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Meaning of Fault with regard to Liability for Damage Caused by the Unlawful Action of Another Person

It should be a self-evident, seemingly natural rule that everyone is liable only for the damage they themselves have caused. However, there are situations in which society considers it just and necessary to place the burden of liability for the damage caused by one person on another person. Such solutions are justifiable when the person causing the damage and the person held liable are, on some level, closely interrelated. As regards liability for delicts committed by other persons, four types of cases in particular can be pointed out: the other person exempted from liability can be a minor without delictual capacity, a person without delictual capacity due to a disability, a minor with delictual capacity, or a service provider.¹

This article is aimed at analysing the requisites for one person's liability for the delict of another. The main attention is still directed to the element of fault as one of the primary requisites for liability in the law of delict. In other words, this article studies the question of whether one person's liability for a delict committed by another person will require culpability of the tortfeasor, culpability of the person responsible for the damage or a possibility of blaming them both. Naturally, an assessment is also provided with regard to the question of which solution is justified in view of the subjective element of liability.

The problems raised here are equally interesting to jurists of all countries regardless of the legal system or the law family. In order to provide answers to the questions, the author will analyse and compare, above all else, the respective provisions in the Estonian Law of Obligations Act² (LOA), the German Civil Code³

¹ There are other cases that can be considered similar to those mentioned: in the event of compulsory liability insurance, the insurer's direct liability for a delict of a policy-holding tortfeasor; the liability of a legal person for a delict committed by a member of its managing body; and the liability of a public authority for unlawful activities of an official. These cases are not analysed in this article due to the size restrictions. It must be noted additionally that liability for the activities of another person was not known in, e.g., Roman law. See K. Zweigert, H. Kötz. *Introduction to Comparative Law*. 3rd ed. Oxford: Clarendon Press 1998, p. 630.

² *Võlaõigusseadus*, 26.09.2001. – Riigi Teataja (State Gazette) I 2001, 81, 487; 2005, 61, 473 (in Estonian).

³ The Civil Code of the Federal Republic of Germany. Text with commentaries in O. Jauernig. *Eläutert von C. Berger und andere*. *Bürgerliches Gesetzbuch*. 10. Aufl. München: Verlag C. H. Beck 2003.

(BGB) and the draft European Civil Code⁴ (ECC). At present, analysis and evaluation of the above mentioned project should, in particular, be one of the (most important) tasks of jurists in EU Member States.

This article is composed of four chapters: according to the above-mentioned cases, in which one person is liable for the delict of another, the meaning of the subjective element in the case of liability for delicts committed by minors without delictual capacity is addressed in the first part, liability for delicts committed by persons who do not have delictual capacity due to disability is detailed in the second part, liability for delicts of minors with delictual capacity is discussed in the third part and the element of fault in the event of the service user's liability for a delict of the service provider is analysed in the fourth part of the article.

1. Fault in case of liability for delicts committed by minors without delictual capacity

1.1. General

It can be regarded as a generally recognised principle that until a certain age, persons are not liable for damage caused by them. In accordance with LOA § 1052 (1), a person under 14 years of age does not have delictual capacity.⁵ Although a minor without delictual capacity may be obliged to compensate for damage, under the so-called equitable liability (see, e.g., LOA § 1052 (3) and ECC article 3:103 (3)), we must nevertheless take into account the fact that liability for damage caused by a minor without delictual capacity is borne, first of all, by other persons: usually the parents or the guardian.⁶ There is still the question whether the liability for acts by a person who does not have delictual capacity due to age should be incumbent on other persons on the basis of fault or independently of fault.

1.2. So-called parental liability depending on fault

In § 454 (1) of the former Civil Code of the Estonian Soviet Socialist Republic⁷ (CCESSR), liability for delicts committed by minors (of up to 15 years of age) without delictual capacity was made dependent upon culpability of the parents (adopters) or the guardian. In accordance with CCESSR § 454 (2), liability for damage caused by a minor without delictual capacity could also be borne by an educational, child care or medical institution if the minor caused the damage while being under the supervision of such institution. Those institutions were exempted from liability if they proved that the damage had not been caused due to their fault. The Soviet legal theory held the prevalent position that parental fault (primarily in the form of negligence) was constituted by a failure to fulfil, or a negligent fulfilment of, the parental duty of supervision.⁸ As a rule, the question of fault of the legal representatives of a minor without delictual capacity has not been at issue in judicial practice.⁹ Thus we can assume that it was virtually impossible for the parents to prove that they were not at fault. Rules similar to those of CCESSR § 454 have been established by § 1073 (1) to (3) of the Civil Code of the Russian Federation¹⁰ (CCRF).¹¹

In accordance with BGB § 832 (1), liability for damage caused by a minor without delictual capacity will be borne by the persons who have the duty of supervision.¹² The parents must exercise the supervision under BGB § 1626, and poor performance of supervision is also an expression of the parents' fault. In accordance

⁴ The draft European Civil Code. Available at http://www.sgecc.net/index.php?subsite=subsite_4 (15.05.2006).

⁵ On absence of delictual capacity, see J. Lahe. *Deliktivõimetus süülist vastutust välistava asjaoluna* (Absence of Delictual Capacity as a Circumstance Precluding Culpability). – *Juridica* 2002/6, pp. 391-400 (in Estonian).

⁶ On rights and duties of parents and guardians, see *Perekonnaseadus* (Family Law Act, FLA), 12.10.1994. – *Riigi Teataja* (State Gazette) I 1994, 75, 1326; 2006, 14, 111 (in Estonian).

⁷ The Civil Code of the Estonian SSR was passed by the ESSR Supreme Soviet on 12.06.1964. – *Ülemnõukogu Teataja* (Supreme Soviet Gazette) 1964, 25, 115; *Riigi Teataja* (State Gazette) I 1997, 48, 775 (in Estonian).

⁸ E. Laasik. *Nõukogude tsiviilõigus*. Eriosa (Soviet Civil Law. Special Part). Tallinn: Valgus 1975, p. 343 (in Estonian).

⁹ See, e.g., Decision of 23.12.1998 of the Civil Chamber of Tartu Circuit Court in Case II-2-246/98 (in Estonian).

¹⁰ The General Part of CCRF was passed by the State Duma of Russia on 21.10.1994 and the Special Part of CCRF was passed on 22.12.1995.

¹¹ On respective analyses by Russian jurists, see A. P. Sergeev, U. K. Tolstoy. *Гражданское право* (Civil Law). Moscow 1997, p. 725 (in Russian); and O. N. Sadikov. *Комментарии к гражданскому кодексу Российской Федерации* (Commentaries to the Civil Code of the Russian Federation). Moscow: Kontrakt, Infra M-norma 1996, p. 669 (in Russian).

¹² The persons who have the duty of supervision are, in particular, the parents or the guardian (BGB § 1793); by a contract, the responsibility may be borne by foster-parents, step-parents or, in a kindergarten or boarding institution, supervisors. See H. Brox. *Besonderes Schuldrecht*. München: C.H. Beck'sche Verlagsbuchhandlung 1987, p. 351.

with the second sentence of BGB § 832 (1), the obligation to compensate for damage will not be applicable if the parents can prove that the supervision was sufficient or that the damage would have been caused even in the case of due supervision. The degree of due supervision is determined according to the age and characteristics of the minor.^{*13} Well-recognised scientists in Germany are speaking of the need to decrease parental liability. They are of the opinion that generally, parents are unable to exempt themselves from what has, *de facto*, become strict liability. Another argument in favour of restricting parental liability would be the modern pedagogic notion that children must acquire their life experiences and excessive supervision would be an obstruction to this.^{*14}

In France, persons with supervisory duty can be exempted from liability if they prove that they have exercised sufficient care in carrying out their duty of supervision and raising the child. It is clear that the younger the child, the more difficult it will be for the parents to be exempted from liability.^{*15} In Japan, so-called parental liability is also based on fault (§ 714 of the Japanese Civil Code (JCC)). Parental liability, in its traditional meaning, is not applicable in English law, where parents may be liable for damage caused by a minor as their own delict, which can be constituted, e.g., by the fact that they failed to fulfil their duty of supervision.^{*16}

1.3. Liability independent of parent's fault

In accordance with ECC, minors under seven years of age do not have any delictual capacity (article 3:103 (2)). Minors from seven to eighteen years of age will have a restricted delictual capacity, i.e. they will be liable for damage only if they do not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case (article 3:103 (1)). In accordance with ECC article 3:104 (1), parents or other persons obliged by law to provide parental care for a person under fourteen years of age, are accountable for the causation of legally relevant damage where that under age person caused the damage through conduct that would constitute negligence if it were the conduct of an adult. Responsibility for a minor without delictual capacity can also be incumbent on an institution or other body which has the task of supervision over the person who caused the damage. The liability of a supervising institution or other body will arise if the following preconditions are fulfilled: (a) the damage must be constituted by personal injury, by damage caused to a third person by death of, or injury to, a person, or by damage to property; (b) the person whom the institution or other body is obliged to supervise, caused that damage intentionally or negligently or, in the case of a person under eighteen, by conduct that would constitute intention or negligence if it were the conduct of an adult; and (c) the person under supervision is a person likely to cause damage of that type (ECC article 3:104 (2)). However, the liability of a supervising institution or other body is mitigated by ECC article 3:104 (3), whereunder such body will be exempted from liability if it shows that the supervision over the person who caused the damage was not defective (i.e. was sufficient).

Thus, one of the requisites for the so-called parental liability under ECC is (at least) objectively negligent conduct by a minor under 14 years of age. The liability of an institution with a supervision duty is less stringent: on the one hand, its liability is based on (at least) the objective negligence of the person who caused the damage, and on the other hand, the exercise of nondefective supervision over the person in question will also serve as a means for exemption from liability.

In accordance with LOA § 1053 (1), the parents or guardian of a person under 14 years of age will be liable for damage unlawfully caused to another person by the person under 14 years of age, regardless of the culpability of the parents or guardian (in accordance with LOA § 1053 (3), the liability will also be incumbent on a person who has, via a contract, assumed the obligation to exercise supervision over a minor without delictual capacity).^{*17} This provision is incredibly stringent in comparison with parental liability

¹³ H. Köhler. BGB. Recht der Schuldverhältnisse II. Einzelne Schuldverhältnisse. 13. Aufl. München: C.H. Beck'sche Verlagsbuchhandlung 1993, p. 261.

¹⁴ At the same time, there are also supporters of the opposite position, who find that as children are generally exempted from liability, the liability of parents should, rather, be made more stringent. See B. Dauner-Lieb. Schuldrecht. Erläuterungen der Neuregelungen zum Verjährungsrecht, Schuldrecht, Schadenersatzrecht und Mietrecht. Bonn: Deutscher Anwalt Verlag 2002, p. 851.

¹⁵ C. von Bar, P. Cotthard. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 33–34.

¹⁶ M. A. Jones. Textbook on Torts. 4th ed. London: Blackstone Press Limited 1993, p. 129. See also J. F. Clerc, W. H. B. Lindsell. Torts. The Common Law Library No. 3. 16th ed. London: Sweet and Maxwell 1989, p. 165; and D. Howarth. Textbook on Tort. London, Dublin, Edinburgh: Bottenworths 1995, p. 70. As regards the same subject in the United States of America, see J. L. Skaare. The Development and Current Status of Parental Liability for the Torts of Minors. – North Dakota Law Review 2000, 76, 89, p. 5.

¹⁷ LOA § 1053 (1) and (3) (and, in the opinion of the author of this article, also other categories of liability for the activities of another person) cannot be applied in the case of strict liability. (See also T. Tampuu. Deliktioiguslik vastutus teise isiku tekitatud kahju eest (Liability in the Law of Delict for Damage Caused by Another Person). – Juridica 2003/7, p. 467 (in Estonian). T. Tampuu has explained this by the argument that in the event of strict liability or liabilities composed of special sets of elements, no assessment is provided at all with regard to whether an act is unlawful or not. *Ibid.*

established in other countries as well as in ECC. For example, if a fire is caused by a four-year-old playing with matches, the parents must be liable for the child's activity under the LOA, regardless of whether or not they can be blamed, in any aspect, for what happened. The author holds the opinion that in order to prevent results from leading to extreme injustice, the law should enable the parents to be exempted from their liability in exceptional cases.^{*18}

One option is to consider making the liability of the other persons described in LOA § 1053 (1) dependent on fault, but this will naturally require clear delimitation of fault of other persons. According to the generally accepted principles, fault of other persons is constituted by the exercise of defective supervision over a minor without delictual capacity. This is also the only acceptable solution because there would not be much left of the fault-based liability of the persons with a supervision duty if their culpability is also seen in the unsatisfactory upbringing of the minor. The judicial practice is left with the task of specifying the extent of supervision required for each specific age group. The author finds that the determination of the extent of the supervision duty should be based, above all, on the age and the mental stage of development of the minor and also whether any prior delicts have been committed by the minor. Additionally, such a solution would not leave the aggrieved party in an unsatisfactory situation: the absence of fault must be proved by the person with supervision duty and, as a rule, this should be possible only in a relatively small number of cases.

Another solution to mitigate the so-called parental liability could be an interpretation of LOA § 1053 (1) in a manner similar to what is provided by ECC: the parents or the guardian could be liable for damage caused by a minor without delictual capacity only if the minor can be objectively blamed for his or her conduct. The liability of other persons could thus depend on the conventional criterion of the objective fault of the person without delictual capacity, and reasonable conduct of persons with delictual capacity could be considered as a standard of conduct in this situation.

2. Fault in case of liability for delicts committed by persons without delictual capacity due to disability

As in the case of responsibility for a minor without delictual capacity, the main questions relating to the culpability of a person who will bear delictual liability for acts of a person without delictual capacity due to a disability also lie in matters concerning the requirement of fault of the delictually liable person in order that the liability could arise, and the fulfilment thereof. Responsibility for a person without delictual capacity due to a disability is, as a rule, incumbent on the guardian.^{*19}

On the basis of CCESSR, this category may include persons who were liable for damage caused by a person divested of active legal capacity. In accordance with CCESSR § 456, the obligation arising from an infliction of damage was incumbent on the guardians or the supervising organisations unless they proved that the damage was not caused by their fault. In CCRF § 1076 (1), this matter is regulated similarly to CCESSR § 456.^{*20}

In accordance with BGB § 832 (1) and (2), if damage has been caused by an adult without delictual capacity, the liability will be borne by the person who has the duty of supervision arising out of the law or a contract. If an adult is completely or partially incapable of taking care of his or her affairs due to mental illness or physical, mental or psychological disability, a court of guardianship will, at his or her request or *ex officio*, appoint a guardian for that person.^{*21} It is of no relevance whether the person under guardianship has active

¹⁸ The situation is, however, alleviated by LOA § 140 which allows the extent of compensation to be reduced. It must be noted additionally that the application of LOA § 1053 (1) would result in a peculiar situation if the parent himself or herself is not an adult either. The parent will become the legal representative of the child but it is questionable whether he or she will have to compensate for the damage caused by his or her child. This question must be answered in the affirmative and hence, this may lead to a situation in which liability for damage caused by a minor child will be borne by a minor parent, and liability for damage caused by the minor parent will, in turn, be borne by the legal representative of the minor parent in the event of realisation of the elements provided for in LOA § 1053 (2).

¹⁹ On the concept of guardianship and related issues, see FLA § 92 et seq.

²⁰ The rules in question are supplemented by CCRF § 1078 (3), which provides that if damage was caused by a person who was not able to understand the meaning of his or her actions or control them due to a psychic disorder, the obligation to compensate for the damage may be transferred to persons living together with the person causing the damage: a spouse capable of working, the parents or adult children, who were aware of the psychic disorder but did not raise the question of divesting the person of active legal capacity.

²¹ A guardian whose consent is required for a transaction to be conducted by the ward must be equal to a legal representative within the meaning of BGB § 278. See P. Schlechtriem. *Võlaõigus. Üldosa* (Law of Obligations. General Part). 2nd ed. Tallinn: Õigusteabe AS Juura 1994, p. 112 (in Estonian).

legal capacity or not.^{*22} The second sentence of BGB § 832 (1) additionally provides that the obligation to compensate for the damage will not be applicable if the supervision was sufficient or if the damage would also have been caused in the case of a higher degree of supervision. The supervisory duties depend, in that respect, on the circumstances of the specific case, particularly on the extent of the guarded person's ability to understand and control his or her activities.^{*23}

In accordance with ECC, an institution or other body obliged to supervise a person may be accountable for delicts caused by the person under supervision when the person has caused damage intentionally or negligently (article 3:104 (2)(b)).^{*24} As mentioned above, the supervising institution or other body will be exempted from liability if it shows that there was no defective supervision (article 3:104 (3)).

This brings us to the question of how one can unconditionally speak of the intentional or negligent conduct of a person who is under supervision. Presumably, supervision needs to be exercised over such persons who are incapable of fully understanding their own conduct. Therefore, the author of this article is of the opinion that in ECC article 3:104 (2)(b), it would be correct to provide for the possibility of objectively blaming the person under supervision as a precondition for liability.

In LOA, rules for the guardian's liability for damage caused by persons with restricted legal capacity are contained in § 1053, subsection (5) of which provides that the guardian of a person with restricted active legal capacity who has been placed under guardianship due to mental disability will be liable for damage unlawfully caused by that person to another person, unless the guardian proves that he or she has done everything which could be reasonably expected in order to prevent the ward from causing damage.^{*25} In the opinion of the author of this article, conventional or objective blaming of the ward for his or her conduct should be one of the preconditions for the guardian's liability (in order to ensure that liability will not arise from conduct that could not be regarded as culpable even in the case of a person with delictual capacity). With that interpretation, the guardian's liability under LOA would not be stricter than the liability of a person with the supervision duty, as provided by ECC.

One could ask why fault-based liability is provided for in LOA § 1053 (5), while § 1053 (1) provides for liability without fault. As mentioned previously, even in ECC the so-called parental liability is significantly stricter than the liability of a person with supervisory duty. Justifications for such differentiation are not completely obvious. It is possible to present the argument that the relationship between a child and his or her legal representative is closer and less selfish than that between an adult with restricted legal capacity and his or her legal representative, yet this justification seems to be artificial. Nevertheless we must take into account that the legal representative of a child has the duty of raising the child while the guardian of a person with restricted legal capacity has no such duty.

It is also inevitable in this case, as in the case of problems relating to the culpability of persons responsible for minors without delictual capacity, to emphasise the role of judicial practice in delimiting the extent of supervision. Obviously, abilities differ even among persons with restricted legal capacity, and the extent of the guardian's duties in the exercise of supervision should specifically depend on the ability to understand and to control one's actions.

3. Fault in case of liability for delicts committed by minors with delictual capacity

The third case in which one person will be responsible for damage caused by another can be parents' or guardians' liability for delicts committed by minors with delictual capacity. Although minors with delictual capacity (i.e., under LOA, minors of 14 to 18 years of age) will be held liable for unlawfully caused damage pursuant to general principles, it is evident that such persons often do not have the property needed to compensate for damage, and in order to protect the aggrieved party, it is reasonable to establish the option of

²² H. Köhler. *Tsiviilseadustik. Üldosa. Õpik*. Heinrich Lange poolt alustatud teose 23. täielikult ümbertöötatud trükk (Civil Code. General Part. Textbook. The 23rd, completely rewritten edition of the work started by Heinrich Lange). Tallinn: Õigusteabe AS Juura 1998, p. 157 (in Estonian).

²³ P. Schlechtriem. *Võlaõigus. Eriosa (Law of Obligations. Special Part)*. 4th ed. Tallinn: Õigusteabe AS Juura 2000, p. 275 (in Estonian).

²⁴ In this respect, other preconditions for liability as provided in the above-mentioned ECC article 3:104 (2) are also important.

²⁵ This provision must be interpreted in light of § 8 (2) of the General Part of the Civil Code Act (GPCCA, passed on 27 March 2002. – Riigi Teataja (State Gazette) I 2002, 35, 216; 2005, 39, 308), whereunder, besides persons who are under 18 years of age, persons who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions, also have restricted active legal capacity. Divestment of a person of his or her active legal capacity or restriction of a person's active legal capacity by a court is not mentioned in GPCCA.

liability of the parents or guardian of a minor with delictual capacity. There is the problem of whether or not such liability should depend on fault of the parent or guardian.

In CCESSR § 455 (2), the liability of the parents (adopters) or guardians for delicts committed by minors of 15 to 18 years of age was provided for only in those cases in which the minor did not have property or salary sufficient to compensate for the damage. The liability of the parents (adopters) or guardian depended upon their fault, which could be manifested in insufficient supervision or upbringing. The obligation created between the parents or the guardian and the aggrieved party was subsidiary, not solidary. In CCRF § 1074 (1), responsibility for minors with delictual capacity is regulated similarly to CCESSR § 455. In accordance with CCRF § 1074 (2), the liability may also be incumbent on an educational or medical institution, an institution of social protection or a similar institution acting as the minor's guardian by law. Their liability is also fault-based.

In the Federal Republic of Germany, BGB § 832 (1) and (2) also extend to responsibility for minors with delictual capacity. As in the case of responsibility for a person without delictual capacity, the liability of persons with a supervision duty in this case is fault-based and they are liable in so far as compensation for damage cannot be taken from the minor's own property.

As noted above, in accordance with ECC, liability for delicts committed by persons under 14 years of age is incumbent on the parents or other persons if the person under age caused the damage through conduct that would constitute negligence if it were the conduct of an adult (article 3:104 (1)). On the basis of this regulation, the parents or other persons will not be liable for damage caused by a person between 14 and 18 years of age. This solution is difficult to justify: although, under ECC article 3:103 (1), persons between 14 and 18 years of age may be liable for damage with their own property, in most cases, such minors inevitably lack the means needed to compensate for damage.

It is interesting to note that the 14-year age limit does not apply to the liability of an institution or other body obliged to supervise a person. The liability of such bodies is triggered by the condition that a person under 18 years of age has caused damage by conduct which can be regarded as intentional or negligent if it were the conduct of an adult (see article 3:104 (2)(b)).^{*26}

According to ECC, the delictual liability of minors themselves does not always serve as a basis for liability for delicts committed by minors with restricted delictual capacity: e.g., a 13-year-old need not be liable for damage, the reason being that a person of such age could not be blamed for such conduct. At the same time, similar conduct may be charged in the case of an adult; that, however, is sufficient to create the liability of a parent or a supervisory institution.

LOA § 1053 (2) provides that the parents^{*27} or the guardian will also be liable for damage caused to another person by a person of 14 to 18 years of age **regardless of the culpability** of the parents or guardian, unless they prove that they have done everything which could be reasonably expected in order to prevent the damage.^{*28} Since LOA also establishes the so-called parental liability for delicts committed by minors between 14 and 18 years of age, the rules offered by LOA are, in this respect, more justified than those in ECC article 3:104 (1).

In the opinion of the author of this article, LOA § 1053 (2) may be prone to disputes: namely, in that provision, fault-based liability as well as liability without fault are both, at the same time, established for the parents or the curator. The legislator should reach a decision on reformulating this provision since in its present form, it may lead to misunderstandings. The author of this article is of the position that it would be reasonable to establish liability on the basis of culpability of the person with the supervision duty, since supervision over a minor between 14 and 18 years of age is more difficult than during the child's earlier life, and the parents must have the option to prove that they exercised supervision to a reasonable extent, as otherwise, consequences may turn out to be unacceptably unjust for the legal representatives. It must be mentioned that LOA § 1053 (2) does not preclude the interpretation whereby the parents' or the guardian's liability is fault-based. The author of this article still finds that it would be reasonable to delete the words 'regardless of the culpability of the parents or guardians' from the provision in question.

T. Tampuu has justifiably noted that in the absence of unlawful conduct and fault of a person between 14 and 18 years of age, the application of LOA § 1053 (2) and (3) will be precluded, since in that case, one could not reasonably expect those persons to prevent the damage in any manner.^{*29} Hence, the primary precondition for a parent's or guardian's liability is the minor's own liability.

²⁶ The existence of liability will also require the fulfilment of other preconditions for liability provided in ECC article 3:104 (2) and (3).

²⁷ In accordance with Decision No. 3-1-1-113-01 of 22.11.2001 of the Civil Chamber of the Estonian Supreme Court, a parent's duties in respect of a child will not terminate even if they live separately and the parent does not participate in raising the child.

²⁸ Although LOA § 1053 (2) does not mention that liability for damage caused by a person between 14 and 18 years of age may also be borne by a guardianship institution, the Civil Chamber of the Estonian Supreme Court has justifiably found that in certain cases, the said provision would also be applicable to guardianship institutions. See Decision No. 3-2-1-101-05 of the Civil Chamber of the Supreme Court.

²⁹ T. Tampuu (Note 17), p. 469.

In addition, there may be the question of whom, and on what grounds, will be liable for damage caused by a person who would have delictual capacity by virtue of age but still does not have such capacity due to a disability. One must take the position that such a person will not be liable pursuant to general principles (LOA § 1052 (2)). Responsibility for that person will be incumbent on the parents or the guardian. At the same time, there is no principal difference in whether the persons with the supervision duty will be liable under subsection (2) or (3) of LOA § 1053 as in either case, they will have the option to prove that they have done all that could be expected from them in order to prevent unlawful damage and, hence, be exempted from the liability. Additionally, the liability of a minor without delictual capacity due to a disability will be possible under LOA § 1052 (3).

In summary, it can be concluded that for damage caused by a minor with delictual capacity, fault-based liability of the persons with the duty of supervision and upbringing is prevalent. Fault is constituted by breach of the supervisory duty, which must be determined on a case-by-case basis. Additionally, the author would like to stress that it would also be reasonable to establish the parents' fault-based liability for delicts committed by persons between 14 and 18 years of age in ECC.

4. Fault in case of liability for delicts committed by service providers

4.1. Fault-based liability of service user

Lastly, this article discusses the service user's liability for damage caused by the service provider.^{*30} This matter is regulated by LOA § 1054 but that section does not expressly specify whether the service user's liability is fault-based or not.

In accordance with BGB § 831 (1), a person entrusting another person with a task must compensate for damage inflicted unlawfully by the second person to a third party during the performance of the task. In the law of the Federal Republic of Germany, a service user's responsibility for the service provider is not related to fault of the service provider^{*31} but, rather, with the presumable fault of the service user itself.^{*32}

In accordance with sentence 2 of BGB § 831 (1), the service user's fault is primarily constituted by breach of the duty of due care in selecting the vicarious agent and exercising supervision.^{*33} In order to be exempted from liability, the service user must prove that it has not violated the respective duty of due care.^{*34} This constitutes a separate claim against the service user, where the burden of proof as regards fault has been reversed for the benefit of the aggrieved party.^{*35}

One may ask the question of whether the service user's liability should also be recognised if, although it violated the duty of care in selection and supervision, damage would also have been inflicted in the case of careful selection and supervision. According to the second sentence of BGB § 831 (1), this question must be answered in the negative. K.-H. Gursky has correctly pointed out that if a service user could prove the latter case, then that service user would not be liable since there would be no causal link between its fault and the damage inflicted.^{*36}

In light of BGB § 831 (1), there is also room for dispute in the question of whether the service user should be liable even when it failed to exercise due care in selecting the vicarious agent but subsequently controlled

³⁰ In this article, a 'service user' means a person who engages another person in the person's economic or professional activities or engages another person in the performance of the person's duties or engages another person to perform an act at the person's request, as specified in LOA § 1054. That 'another person' is the service provider.

³¹ A person may be regarded, at one and the same time, as a performing agent (*Erfüllungsgehilfe*, BGB § 278) and a vicarious agent (*Verrichtungsgehilfe*, BGB § 831).

³² Hence the liability of a service user will not require fault of the service provider as a precondition: in order to give rise to liability of the service user, the conduct of the service provider must, besides the objective presence of the required elements, include only unlawfulness. Therefore, liability of the service user may also arise if the service provider does not have any delictual capacity: this further increases the required degree of efficiency of supervision to be exercised by the service user. A higher-than-average degree of control must also be applied if the service provider is, e.g., an older person and is therefore subject to less stringent requirements of due care.

³³ Dogmatically, the service user's respective duties can be logically classified as part of the general obligation of safe organisation of its own sphere of control. See P. Schlechtriem (Note 23), pp. 272–273.

³⁴ R. Arnoldi. *Die Haftung der juristischen Person für ihre Organe nach deutschem und keranischem Recht*. Berlin: Duncker&Humblot 1997, p. 189.

³⁵ O. Jauernig (Note 3), p. 1063.

³⁶ K.-H. Gursky. *Schuldrecht. Besonderer Teil. 3. Aufl.* Heidelberg: C. F. Müller Verlag 1999, p. 229.

the agent completely as required. In that case, fault of the service user should, nonetheless, be negated because discovery and elimination of defects in selecting an agent could be regarded as one of the objectives of carrying out due control: any blame for careless selection as a basis for fault will be rendered void of meaning and merely formal by virtue of careful supervision. Hence, service users should not be blamed for inappropriate selection if they subsequently exercise due supervision.

Rules similar to BGB § 831 have been established to provide for the service user's liability for delicts of the service provider in Switzerland (§ 55 (1) of the Swiss Civil Code)^{*37} and Japan (JCC § 715 (1)) and also, e.g., in Turkey (§ 55 of the Turkish Civil Code).^{*38}

4.2. Liability depending on the fault of service provider

Differently from the legal orders discussed in the previous subchapter, service users cannot exempt themselves from liability pursuant to § 1384 of the French *Code civil*. The liability cannot be precluded because the service user exercised due care in selecting the agent or exercising supervision.^{*39} The service user's liability is based on the assumption that the service user itself is responsible for the inflicted damage.^{*40} Responsibility for the service provider is also independent of the service user's own fault in, e.g., Italy (§ 2049 of the Italian Civil Code), Spain^{*41}, Finland^{*42} and Austria (ABGB § 1313a).^{*43}

In English law, the service user's liability for torts committed by the service provider (vicarious liability) is, in essence, strict liability.^{*44} Decisive importance can be attributed to the question of whether the service user had, at the appropriate time, the right to direct and control the actions of the service provider. If the 'principal' did not have the right of direction and control, the 'principal' will not be liable for the consequences of the service provider's tortious conduct.^{*45} Potential liability (independent of fault) should motivate the service user to arrange the work in such a manner as to minimise the potential for damage.^{*46}

The question under analysis was not directly regulated by CCESSR, and no respective analyses could be found within Soviet professional literature, either. However, § 449 of CCESSR can be understood as being a rule on the service user's liability for delicts of the service provider, whereby an organisation was obliged to compensate for damage inflicted due to the fault of employees of that organisation during the performance of their work or service duties. This provision has been applied as a basis for strict liability of the employer.^{*47} According to Decision No. 3-2-1-122-03 of 4 November 2003 of the Civil Chamber of the Estonian Supreme Court, liability under CCESSR § 449 required unlawful action towards the aggrieved party. The Chamber has substantiatedly noted that if an employee was in breach of the contract of employment, this could give rise to the employee's liability to the employer but not to the aggrieved party, who was not part of the contract of employment.

The service user's own liability without fault has also been established in ECC: a person who employs or similarly engages another, is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged caused the damage in the course of employment or engagement, and caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage (article 3:201 (1)).

³⁷ Schweizerisches Obligationrecht (30.03.1911). 37. Aufl. Zürich: Schulthess Polygraphisches Verlag 1988, pp. 12–13.

³⁸ T. Ansay, D. Wallace Jr. Introduction to Turkish Law. 3rd ed. Deventer, Antwerp, London, Frankfurt, Boston, New York: Kluwer Law and Taxation publishers 1987, p. 200.

³⁹ H. J. Sonnenberger, C. Autexier. Einführung in das französische Recht. 3. Aufl. Heidelberg: Verlag Recht und Wirtschaft GmbH 2000, p. 139.

⁴⁰ C. von Bar, P. Cotthard (Note 15), p. 32.

⁴¹ See E. Lobedanz. Schadenausgleich bei Straftaten in Spanien und Lateinamerika. Frankfurt am Main: Alfred Metzner Verlag 1972, p. 28.

⁴² J. Pöyhönen. An Introduction to Finnish Law. Helsinki: Finnish Lawyers Publishing 1993, p. 84.

⁴³ R. Ditttrich. Das Allgemeine Bürgerliche Gesetzbuch. 18. Aufl. Wien: Manzsche Verlags- und Universitätsbuchhandlung 1997.

⁴⁴ C. von Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 12, 44; and C. D. Baker. Tort. 5th ed. London: Sweet & Maxwell 1991, pp. 307–308.

⁴⁵ P. Keeton, R. E. Keeton, L. D. Sargentich, H. J. Steiner. Tort and Accident Law. American Casebook Series 1984, p. 536.

⁴⁶ G. Williams, B. A. Hepple. Foundation of the Law of Tort. 2nd ed. London: Butterworths 1984, p. 134.

⁴⁷ See, e.g., Decision of 26.02.1998 of the Civil Chamber of the Estonian Supreme Court in Case 3-2-1-24-98, and Decision of 28 December 2000 of the Civil Chamber of Tartu Circuit Court in Case II-2-2/2000 (in Estonian).

In LOA § 1054, rules provided for the service user's liability for a service provider's delict are independent of fault of the service user.^{*48} Hence similarities can be found between the liability arising under LOA § 1054 and strict liability. The above-mentioned provision only establishes that the damage must have been caused unlawfully by the service provider but makes no mention of the element of fault of the service provider. According to G. Hager, if the service user's liability would depend only on unlawfulness of the service provider's conduct, this would constitute a special, extreme case.^{*49}

The author of this article is of the position that although fault of the service provider is not mentioned *expressis verbis* in LOA § 1054, the service user's liability should, as in the provisions of ECC article 3:201 (1), be regarded as requiring the service provider's liability, i.e. the service provider's conduct must, in addition to other preconditions of the liability, include fault of the service provider. Hence, the service provider's conduct should be at least objectively negligent in order to give rise to the service user's liability.^{*50} Such a case may lead to a situation in which the service provider does not have any delictual capacity, or to a situation in which it can be exempted from liability due to its subjective characteristics. In the above-described case, the service user will not be liable pursuant to LOA § 1054 but the problem can be resolved through the service user's liability on the basis of culpability of the organisation (LOA § 1043 et al.). In that case, the service user can be blamed for careless selection of the service provider and then the service user will already be liable on the basis of its own fault.

The author of this article finds it unjustified to resort to the resolution of attributing only the factual conduct of the service provider to the service user and then asking the question of whether such conduct on its part would be wrongful.^{*51} Recognition of the last-mentioned position would base the service user's liability on fault under a scheme yet unknown in professional literature. Moreover, such attribution of the, so-to-say, factual conduct may lead to a wrong situation in which the service provider could be blamed for its conduct while the service user could not, and thereby the latter would be unjustifiably exempted from liability. Thus, in the opinion of the author of this article, the application of LOA § 1054 and the service user's liability should, as in the provisions of ECC article 3:201 (1), require wrongful conduct of the service provider.

5. Conclusions

In summary, it can be stated that in many countries the so-called parental liability for damage caused by a minor without delictual capacity depends on the parent's culpability. In LOA, the so-called parental liability has been established independently of culpability. A just result could be achieved by understanding LOA § 1053 (1) similarly to the provisions of ECC, whereby the parents or the guardian will be liable for damage

⁴⁸ In accordance with LOA § 1054 (1), a person engaging another person in the person's economic or professional activities on a regular basis, the person shall be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person, if the causing of damage is related to the person's economic or professional activities. Thus, in order to apply LOA § 1054 (1), it is necessary to determine that one person engages another person in the person's economic activities on a regular basis. The engagement of another person in one's economic or professional activities as a precondition for the application of LOA § 1054 (1) means that one person is using the services of another. On this, see Decision No. 3-2-1-75-05 of 5.10.2005 of the Civil Chamber of the Estonian Supreme Court. In accordance with LOA § 1054 (2), if one person engages another person in the performance of the person's duties, the person will be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person if the damage is caused or the occurrence thereof is made possible through the performance of such duties. According to LOA § 1054 (3), if a person performs an act at the request of another person, the person at whose request the act is performed will be liable for any damage caused in the course of the performance thereof on the same basis as for damage caused by the person if the damage is caused or the occurrence thereof is made possible through the performance of the act and if, due to the relationship between the person at whose request the act is performed and the person who causes the damage, the person at whose request the act is performed has control over the behaviour of the person who causes the damage. It must be added that liability for another person's activities is also regulated by GPCCA § 132 (1) and (2). In accordance with those provisions, liability of a service user will not require, as a precondition, that the service provider must have committed an unlawful act within the meaning of clauses 1) to 8) of LOA § 1054 (1). Thus, the scopes of GPCCA § 132 and LOA § 1054 do not overlap since LOA § 1054 provides rules for the service user's liability for extracontractual damage caused by the service provider while GPCCA § 132 regulates primarily the service user's liability for damage caused by the service provider during the performance of the contract. However, the Civil Chamber of the Estonian Supreme Court has, in its Decision No. 3-2-1-92-05 of 13.10.2005, stated that the application of GPCCA § 132 (1) would, *inter alia*, require that the conduct of the person engaged in economic or professional activities must have been such for which the other person engaging that person in economic or professional activities could be blamed.

⁴⁹ G. Hager. *Õigusvastaselt kahju tekitamine. Eraõigus. I osa. Abimaterjal kohtunike ja prokuröride twinning-koolituse eraõiguse õppegrupile (Infliction of Damage by Unlawful Action. Private Law. Part I. Supplementary Material for the Private-law Study Group at the Twinning Course for Judges and Prosecutors)*. Tallinn: Ministry of Justice 2001, p. 311 (in Estonian).

⁵⁰ This position is also supported by Decision of 5.10.2005 of the Civil Chamber of the Estonian Supreme Court in Case 3-2-1-75-05, in which the Chamber has justifiably found that the application of LOA § 1054 (1) would require, in addition to the condition of unlawfulness, the ascertainment of fault. If a person has not engaged another person in the person's economic activities on a regular basis, the person receiving a service from the other person may be liable for an unlawful and wrongful act of the other person under LOA § 1045 (2) and (3).

⁵¹ This position was published as an editorial note. G. Hager (Note 49), p. 312.

caused by a minor without delictual capacity only if the minor can be objectively blamed for his or her conduct. The author of this article is of the opinion that the guardian's liability should also include a precondition that the ward can be conventionally or objectively blamed for his or her conduct. With such an approach, the guardian's liability as provided for by LOA would not be stricter than the liability of a person with a supervision duty as provided for in ECC.

Liability for delicts committed by minors with delictual capacity is, in most countries, based on the culpability of persons with a duty of supervision or upbringing. It would be reasonable to provide for the parents' liability for delicts committed by persons between 14 and 18 years of age in ECC, similarly to LOA. Under LOA, the liability of a service user should, as in the provisions of ECC 3:201 (1), nevertheless be regarded as requiring the service provider's liability, i.e. wrongful conduct.

Hence it can be concluded that fault as a precondition for general delictual liability, has a steady role even where a person is liable for a delict committed by another person. Differences can be found particularly as regards the question of whether fault of the tortfeasor or the person responsible for damage or both is required to hold another person liable. The respective rules in ECC are a common part of the positive law of the Member States, a compromise between different methods of resolution. In the improvement and amendment of the analysed provisions of ECC, an approach based on the respective rules in LOA is one of the viable alternatives.