreted as contributory negligence*
- **Result:**³ C has a claim against A under sect. 280(1) phrase 1 BGB for full reimbursement of the costs of new glasses as compensation for damages for breach of duty.

³ Note: Every case solution must be concluded with a concluding sentence, often a cascade of concluding sentences, leading to and presenting the final result. Make sure that the concluding sentence answers exactly the question raised in the introductory sentence!

B. Question 2: Claim for compensation of damages for breach of duty under sect. 280(1) phrase 1 BGB after C slipped on normal ice when looking at her smartphone

- C may have a claim against C under sect. 280(1) phrase 1 BGB for the same reason as under question 1, but since she slipped on normal ice, which she could have noticed easily but did not notice because she was looking at her smartphone, her claim may be excluded or reduced for *contributory negligence* under sect. 254 BGB.
- As under question 1, A is responsible for his employee's B breach of a duty under a pre-contractual obligation with C (cf. sect. 311(2), 241(2), 276(1, 2), 278(1) phrase 1 BGB) and must in principle compensate the damage (the costs for new glasses) caused by this.⁴
- However, looking at the smartphone when walking outside in times of snow and ice, when attention should focus on the ground, constitutes a *significantly careless and thus negligent behaviour of C*, which is likely to have contributed to the accident to the same extent as B's failure to clear the entrance area from the ice.
- On the other hand, it does not supersede, neutralise or excuse the other side's negligent acting.
- So all in all, in this case the negligence at both sides leads to an *equally shared liability* and thus a reduction of C's claim for compensation by 50 percent.⁵
- **Result:** C has a claim against A under sect. 280(1) phrase 1 BGB for reimbursement of 50 % of the costs of new glasses as compensation for damages for breach of duty.

⁴ Note: Concerning these aspects, there are no differences between questions 1 and 2. Consequently, it is not necessary to repeat the comprehensive examination above, but it can be summarised in one precisely formulated sentence.

⁵ The German jurisprudence on contributory negligence in case of slipping on ice is abundant but heterogeneous. The question must be answered individually for each case, with due regard to its specific circumstances.