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Forms of Liability in the Law of Delict: Fault-Based Liability and Liability without Fault

Through times, the question of strictness of liability has been one of the principal problems in the law of delict. Thus there has been a search for the limit to the extent of which damage must be borne by the aggrieved party and for the point from where on the aggrieved party must be compensated for the damage by a third person, i.e. generally the tortfeasor.¹ Or, more specifically, whether a fact of causing damage is sufficient to give rise to delictual liability or the tortfeasor's fault is also required for that purpose has remained a timeless question.

This article is aimed at analysing what the prevailing form of liability is in delictual law and what it should be. In addition, the article will seek an answer to the question of what the trends of development are as regards the strictness of delictual liability. Understandably, this sphere of problems is specific not only to Estonia: the problems in question are topical in all legal orders.

This article is divided into four subtitles: the first provides a brief review on the historical development of liability in the law of delict and the second addresses the forms of delictual liability in present-day legal orders. The third subtitle offers an analysis regarding the rationale of different forms of liability in the law of delict. The final, fourth subtitle is dedicated to exploring whether and to what extent possible developments of liability in the law of delict can be pointed out on the basis of the present tendencies.

¹ R.W.M. Dias, B.S. Markesinis. *Tort Law*, second edition. Oxford: Clarendon Press 1989, p. 29.

1. Historical development of liability in the law of delict

In **the archaic legal orders**^{*2}, liability under the law of delict was independent of fault. The purpose of liability was not to compensate for damage but, first of all, to ‘heal’ the violated legal order through a magical procedure.^{*3} Already **in the beginning of civilisation**, causal liability existed in most societies (e.g. in Babylonian, earliest Roman^{*4} and English law)^{*5}, and delictual liability was a consequence of breach of the peace caused by an improper act.^{*6} The beginning of fault-based liability can be connected with as late a period as the end of **the Roman Republic**^{*7}, and after the end of the Roman State, the principle of fault had to wait until the 17th or 18th century, when it was redeclared by natural-law jurists.^{*8} After the Christianisation of law, sin, which always originated from evil will, became the central concept in liability. Fault was the core of sin.^{*9}

In the 19th century, **the principle of fault** scored a triumph, making its way to the presently applicable civil codes. Thus, in the beginning of that century, fault-based liability was implemented in the French *Code Civil*, (hereinafter *Code Civil*), thereafter also in the Austrian civil code, which entered into force in 1812, and causal liability became an exception.^{*10} Even for the drafters of the German Civil Code (hereinafter ‘BGB’), which entered into force on 1 January 1900, fault was the major requisite for liability under the law of delict.^{*11} It was said that liability without fault, or strict liability, did not serve the development of commerce in any case but it also imposed unreasonable restrictions on individuals’ freedom of movement.^{*12} The same notion also served as a basis for other legislators and scientists of the 19th century.^{*13} Thus the US scientist R.L. Rabin sees the explanation for the inception of fault-based liability in the United States in that at those times many judges believed that the economic development of the young country would be obstructed by a possibility that the entrepreneurs should be liable for damage arising purely from accidents.^{*14}

The establishment of the principle of fault can be regarded as a consequence of the 19th-century liberality.^{*15} According to such a way of thinking, it was said that by the nature of things, a sanction or an obligation to compensate for damage could only follow from reproachable behaviour. The prevailing principle was *nulla indemnitas sine culpa*: no indemnity without fault.^{*16}

The period of the (almost) absolute rule of the principle of fault did not last long: **strict liability** became necessary when, as increasingly high risks were handled, fault-based liability could no longer serve its balancing function (for the reason that due care was not directed to avoiding the risk but to handling the risk in a suitable manner).^{*17} Another reason for the inception of strict liability was the fact that when economic

² According to H. Hattenhauer, ‘archaic’ means initial, early, original. Archaic societies have the characteristic that persons belonging to such societies cannot think abstractly but keep to their traditions, the heritage of their fathers. See H. Hattenhauer. Euroopa õiguse ajalugu. I raamat (History of European Law. Book I). Tartu: Fontes Juris 1995, pp. 27, 31 (in Estonian). Thus the present approach, in which an analysis of Roman law follows an analysis of archaic law, is tentative as the existence of archaic societies did not end with the creation of the Roman State.

³ See H. Hattenhauer (Note 2), pp. 25–76.

⁴ Thus the fault of the tortfeasor was not required for liability in the so-called Law of 12 Tables, which originates from the 5th century B.C.

⁵ On earlier English law, see C.B. Gray (ed.). The Philosophy of Law. An Encyclopedia. New York, London: Garland Publishing Inc. 1999, p. 292. See also: M. Adams. Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung. Heidelberg: R. v. Decker’s Verlag, G. Schenck 1985, p. 114.

⁶ A. Erlner, E. Kaufmann. Handwörterbuch zur Deutschen Rechtsgeschichte. Bd I. Berlin: Erich Schmidt Verlag 1971, p. 1902.

⁷ C. B. Gray (Note 5), p. 293.

⁸ K. Zweigert, H. Kötz. Introduction to Comparative Law, third edition. Oxford: Clarendon Press 1998, p. 597.

⁹ H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: C.H. Beck’sche Verlagsbuchhandlung 1982, pp. 100–101.

¹⁰ C.B. Gray (Note 5), p. 293.

¹¹ E. Schmidt, G. Brüggemeier. Zivilrechtliches Grundkurs. 6. Aufl. Neuwied und Kriftel: Hermann Luchterland Verlag 2002, p. 292. This is also due to the fact that BGB contains only one set of elements of strict liability: the liability of an animal keeper. Thus it is clear that the legislator has seen the principle of fault as the fundamental basis of liability, and strict liability can be regarded as a special phenomenon. On this, see H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luchterhand 2001, p. 136.

¹² H. Kötz, G. Wagner (Note 11), p. 13.

¹³ H. Strickler. Die Entwicklung der Gefährdungshaftung: auf dem Weg zur Generalklausel. Bern, Stuttgart: Verlag Paul Haupt 1983, p. 10.

¹⁴ R.L. Rabin. Perspectives on Tort Law, second edition. Boston, Toronto: Little, Brown and Company 1983, p. 38.

¹⁵ See also K. Zweigert, H. Kötz (Note 8), p. 608; K. Larenz. Lehrbuch des Schuldrechts. Bd 1. Allgemeiner Teil, 13. Aufl. München: C.H. Beck’sche Verlagsbuchhandlung 1982, p. 258.

¹⁶ H. Strickler (Note 13), pp. 9–11.

¹⁷ E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld, 4. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 163.

stability and welfare was achieved by countries, there was no longer need for legislators and courts to support the economy.^{*18}

In Germany, strict liability was first introduced into positive law in 1838 by the Prussian Railway Act. In 1909, liability without fault was established for possessors of motor vehicles (*Kraftfahrzeuggesetz*, § 7), and other areas followed. The French Court of Cassation adopted a judgment pioneering for strict liability in 1896 by awarding damages to a widow for her spouse, who had been killed in an industrial accident, although the company's fault could not be proved.^{*19} In Great Britain, a foundation for strict liability was laid in 1868 by the House of Lords in *Rylands v. Fletcher*.^{*20}

It can be noted in summary that fault has not always and not in every society been a pre-requisite for liability under delictual law. There is no way but to agree with the thesis of B.S. Markesinis that the role of fault has changed through times; fault as a basis of tortious liability has been ignored, glorified and questioned at different times.^{*21} The valuation or discarding of fault has depended primarily upon social values (e.g. the liberal way of thinking, which became a cradle for fault) as well as general views on life, and, from the 19th century also upon the needs of the economy. In any case it is obvious that estimates for the future are relatively difficult to provide on the basis of how liability in delictual law has developed historically as a whole, since the needs and judgments of the society have changed rapidly and may do so in the future.^{*22}

2. Present-day forms of liability in delict law

In the present time, liability based on the general elements of delict, strict liability and producer liability can be distinguished in the laws of delict of most countries. Fault of the tortfeasor is usually required for general delictual liability. Thus § 1043 of the Estonian Law of Obligations Act^{*23} (LOA) provides that a person (tortfeasor) who unlawfully causes damage to another person (victim) must compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.^{*24}

The principle of fault has been also used as a basis for regulating liability resulting from the general elements of delict e.g. in the Russian Federation Civil Code, § 1064^{*25}; the BGB § 823; the Italian Civil Code, § 2043; the *Code Civil*, §§ 1382-1383; the Greek Civil Code, § 914; the Swiss Civil Code, § 41 (1); the Austrian civil code, § 1295 (1); the Hungarian Civil Code, § 339; etc. General delictual liability depends on culpability also in e.g. Finland^{*26} and Sweden.^{*27} Even in common-law countries, the so-called negligence liability constitutes the most important set of elements of liability.^{*28} As a general rule, an obligation to compensate for damage will ensue only from a culpable act also in Japan (Japanese Civil Code, § 709)^{*29} and China.^{*30}

As observed above, delictual liability can also arise without the tortfeasor's fault in most modern legal orders. Such a situation has been reached by introducing respective provisions into civil codes, by adopting

¹⁹ See H. Kötz, G. Wagner (Note 11), p. 13. In French law, the development of strict liability has remained a judicial task. See H. Kötz, G. Wagner (Note 11), p. 135.

²⁰ In *Rylands v. Fletcher*, strict liability was applied to a land owner, whose property was a source of a harmful emission from a non-natural source, which had an impact on another property. It should be noted in addition that as the precedent of *Rylands v. Fletcher* did not develop into a general clause on strict liability in Great Britain, the introduction of sets of elements for strict liability has remained to be the task of primarily the legislator. An example of that was the Nuclear Installations Act of 1965. C. v. Bar, J. Shaw. *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen*. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 1993, pp. 12–43. On the same subject, see also: H. Kötz, G. Wagner (Note 11), p. 135.

²¹ R.W.M. Dias, B.S. Markesinis (Note 1), p. 28.

²² It is, however, possible to do this to some extent on the basis of those processes from the recent past that have influenced liability. In the final subtitle of this article, the author offers a review on some development trends in fault-based liability and in the entire delictual liability.

²³ *Võlaõigusseadus* (Law of Obligations Act). – RT I 2001, 81, 487; 2002, 53, 336 (in Estonian).

²⁴ General delictual liability was dependent on fault also under the Estonian SSR Civil Code, § 448 (2), which was applicable before the entry into force of the Law of Obligations Act. That Civil Code was adopted by the Supreme Council of the Estonian Soviet Socialist Republic on 12 June 1964. – ÜNT (Supreme Council Gazette) 1964, 25, 115; RT I 1997, 48, 775 (in Estonian).

²⁵ The general part of the Russian Federation Civil Code was adopted by the State Duma on 21 October 1994 and the special part thereof was adopted on 22 December 1995.

²⁶ W.V. Gerven, J. Lever, P. Larouche, C. v. Bar. *Common Law of Europe Casebooks. Torts. Scope of protection*. Oxford: Genevieve Viney, Hart Publishing 1998, p. 44.

²⁷ S. Strömholm. *An Introduction to Swedish law*, second edition. Norstedts 1998, p. 304.

²⁸ D.J. Cooke, D.W. Oughton. *The Common Law of Obligations*, second edition. London, Dublin, Edinburgh: Butterworths 1993, pp. 166, 179.

²⁹ See also H.P. Marutschke. *Einführung in das japanische Recht*. München: C.H. Beck'sche 1999, p. 183.

³⁰ H. Oda. *Japanese Law*. London–Dublin–Edinburgh: Butterworths 1992, p. 210; H.R. Zheng. *China's Civil and Commercial Law*. Butterworths, Singapore, UK, USA, Canada, Australia, New Zealand 1988, p. 37.

specific acts (primarily in the German law of delict^{*31}) or as a result of judicial legislation (in French law and in common-law countries).^{*32} This regards mainly strict liability and producer liability, in respect of which the question of fault is put in the background (in the event of producer liability) or altogether disregarded (in the event of strict liability).

The number of the sets of elements giving rise to strict liability is increasing all the time, and for example, in common-law countries, more and more disputes can be settled on the basis of strict liability.^{*33} Today, the actual situation is seen rather as such that most of the damage cases are already covered by the regulation of strict liability and producer liability, and hence an overwhelming majority of damage cases are settled on the basis of liability without fault.^{*34} Thus it can be asserted that although fault is required in the general elements of delictual liability, fault-based liability is increasingly losing its dominant position to liability without fault or strict liability in modern legal orders.

Caution should be exercised in assessing whether fault-based liability or strict liability is essentially applied to specific cases in a legal order. The reason for this is the possibility of a smooth transition from fault-based liability to strict liability. Such a transition can be noticed particularly in those legal orders where the law provides only a few or no sets of elements for strict liability. Thus, for example, there is yet no specific regulation for compensation for damage caused by motor vehicles or aircraft in Great Britain, the United States and even France. Although courts of those countries should use general fault-based liability as a basis in such cases, a closer observation shows that in fact, the liability there is not less strict than in Germany, where courts can rely on specific sets of elements for strict liability. Such a result is achieved by reversing the burden of proof, by establishing a very high standard of care and by other means.^{*35}

In summary it can be stated that although some jurists regard the general elements of delict as applicable even without the tortfeasor's fault, recognition of the principle of fault is still the dominant direction all over the world, as regards general delictual liability. Mainly, derogations from the principle of fault are made only by adding sets of elements for strict liability. As noted above, there is naturally the separate problem of how much importance can be attributed to the fault-based general set of elements of delict, when less and less cases of damage can be classified under the general set of elements due to the rapid triumph of strict liability. It would be too venturesome to agree with the statement that the sets of elements of strict liability can be characterised as exceptions and do not pose any danger to the applicability of the principle of fault. We should rather adopt the standpoint that in delictual liability, the principle of fault is far from unassailable any longer and its dominant position has become a very disputable issue due to the introduction of the sets of elements of strict liability and producer liability into the law, which should actually be regarded as justified steps in general.

It is noteworthy that no modern system of liability is purely fault-based or purely causal. Rather, the question lies in whether a system is dominated by fault-based or causal liability. As noted above, fault-based liability presently seems to be more and more obviously losing its position to strict liability to an increasingly large degree. Hence it is no longer easy to defend R. von Ihering's idea that 'The obligation to compensate for damage does not arise from the damage but, rather, from fault — this is a sentence as simple as the chemists' postulate that what burns is not fire but oxygen contained in the air'.^{*36}

³¹ In German law, strict liability has been established by special acts, largely; only the liability of an animal keeper has been established by the BGB. K.-H. Gursky, too, finds that most of the sets of elements for compensation for damage are based on the principle of fault and cases of strict liability are exceptions, and the sets of elements of strict liability must not be applied to similar cases by analogy. See K.-H. Gursky, *Schuldrecht. Besonderer Teil*, 3. Aufl. Heidelberg: C.F. Müller Verlag 1999, p. 188.

³² On the development of strict liability by way of administration of justice and on interpretation of the provisions of fault-based liability with results which are similar to strict liability, see also: H. Kötz, G. Wagner (Note 11), p. 135.

³³ J. Spier (ed.), *The Limits of Liability. Keeping the Floodgates Shut*. The Hague, London, Boston: Kluwer Law International 1996, p. 13.

³⁴ M. Adams (Note 5), p. 111. The position of strict liability in the law of delict could also be at least indirectly coloured by the fact that during the recent five years, the Estonian Supreme Court has awarded judgments in 18 cases concerning motor liability insurance or damage from sources of greater danger. At the same time, under the key phrase 'unlawful causing of damage', only 13 judicial decisions could be found from the same period (exclusive of the cases of damage caused by a source of greater danger). See <http://www.nc.ee> (in Estonian).

³⁵ H. Kötz, G. Wagner (Note 11), p. 107.

³⁶ K.P. Finke, W. Hempel, *Gefährdung und Verschulden im Strassenverkehr*. Athenäum Verlag 1978, p. 25.

3. Fault-based delictual liability and strict liability

3.1. Principal positions of advocates of strict liability

The following analysis is focused on the question of whether fault-based delictual liability or strict liability should be the dominant one in modern society. This is an interesting and intriguing question of the strictness of liability, largely reducible to the problem of who should cover the damage caused by no one's fault.^{*37} In the opinion of R.-D. Pfahl, a solution to that problem will require an assessment of which party stands closer to the damage: either the tortfeasor as the person who caused the damage or the aggrieved party as the damage was caused in his or her personal or proprietary sphere. The answer cannot be simple. Therefore, a more correct way to put the question could be as follows: should the damage caused be left to be borne **rather** by the aggrieved party or **rather** by the tortfeasor?^{*38} This means a decision of whether to prefer the aggrieved party or the tortfeasor. The first option of preference would be realised by strict liability without fault, and the second option would be realised by means of fault-based liability under the law of delict.

The advocates of strict liability, a majority of whom are in favour of strict liability in only certain spheres while others think that it should replace all fault-based liability completely, justify their positions with mainly the following arguments. The primary idea of strict liability can be regarded as expressed in the position of the German penal jurist, K. Binding, who stated that the absence of fault is a basis for precluding liability in penal law but not in the law of compensation for damage. An obligation to compensate for damage is not a punishment.^{*39}

It is found that in a modern society, cases of damage can occur even if nobody can be blamed for culpable behaviour. This happens primarily in cases of handling particularly dangerous items. In such cases, strict liability enables to protect the aggrieved party and leaves greater damage caused by the source of danger to be borne by the person who created that danger in its own interest.^{*40} In other words, as business operators gain profits from their enterprises, they should also sustain the risk of damage. Generally, a business operator is also more capable of compensating for damage than an individual person, the aggrieved party.^{*41}

In the case of fault-based liability, damage caused in consequence of the so-called accidents without anyone's fault should be borne by the aggrieved party, which does not seem fair.^{*42} In other words: if no one is culpable of causing the damage, it may be less fair to leave such damage to be borne by the aggrieved party rather than the tortfeasor, because it was the tortfeasor, and not the aggrieved party, who caused the damage.^{*43} It could be said that in such cases, strict liability serves the purpose of balancing the interests of the aggrieved party and the tortfeasor.^{*44}

M. Adams finds that the invention and general acceptance of the idea of fault has yet had a remarkably short legal tradition. In M. Adams's opinion, the fact that in today's legal practice, all major spheres of activity where accidents occur are covered by the system of strict liability or social security, justifies the idea that fault-based liability as a general principle does not conform to the citizens' values or expectations and thus collides with the law's function of securing the peace. With legal certainty and social costs in mind, M. Adams recommends a full-scale transition from fault-based liability to strict liability.^{*45}

In the opinion of B.S. Markesinis, one of the reasons for the principle of fault-based liability to falter may also lie in its frequent conflicts with the common sense of fairness: namely, there are very many persons who, though having culpably caused damage, will never have to sustain the consequences of their activities.^{*46} Often, the actual offender will not have to compensate for the damage because of not being worth an

³⁷ J. L. Coleman has provided a comment to the point: 'Tort law is unjust either to victims or injurers, probably to both.' J.L. Coleman. *Risks and Wrongs*. Cambridge University Press 1992, p. 221.

³⁸ R.-D. Pfahl. *Haftung ohne Verschulden als sittliche Pflicht*. Düsseldorf: Patmos Verlag 1974, p. 131.

³⁹ H. Strickler (Note 13), p. 27.

⁴⁰ B. Baudisch. *Die Gesetzgeberischen Haftungsgründe der Gefährdungshaftung*. Aachen: Shaker Verlag 1998, pp. 188–191. About the same position, see also: H. Kötz, G. Wagner (Note 11), p. 13. Historically, the establishment of strict liability has been based on the presumption that the thing or activity for which strict liability is established emanates a greater danger, is new and is not completely controllable. *Ibid.*, p. 137.

⁴¹ R.-D. Pfahl (Note 38), pp. 112–113.

⁴² B. Baudisch (Note 40), p. 194.

⁴³ J. L. Coleman (Note 37), p. 224.

⁴⁴ B. Baudisch (Note 40), p. 194.

⁴⁵ M. Adams (Note 5), pp. 114–115.

⁴⁶ R.W.M. Dias, B.S. Markesinis (Note 1), p. 30.

action, and the actual liability will be borne by the offender's employer or insurer.^{*47} The aggrieved party's inability to prove the actual tortfeasor's fault may be another reason why the latter is not held liable. In the case of strict liability, however, the aggrieved party does not have to go through the complicated process of proving the fault.^{*48} As regards the principle of fault, Esser has found that a basis for it was not provided by moral motives but by those of economic policy. Thus, the aggrieved party was, in essence, sacrificed to economic development.^{*49}

The reasonableness of strict liability has also been upheld by the argument that producers who have strict liability can insure their liability and include the costs of that insurance in the price of their products.^{*50} However, the author is of the opinion that such an argumentation is not utterly convincing since it cannot be used as a justification for all cases of strict liability. For example, animal keepers (e.g. dog owners) often cannot recover their insurance expenses.

According to the position of K. Zweigert and H. Kötz, there may be a multitude of reasons to establish strict liability: the need to protect the aggrieved party (including the complexity of proving the fault in some areas), the acceptance of risks in a society only if strict liability is provided for the event of their realisation, the uncomplicated insurability of the respective risks, etc.^{*51} Hence it can be noted that justifications for strict liability have been provided in several manners and, for the most part, convincingly.

3.2. Principal positions of advocates of fault-based liability in the law of delict

It could be stated that if a person, without intent or negligence, causes damage to another person, there is generally no basis why that first person should compensate for the damage.^{*52} It is found that according to the common perception of morals, only the person who has behaved culpably must pay compensation to the person who suffered the damage.^{*53} An opposite kind of situation could unjustifiably restrict the individual freedom to act (and, *inter alia*, the development of economy).^{*54} Likewise, J. Horder takes the position that courts should deliberate on whether the result of strict liability is of a high enough value for the principle of individual autonomy to give way to it.^{*55} B.S. Markesinis has noted that fault has an educational and social value inasmuch as it helps to balance an individual's freedom to act and the obligations (including liability) arising out of such activity.^{*56}

Technical development is rapidly bringing about an increasing number of objects and activities which pose greater-than-normal dangers to third parties. However, what distinguishes a special threat from a normal one is not always obvious.^{*57} Insofar as the question of what a source of a greater danger is often a question of fact, it could be stated that strict liability also restricts the principle of legal certainty.^{*58}

In T. Tampuu's opinion, strict liability has the shortcoming that it is accompanied by the propagation of liability insurance, which obfuscates the preventive effect of the law of delict and the objective to attain fairness, as the person usually escapes personal liability.^{*59} Tampuu adds that on the basis of the principle of fairness, the law of delict must, first of all, enable the actual civil liability of the person who caused damage and who can be blamed for it.^{*60} One has to agree with that position, with the addition that by establishing a

⁴⁷ R.F.V. Heuston, R.A. Buckley. *Salmond and Heuston on the Law of Torts*. 19th edition. London: Sweet&Maxwell 1987, p. 25.

⁴⁸ C. Huber. *Das neue Schadenersatzrecht*. Bonn: Deutscher Anwalt Verlag 2003, p. 169.

⁴⁹ H. Kötz, G. Wagner (Note 11), p. 15.

⁵⁰ B. Baudisch (Note 40), p. 175.

⁵¹ K. Zweigert, H. Kötz (Note 8), p. 671.

⁵² R.F.V. Heuston, R.A. Buckley (Note 47), p. 24.

⁵³ G. Williams, B.A. Hepple. *Foundation of the Law of Tort*, second edition. London: Butterworths 1984, p. 136.

⁵⁴ See the same position by T. Tampuu. *Riskivastutus ja tootja vastutus võlaõigusseaduses* (Strict liability and producer liability in the Law of Obligations Act). – *Juridica* 2003/3, p. 161 (in Estonian). Actually it is also admitted by M. Adams that liability for damage caused without fault will restrict persons' freedom of movement to a regrettable extent. M. Adams (Note 5), p. 117.

⁵⁵ J. Horder. *Strict Liability, Statutory Constructions, and the Spirit of Liberty*. F.M.B. Reynolds (ed.). *The Law Quarterly Review*. Vol. 118. London: Sweet&Maxwell 2002, p. 461.

⁵⁶ R.W.M. Dias, B.S. Markesinis (Note 1), p. 29.

⁵⁷ B. Baudisch (Note 40), p. 196.

⁵⁸ For example, a ski lift was not judged to be a source of greater danger by the Finnish Supreme Court (Judgment No. 1992:141 of 20 October 1992).

⁵⁹ T. Tampuu (Note 54), p. 161.

⁶⁰ T. Tampuu. *Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus* (Law of delict in the law of obligations. General problems and liability based on the general elements of delict). – *Juridica* 2003/2, p. 71 (in Estonian).

lower threshold for liability insurance coverage it is possible to decrease, to a certain extent, the obfuscation of the preventive effect of the law of delict and the attainment of the principle of fairness.^{*61}

Thus it can be noted that the necessity of both fault-based liability as well as strict liability can be relatively successfully justified. Before presenting the final conclusions, the problem in question will also be analysed from the viewpoint of legal economy as well as the philosophical viewpoint.

3.3. Legal economy aspect of the discussion

The discussion on the justifiability of fault-based liability or strict liability in terms of legal economy is, in summary, a matter of which of those liability forms is so to say economically less costly. Thus R. Cooter and T. Ulen also assert that the economic purpose of delictual liability is to minimise the instruments used to prevent damage and damage in total. Thus we have to reduce the set of social costs made up by the expenses of preventing the damage, those of the damage itself and the administrative expenses.^{*62}

P. Cane is of the position that individuals take decisions on whether and to what extent expenses on preventing damage should be incurred on the basis of whether or not the expenses caused by damage will exceed those of preventing the damage.^{*63} If expenses of damage are higher than those of preventing the damage, the latter are incurred regardless of whether this is the question of fault-based or strict liability. In the opinion of P. Cane, the strictness of liability does not remarkably alter the general level of safety in a society.^{*64} W.L. Prosser, too, has found that in general, there is no basis for choosing between strict liability and fault-based liability, as regards the prevention of accidents.^{*65}

This position is opposed by G. Williams, who finds that since the law of delict is aimed at, *inter alia*, the prevention of damage, it is the strict liability that specifically assists to the fulfilment of this aim.^{*66} The discussion is developed further by R.L. Rabin, who offers an interesting example: if liability were fault-based, a car driver would decide on how much to drive only on the basis of how much he would like to do it. However, things would be different in the case of strict liability. Since the driver would have to compensate for any damage from an accident, he should decide on the activity of his driving.^{*67}

The author of this article agrees with the lastly presented positions and admits that the regulation of strict liability can make individuals more careful, of course if compensation for damage can be reduced to the extent of the aggrieved party's own role in causing the damage. Insofar as strict liability also has an impact on the activity of individuals, it can also reduce the total costs of damage. Nonetheless, we have to keep in mind the fact that legal economy is not aimed at making the society safer but at judging which regulation will be less costly in summary. In other words, if damage itself is less costly than its prevention, legal economists will let the damage happen without worry.

All in all, the question of whether to prefer fault-based or strict liability is reducible to the question of who should sustain the damage caused by accidents. In the system of strict liability in which compensation for damage can be reduced due to the aggrieved party's role, if any, in causing the damage, the difference between fault-based and strict liability is that in the latter case, the costs of an accident which could be avoided only by expenses higher than the damage itself have been left to the tortfeasor. In fault-based liability, such costs have been left to be borne by the aggrieved party.^{*68} In the opinion of S.R. Perry, this is the very reason why fault-based liability is not economically justifiable: if the tortfeasor can use the excuse that due care was exercised in respect of the aggrieved party, it follows that the tortfeasor can enjoy the income from an activity but the expenses of such activity are left to be sustained by another person.^{*69} At the same time it has also been found that the argument of leaving the expenses of an activity to be borne by

⁶¹ On that see also: B. v. Eyben. *Alternative Compensation Systems*. P. Wahlgren (ed.). *Scandinavian Studies in Law*. Vol. 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, p. 232.

⁶² R. Cooter, T. Ulen. *Law and Economics*, second edition. United States: Addison-Wesley Educational Publishers Inc. 1998, p. 288. On that see also: B.S. Byrd. *The Law & Language of Contracts and Torts*. Anglo-Amerikanisches Vertrags- und Deliktsrecht. München: C.H. Beck'sche; Wien: Manz'sche Verlags- und Universitätsbuchhandlung; Bern: Verlag Stämpfli AG 1998, p. 162.

⁶³ P. Cane. *The Anatomy of Tort Law*. Oxford: Hart Publishing 1997, p. 45.

⁶⁴ M.A. Franklin, R.L. Rabin. *Cases and Materials on Tort Law and Alternatives*, third edition. New York: The Foundation Press 1983, p. 653.

⁶⁵ *Scil.*, even fault-based liability can be economically efficient if an efficient position is provided to the degree of due care. See R.L. Rabin (Note 14), p. 655.

⁶⁶ G. Williams, B.A. Hepple (Note 53), p. 138.

⁶⁷ R.L. Rabin (Note 14), pp. 225–226.

⁶⁸ M.A. Franklin, R.L. Rabin (Note 64), p. 654.

⁶⁹ E.J. Weinrib (ed.). *Tort law*. Aldershot, Hong-Kong, Singapore, Sydney, 1991, p. 182. In strict liability, such expenses can often also be distributed between consumers. See R.L. Rabin (Note 14), p. 656.

another person is not convincing enough. On the one hand, a person driving a car enjoys his or her activity, but on the other hand, motor vehicles are beneficial to the entire society. The situation is similar in the case of producer liability: it cannot be said that benefits of the product are enjoyed only by the producer as they are also enjoyed by the consumers.^{*70}

Costs of administration must also be taken into account, as regards the economic aspect of the regulation by the law of delict.^{*71} In the case of strict liability, the administrative costs are lower than in the case of fault-based liability.^{*72} Although strict liability results in a larger number of claims, those claims are easier to settle; fault-based liability results in a lesser number of claims but the settlement of those claims is substantially more complex.^{*73}

In reality, the insurance system is also of significant importance in the described discussion since a material portion of damage costs is actually sustained by insurance. R.L. Rabin is of the position that strict liability has the effect of forcing the tortfeasor to insure its liability. Rabin finds that if the tortfeasor's (liability) insurance is less costly than the aggrieved party's (loss) insurance, there exists an economic argument in favour of strict liability. However, Rabin finds it difficult to confirm whether it is actually so.^{*74}

Hence, it can be concluded on the above basis that given the costs of preventing damage, the costs of damage itself and the administrative costs as well as taking account of the total amount of such costs, the system of strict liability seems to be the more justified one in economic terms.^{*75}

3.4. Legal philosophy aspect of the discussion

The provisions in the law of delict must not invade the society's sense of fairness. Norms of the law of delict must be automatically acceptable to the people, otherwise there will be difficulties in implementing those provisions.^{*76} By presenting positions of legal philosophers in the following paragraphs, the author will attempt to answer the question of how the preference of fault-based or strict liability can be justified by the attainment of fairness as one of the objectives of the law of delict.

Naturally, for that purpose, an answer should first be provided to the question of what kind of regulation is fair.^{*77}

By the Aristotelian approach, fairness in the general sense and in the individual sense can be treated as distinct. As regards fairness in the general sense, there are two concepts: legality and equality. Fair means legal, equal and honest; unfair means illegal, unequal or dishonest. With regard to individual fairness, there are also two distinguishable aspects: the fairness of distribution and the corrective justice. The fairness of distribution is applicable to the distribution of social values (e.g. honour, money), and such distribution can be equal or unequal between the members of society.^{*78} Corrective justice is directed to protecting the share of each citizen. If a person has forfeited his or her share to another person, he or she has a claim against that other person.^{*79}

One of the most important developers of the theory of corrective justice, R. Epstein, and other supporters of that theory find that protection of individuals' freedom is the task of the law of delict. The theory is based on

⁷⁰ W.B. Dufwa. Development of International Tort Law. Till the Beginning of the 1990's From a Scandinavian Point of View. P. Wahlgren (ed.). Scandinavian Studies in Law. Vol. 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, p. 95.

⁷¹ R.L. Rabin (Note 14), p. 656.

⁷² It is clear that administrative costs could best be avoided by the absence of delictual liability. See R. Cooter, T. Ulen (Note 62), p. 288.

⁷³ R. Cooter, T. Ulen (Note 62), p. 289. In fault-based liability, administrative costs are very high primarily in common-law countries, where also the jury must learn to understand the necessary matters concerning fault.

⁷⁴ R.L. Rabin (Note 14), p. 655. In this point, the author would like to stress that as insurance influences the care of negatively insured persons, a lower threshold of liability (an excess) must be established with regard to the insured in order for the system of compensation for damage to function, regardless of whether the question is about non-life insurance in general or its subtype, the liability insurance. That lower threshold should be established on such a level that would force the person to act with care but would, at the same time, not lessen that person's interest in concluding an insurance contract. However, the author admits that the preventive effect of the law of delict is, in any case, somewhat decreased by insurance; the lower threshold of liability would help to limit such a decrease.

⁷⁵ Fault-based liability has been criticised for its economic inefficiency by R. Posner. See E.J. Weinrib (Note 69), p. 175.

⁷⁶ W.B. Dufwa (Note 70), p. 164.

⁷⁷ At this point it should be noted that e.g. I. Tammelo has stated that discussions regarding fair decisions and norms will not lead to graspable results. See I. Tammelo. Theorie der Gerechtigkeit. Freiburg, München: Verlag Karl Alber, 1977, p. 101. The author is of the opinion that notwithstanding the truthfulness of that statement, legal philosophical discussions should not be avoided.

⁷⁸ H. Kelsen. What is Justice? Justice, Law and Politics in the Mirror of Science. New Jersey: The Lawbook Exchange LTD Union 2000, pp. 125–126.

⁷⁹ R.O. Brooks, J. B. Murphy (eds.). Aristotle and Modern Law. England: Dartmouth Publishing Company 2003, p. 1589.

the idea that all humans have a right to autonomy and interventions with this freedom are acceptable only if damage from the exercise of this freedom is suffered by a third party. On moral considerations, the tortfeasor must put the aggrieved party in the situation which would have prevailed if the damage had not occurred.^{*80}

In the opinion of S.R. Perry, strict liability is the form of delictual liability compatible with the concept of corrective justice. If the tortfeasor causes damage to the aggrieved party, the tortfeasor must compensate for the damage even if the risks taken by the tortfeasor were reasonable.^{*81} Upon the assumption that persons are different in their situations and abilities and it would be fair if everyone acts and takes positions according to his or her abilities, it could also be claimed, reversely, that it would be fair if persons had to be liable for their behaviour only if they had behaved below the level of such abilities. Such an approach to fairness seems to be in favour of fault-based liability or even a subjective standard of fault.

The nature of fairness has been analysed by several other authors, including e.g. J. Rawls^{*82}, H. Römer^{*83}, H. Kelsen^{*84} and others, but a single answer to the question of whether the law of compensation for damage should prefer fault-based or strict liability has not been provided by works of legal philosophy.

3.5. Justified form of liability in the law of delict

On the basis of the above-presented analysis, it can be concluded that the question of strictness of liability or, more exactly, of whether fault-based or strict liability should dominate in the law of delict, is intriguing and interesting. At the same time this question cannot be answered on the basis of what has been presented: namely, there are only a few authors who unconditionally favour one or the other form.^{*85} Thus, positions have been expressed in recent legal literature that fault-based liability and strict liability are two equivalent forms of liability, which complement each other.^{*86} While fosterers of the legal economic method of research tend to support strict liability, neither of the liability forms can be preferred to the other under the legal philosophical approaches.

Therefore the author of this article adopts the position that in today's society, it is not right to prefer one form of liability to the other. It is justified to maintain individuals' freedom to act as far as no damage can obviously arise from such activity provided that due care is exercised. Otherwise, economic activity would be unreasonably obstructed as well. Thus, the author is of the opinion that unless dealing with a source of greater danger which can cause damage regardless of the care exercised by the person, fault-based liability should be regarded as appropriate.^{*87}

At the same time, the author admits that fault-based liability is inappropriate in some spheres of activity. Namely, the aggrieved party would be left without compensation in the cases in which damage has been caused by a source of greater danger (as in such cases, damage can arise without the tortfeasor's fault, i.e. by an accident) and that would certainly not be fair or reasonable. Damage caused by accidents should be borne by the keeper of the source of greater danger because he or she can decide whether and how to keep, use or handle that source of greater danger.

Establishment of strict liability cannot be justified only by stating that persons can insure their liability. Namely, an individual cannot insure all liability that could potentially follow from that individual's behaviour and even if insurers agreed to sign such contracts, the insurance premiums would be unreasonably high. This would, however, lead to a situation in which persons do not insure their liability and their freedom to act would still be restricted in an unreasonable manner.

⁸⁰ W.B. Dufwa (Note 70), p. 170.

⁸¹ E.J. Weinrieb (Note 69), p. 176.

⁸² O. Höffe. John Rawls. Gerechtigkeit als Fairness. Freiburg, München: Verlag Karl Alber 1977, pp. 19–20.

⁸³ H. Römer. Privatrecht. Intensivkurs. 4. Aufl. München, Wien: R. Oldenbourg Verlag 1999, p. 18.

⁸⁴ H. Kelsen (Note 78), p. 295.

⁸⁵ As noted above, there are some authors who do not regard fault as an important element of liability in the law of delict, and there are also some authors who have adopted the position that as the sets of elements of strict liability do not have the requirement of fault, strict liability should not even be considered to be a part of the law of delict. See M. Gruber. Freiheitsschutz als ein Zweck des Deliktsrechts. Versuch einer methodengerechten Begründung. Berlin: Duncker&Humblot 1998, p. 203.

⁸⁶ B. Baudisch (Note 40), p. 212.

⁸⁷ In modern theoretical literature, the answers to the question of what the general form of delictual liability should be are in general explicit: fault-based and strict liability. See E.J. Weinrieb (Note 69), p. 175. Regarding the same position, see: K. Zweigert, H. Kötz. Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3rd ed. Tübingen: Mohr 1996, p. 652.

4. Development trends of liability in the law of delict

Since the beginning of the 19th century, the law of delict has been developing in one important direction: protection of the aggrieved party has been increasing in the regulations of liability.^{*88} In addition, it cannot go unmentioned that economic efficiency of the system of damage compensation may become an increasingly important goal in modern society. It is obvious that these developments imply the domination of strict liability in the future.

However, the complete replacement of fault-based liability by strict liability will not yet take place in the near future. The reasons for this are the following. Although the replacement of the principle of fault with causal liability has been recently considered, such a plan has not been implemented yet at least in European legal orders.^{*89}

Secondly, it must be remembered that even today, jurists and legislators still see the principle of fault as viable. This is also endorsed by the Tort-Law Book of the European Civil Code project^{*90}, art. 1:101:1 of which provides that a person who suffers legally relevant damage has, under that Book, a right to reparation from a person who caused the damage intentionally or negligently (or who is otherwise accountable for the causation of the damage). Assessors of developments in the European law of delict have adopted the position that negligence liability and strict liability are two equally important forms of liability, which are not opposed to each other. Rather, they are interconnected: on the one hand, fault-based liability does not require an actual fault of the tortfeasor or the possibility of blaming the tortfeasor subjectively for the damage; on the other hand, strict liability is not absolute but more of a hybrid institution between causal liability and fault-based liability.^{*91}

Likewise, the national laws of most states (and also the scientific research) still firmly cling to the principle of fault. On the above basis it can be asserted that at least in the near future, the general elements of delict, which include fault as one of the elements, will continue to apply. At the same time it is no longer correct to say that strict liability will continue to apply by its side: fault-based liability will rather remain applicable by the side of strict liability.

In discussing developments in the law of delict, the impact of developments in the **insurance system** should certainly not be neglected. After all, the development of the insurance system led to the situation in which there were no more reasons to protect business operators^{*92} and opened up the way for strict liability. Therefore it could be asked whether e.g. a sudden drop in economic welfare or the pace of development would not force the legislators to re glorify the principle of fault. The author still finds this to be quite unlikely.

The increased role of the insurance system has been accompanied by a decrease in the importance of the law of delict.^{*93} The British jurist M.A. Jones also states that the role of insurance in modern tort law is decisive. Courts award high damages that are unaffordable to individuals as well as smaller companies.^{*94}

⁸⁸ W.B. Dufwa (Note 70), p. 91. It has been found that the protective sphere of tort law has significantly expanded in recent times and this does not concern only the phenomenon of the United States. See E. Hondius (ed.). *Modern Trends in Tort Law. Dutch and Japanese Law Compared*. The Hague, London, Boston: Kluwer Law International 1999, p. 261.

⁸⁹ For example, the Peason Commission (the Royal Commission on Civil Liability on Compensation for Personal Injury, set up in 1978) in Great Britain seriously considered the introduction of delictual liability without fault but still did not recommend it to the parliament. See C. v. Bar, J. Shaw (Note 20), p. 71.

⁹⁰ The Study Group on a European Civil Code came together in the middle of 1999 and it is considered to be the successor of the Commission on European Contract Law. See C. v. Bar. *Konturen des Deliktsrechtskonzeptes der Study Group on European Civil Code — Ein Werkstattbericht*. *Zeitschrift für Europäisches Privatrecht*. 9th year of issue. München: Verlag C.H.Beck, 2001, p. 515. Although upon external observation, the law of liability in European legal orders offers diverse picture at first sight (N. Jansen. *Auf dem Weg zu einem europäischen Haftungsrecht*. *Zeitschrift für Europäisches Privatrecht*. 9th year of issue. München: Verlag C.H. Beck 2001, p. 30), the creation of a European law of delict was considered as relatively probable at least at the end of the 20th century. See U. Magnus. *Elemente eines europäischen Deliktsrechts*. *Zeitschrift für Europäisches Privatrecht*. 6th year of issue. München: Verlag C.H. Beck 1998, p. 614. The project materials of a European Civil Code are available at: http://www.sgecc.net/index.php?subsite=subsite_4

⁹¹ N. Jansen (Note 90), p. 47.

⁹² R.W.M. Dias, B.S. Markesinis (Note 1), p. 30.

⁹³ W.B. Dufwa (Note 70), p. 98. There are well-developed insurance systems also in the Nordic countries. On that, see B. v. Eyben. *Alternative Compensation Systems*. P. Wahlgren (ed.). *Scandinavian Studies in Law*. Vol. 41. *Tort Liability and Insurance*. Stockholm: The Stockholm University Law Faculty 2001, p. 201.

⁹⁴ M.A. Jones. *Textbook on Torts*, 4th edition. London: Blackstone Press Limited 1993, p. 10.

Moreover, there are authors who consider it reasonable to replace the entire system of the law of delict with a system of insurance.^{*95} Such a tendency is also predicted by e.g. J. Fleming.^{*96} It is asserted that the system of the law of delict is not economically efficient because it requires more time and money than the functioning of an insurance system.^{*97} In many spheres of activity, insurance has already become the dominant mechanism of compensation for damage.^{*98}

The respective considerations of legal policy are still clouded by the bitter fact that society does not have the means to compensate for all the damage that can occur.^{*99} An all-inclusive system of insurance would be possible only if compensations for the aggrieved parties were significantly smaller than in the law of delict, e.g. if any compensation for intangible damage were unavailable. In the opinion of many prominent authors, including K. Zweigert, the need for a reformation is therefore not urgent.^{*100}

5. Summary

In summary, it can be noted that historically, the valuation or discarding of fault has depended primarily on social values and, from the 19th century, also on the needs of economy. Nowadays, the general delictual liability, which has the requirement of fault, is recognised everywhere. At the same time, the principle of fault is losing its dominant position since in the legal reality, a large part of damage cases is settled under the provisions of strict liability or producer liability.

The need for preferring either fault-based liability or strict liability can be successfully justified. The author is of the opinion that today, it is not correct to prefer one form of liability to the other. It is justified to maintain individuals' freedom to act as far as no damage can obviously arise from such activity provided that due care is exercised. Thus, unless the question is about a source of greater danger which can cause damage regardless of the care exercised by the person, fault-based liability should be, in the author's opinion, considered as appropriate.

As regards possible developments in the law of delict, it can be noted that at least in the near future, fault-based delictual liability will still remain in the civil codes of European countries. Fault-based liability and strict liability are not opposed but, rather, complementary forms of liability.

⁹⁷ K. Zweigert, H. Kötz (Note 8), p. 679.

⁹⁸ S.P. James. *Introduction to English Law*, 11th edition. London: Butterworths 1985, p. 410.

⁹⁹ W.B. Dufwa (Note 70), p. 105.

¹⁰⁰ K. Zweigert, H. Kötz (Note 8), pp. 681-683. They find that an all-inclusive insurance system would be accompanied by several other problems. For example, it remains unclear whether those who were particularly careless with regard to the occurrence of damage should also be compensated for the damage. K. Zweigert, H. Kötz (Note 8), p. 681-683.