



Janno Lahe

*Docent of Civil Law,
University of Tartu*

Regulation of Strict Liability in the CFR and the Estonian Law of Obligations Act

1. Introduction

In delictual liability we can generally distinguish between fault-based liability and liability without fault if we look at it from the angle of the strictness of liability. Strict liability and producer liability are the most commonplace types of no-fault liability or heightened delictual liability. In addition to the afore-mentioned types of liability, several other no-fault cases under the law of delict may exist (such as the parental liability for a delict of a child less than 14 years of age). They are all opposed to fault-based liability arising out of the general elements of delict.

Within Chapter 53 of the Law of Obligations Act^{*1} (hereinafter 'LOA'), which deals with unlawful damage, it is possible to distinguish the general elements of delict (Division 1) determinable as a set of specific prerequisites to liability in the presence of which the person causing the damage (tortfeasor) faces the obligation to compensate the injured party for the damage. The fault of the tortfeasor is one such prerequisite. Secondly there is a separate issue of strict liability (Division 2) where the act or fault of the tortfeasor is irrelevant, but rather it is ascertained whether the damaging result was caused by the actual realisation of the heightened risk characteristic to things or actions. The third type of liability under the law of delict regulated by the LOA is the liability for a defective product (Division 3).

The aim of this article is to provide for a comparative analysis of strict liability in the LOA and the provisions of the law of delict, as defined by the Study Group on a European Civil Code, in the Common Frame of Reference (hereinafter 'CFR').^{*2} The author of this article wishes to clarify whether the general elements of strict liability in the LOA and CFR are similar; and if not, which are the main differences between the two regulations and whether the difference of the LOA regulation from the CFR is justifiable in each case.

The author also wishes, in order to delimit his treatment of the subject, to note that this article will analyse only the general elements of strict liability. Legal literature specifies that we can speak of strict liability only where we deal with an institute, historically developed, under which the determinant factor of liability is whether the risk characteristic to the major source of damage realised or not.^{*3} Although the first article (3:201) of

¹ Völaõigusseadus. Adopted on 26 September 2001. – RT I 2001, 81, 487; 2010, 2, 3 (in Estonian).

² The text of the CFR is available at www.sgecc.net. Analysis of the CFR rules certainly contributes to a better understanding of the strict liability provisions of the LOA.

³ F. G. v. Westphalen jt. *Produkthaftungshandbuch*. Band 2. Das deutsche Produkthaftungsgesetz, Produktsicherheit, Internationales Privat- und Prozessrecht, Länderberichte zum Produkthaftungsrecht. München: C.H.Beck'sche Verlagsbuchhandlung 1999, pp. 11–14.

Section 2, Chapter 3 of the CFR, titled ‘Accountability without Intention or Negligence’⁴, which regulates accountability for damage caused by employees and representatives, represents a case of no-fault liability, it does not, however, include classical elements of strict liability⁵, but rather is representative of a case of heightened liability.⁶ Based on the same reasoning, the analysis does not cover the problems associated with producer liability (CFR Article 3:204, LOA §§ 1061–1067).⁷

This article has six parts, the first of which treats strict liability in general, the second deals with the general elements of strict liability, the third one concerns the strict liability related to immovables and the fourth part is dedicated to strict liability related to animals. The fifth part analyses liability for motor vehicles. The sixth and final part of the article is about strict liability related to dangerous substances or dangerous emissions.

2. Strict liability in general

Strict liability can be treated as liability without a fault of the possessor of the major source of danger. Strict liability means that a person who causes excessive danger for another person is entitled to do so but must take account of the potential obligation to compensate for no-fault damage.⁸

As regards the evolution and developments of strict liability in European countries, one notes that in Great Britain the House of Lords laid the bases of strict liability in the case of *Rylands v. Fletcher*.⁹ In French law, until the end of the 19th century, fault as the prerequisite to liability under the law of delict was not questioned¹⁰; nevertheless, in 1896, the French cassation court made a sensational decision by ordering payment of compensation to a widow whose husband had died in an occupational accident despite failure to prove the company’s fault.¹¹

In Germany, strict liability was introduced into positive law for the first time in the 1838 Prussian Railway Act. In 1909, keepers of a motor vehicle were subjected to liability without a fault (*Kraftfahrzeuggesetz* § 7). H. Hattenhauer believes that this gave a green light to no-fault liability.¹² In 1922, the Federal Republic of Germany established the strict liability of aircraft keeper, thereafter in the other domains of strict liability. The authors of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), which entered into force on 1 January 1900, treated fault as the fundamental prerequisite to liability under the law of

⁴ CFR does not use the term ‘strict liability’ because different meanings can be attributed to it. About this, see J. Blackie. The Torts Provisions of the Study Group on a European Civil Code. – European Tort Law. Eastern and Western Perspectives. M. Bussani (ed.). Bern: Stämpfli Publishers Ltd. 2007, p. 75.

⁵ Pursuant to Article 3:201 of the CFR 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: (a) caused the damage in the course of the employment or engagement; and (b) caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage. Subsections 1054 (1)–(3) of the LOA too provide for liability irrespective of the fault of the user of the service: the liability of the user of the service may, under § 1054 of the LOA, be brought about if one person engages another person in the person’s economic or professional activities (subsection (1)), by the performance of duties (subsection 2)) or if a person performs an act at the request of another person (subsection (3)). Similarly to the CFR, the condition precedent to such a liability in the LOA is that the damages were caused by the economic or professional activities of the service user (subsection (1)), performance of the duties (subsection 2)) or the performance of a task given by one person to another person (subsection (3)). Although § 1054 of the LOA does not *expressis verbis* provide that the service provider’s wrongful act is a condition precedent to such liability, the Supreme Court deemed the service provider’s wrongful act to be a condition precedent to the service user’s liability in its ruling in the case 3-2-1-75-05 of 5 October 2005. Thus, the wording of Article 3:201 (1) of the CFR and the practice in implementing § 1054 of the LOA are similar.

⁶ On the meaning and differences of heightened liability and strict liability, see, e.g., C. Van Dam. European Tort Law. Oxford University Press 2006, p. 255.

⁷ The producer liability regulation of the LOA is based on the Council directive 85/374 of 25 July 1985. The directive was amended by directive 1999/34 of 10 May 1999. It should be added that some authors treat producer liability similarly to fault-based liability. See G. Brüggemeier. Common Principles of Tort Law. A Pre-Statement of Law. The British Institute of International and Comparative Law 2004, p. 83.

⁸ About this, see also E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld. 4, völlig überarbeitete und erweiterte Auflage. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 162.

⁹ In *Rylands v. Fletcher* strict liability was applied to an owner of a plot of land where emission from non-natural factors caused damage to another plot of land. It should be noted that as the case of *Rylands v. Fletcher* did not develop into a general clause of strict liability in Great Britain, it is the task of the legislator to incorporate the elements of strict liability into law. An example of this is the 1965 Atom Act. C. v. Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 12–43.

¹⁰ K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd Edition. Oxford: Clarendon Press 1998, p. 659.

¹¹ See H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luchterhand 2001, p. 13. In French law, it is the task of the courts to develop strict liability principles. *Ibid.*, p. 135.

¹² H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: C. H. Beck’sche Verlagsbuchhandlung 1982, p. 113.

delict.^{*13} Strict liability was said to not, in any case, serve the development of circulation, but instead to unreasonably restrict the freedom of movement of an individual.^{*14}

Today, strict liability is an inherent element of liability under the law of delict. However, the entirety of delictual liability has not developed into no-fault liability, and today jurists and legislators alike consider the principle of fault viable. This is further proved by the part of the CFR dedicated to the law of delict, Article 1:101 (1) of which sets out that a person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently (or is otherwise accountable for the causation of the damage). Thus, the authors of the CFR also treat fault-based liability as a rule and strict liability mostly as a special case.

In view of the developments of the law of delict in Europe, the predominant stance has been that negligence liability and strict liability are two equally important forms of liability and are not opposed to each other. Rather they are interconnected: on the one hand, in most legal orders fault liability does not impose an option to subjectively admonish the tortfeasor for the damage caused^{*15}; on the other hand strict liability is not absolute, rather it is a hybrid institute of causal and fault-based liability.^{*16}

3. General elements of risk liability

The author understands the general elements of strict liability as a regulation which imposes liability for causation of damage with a major source of danger in general, without specifying such major source of danger. It should be noted that before entry into force of the LOA on 1 July 2002, the then applicable Civil Code of the Estonian SSR regulated the entire realm of strict liability in just one clause. The general elements of strict liability were contained in an indicative list.^{*17}

The CFR does not contain general elements of strict liability; however, it does not limit the provision of the additional elements or the general elements of strict liability to national law. Article 3:207 of the CFR sets out that a person is also accountable for the causation of legally relevant damage, if national law so provides, where it: (a) relates to a source of danger which is not within Article 3:103 to 3:205; (b) relates to substances or emissions; or (c) disapplies Article 3:204 paragraph (4) (e).^{*18}

Subsection 1056 (1) of the LOA sets out that if damage is caused resulting from danger characteristic to a thing constituting a major source of danger or from an extremely dangerous activity, the person who manages the source of danger shall be liable for the causing of damage regardless of the person's culpability.^{*19} A person who manages a major source of danger shall be liable for causing the death of, bodily injury to or damage to the health of a victim, and for damaging a thing of the victim, unless otherwise provided by law. Damage subject to compensation under strict liability provisions may be both patrimonial and non-patrimonial. The extent of compensation is regulated in Chapter 7 of the LOA (§ 127 ff.).

Thus, under Estonian law, strict liability may be applicable also to cases not specified in §§ 1057–1060 of the LOA. The prerequisite to this is that the damage has been caused by a major source of danger. The major

¹³ This is also because BGB contains only one element of strict liability: the liability of a keeper of an animal. Thus, it is clear that the legislator has treated the principle of fault as the fundamental basis of liability and that strict liability is approached as a special phenomenon. See H. Kötz, G. Wagner (Note 11), p. 136.

¹⁴ About this, see H. Kötz, G. Wagner (Note 11), p. 13.

¹⁵ Pursuant to § 1050 (2) it is still necessary.

¹⁶ N. Jansen. *Auf dem Weg zu einem europäischen Haftungsrecht*. Zeitschrift für Europäisches Privatrecht. 9. Jahrgang. München: Verlag C. H. Beck 2001, p. 47. About the justifiability of strict liability as a type of delictual liability, see, e.g., F. J. Vandall. *Strict Liability. Legal and Economic Analysis*. New York, Westport Connecticut, London: Quorum Books 1989, pp. 17–25.

¹⁷ The Civil Code of the Estonian SSR was adopted by the Supreme Council of the ESSR on 12 June 1964. – ÜNT 1964, 25, 115; RT I 1997, 48, 775 (in Estonian). Section 458 of the Civil Code of the Estonian SSR provided that organisations and citizens whose activities involved a major danger to the surroundings (transport organisations, industrial enterprises, structures, car possessors, etc.) were required to compensate for the damages caused with a major source of danger unless they could prove that such damages were caused as a result of *force majeure* or the intent of the person suffering the damage.

¹⁸ Pursuant to Article 3:204 (4) (e) of the CFR, a person is not accountable for the causation of damage if that person shows that the state of scientific and technical knowledge at the time that person put the product into circulation did not enable the existence of the defect to be discovered.

¹⁹ The causation of damage as a result of the realisation of the risk characteristic to a major source of danger is one of the conditions precedent to the application of strict liability. E.g., the damage caused with a motor vehicle can be treated as a consequence of the realisation of the risk characteristic to a motor vehicle as the major source of danger primarily in the case where the damage is a result of the moving vehicle and not where a pedestrian gets dirt on his clothes as a result of climbing through parked and dirty cars. See P. Varul *et al.* *Võlaõigusseadus III. Kommenteeritud väljaanne* (Law of Obligations Act III. Commented edition). Tallinn: Juura 2009, p. 692 (in Estonian). It should be added that under § 1056 (3) of the LOA, the provisions of the strict liability division do not preclude or restrict the right to make claims on any other legal basis, including claims for compensation of unlawfully and wrongfully caused damage.

source of danger is defined in § 1056 (2) of the LOA: a thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist. However, if liability for causing damage by means of a source of danger is prescribed by law, any thing or activity similar to such source of danger is also deemed to be a source of danger, regardless of whether the person who manages the source of danger is culpable or not.

In Estonian court practice, the following instances **were not** treated as major sources of danger: a barrier which dropped on a person's head at the entry to a paid parking lot (CCSC decision, 31 May 2007, in case 3-2-1-54-07), a telephone pole placed on the highway which the injured party's car hit (CCSC decision, 30 June 1994, in the case III-2/1-24/94), or the potable water within the building's piping which ruined the wallpaper in the injured party's living quarters after a pipe burst (CCSC decision, 24 April 1997, in case 3-2-1-53-97). Similarly, the Supreme Court did not treat the operation of a roll transporter as a major source of danger: the court stated that the imminent danger to the plaintiff, i.e., the possibility of the plaintiff's hand being caught between the moving chain and the gear of the working transporter could have been reasonably avoided by remaining at a safe distance from the transporter or by shutting down the transporter before attempting to remove a splinter from between the machine's rolls (CCSC decision, 21 March 2007, in the case 3-2-1-2-07).^{*20}

Obviously it can be claimed that as with the general elements of strict liability there is also the question about what the major source of danger is and, in turn, this is often a question of a fact and restricts the legal certainty of the existence of the general elements of strict liability.

A general clause on strict liability is not completely unknown in European countries. The general elements of strict liability can be found, e.g., in the civil codes of Italy and Portugal.^{*21} The author of the article finds that the general elements of strict liability as such should be supported: although the legal certainty may be lower, the law will be able to adapt to the changing world without a need to change the texts of law. However, the final assessment regarding the existence of the general elements of strict liability will depend on how these elements are applied by courts. On the one hand, strict liability might be used so excessively that the very essence of risk liability might be modified. On the other hand, strict liability might find so little use in practice that the existence of such elements would have only marginal importance. Estonian courts have, to date, been rather timid in applying § 1056 of the LOA.

Neither the CFR nor the LOA regulate how to approach the issue of liability where two major sources of danger have caused mutual damage (e.g., two vehicles collide as a dog runs onto the motorway, etc.). On the basis of CCSC decision 3-2-1-75-07 of 24 September 2007, it may be claimed that in such a case strict liability should be applied. The Supreme Court stated in the decision that the defendant, being the keeper of an animal, may be liable under § 1060 of the LOA despite the plaintiff, as the possessor of the motor vehicle, having at the moment he suffered damages managed a major source of danger as the possessor of the motor vehicle. The liability without the fault of the manager of the major source of damage, i.e., the strict liability (§§ 1056–1060 of the LOA) is applied also where the manager of the major source of danger that caused the damage was not culpable of the causation of damages to the other manager of the major source of danger. The potential role of the plaintiff as the manager of the other source of danger should be assessed in order to lower the amount of compensation for damages in case strict liability is applied to the defendant.

In Estonian judicial practice, the application of strict liability to certain injured parties is restricted. The decision of the CCSC in case 3-2-1-27-07 of 18 April 2007 states that persons who participate in the management of a major source of danger or temporarily manage the major source of danger or benefit from such management are not entitled, in keeping with the principle of good faith, to invoke the provisions of strict liability in order to claim compensation from the manager of the major source of danger for the damages they have suffered.

Section 1056 of the LOA does not provide for any circumstances which would exclude liability on the basis of the general elements of strict liability. One such circumstance might be *force majeure*, but only if *force majeure* has such a determining impact on the evolution of damages that it is no longer possible to talk about the realisation of the risk characteristic to the major source of danger. In addition, liability under § 1056 of the LOA might also be excluded where the injured party voluntarily accepts the risk. C. von Bar believes that the systematic application of the concept of voluntary acceptance of the risk in the law of delict is still a rather questionable issue.^{*22} However, such a basis which excludes or restricts liability has been recognised quite widely, as evidenced in Article 5:101 (2) of the CFR which sets out that a person has a defence if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and

²⁰ The decisions of the Supreme Court are available at www.riigikohus.ee (in Estonian). In Estonian legal literature, the prevailing stance is that, e.g., the following instances may be deemed to be major sources of danger: lighting a live fire in the nature, spraying toxic substances onto a field, using a weapon in a shooting gallery, etc. P. Varul *et al* (Note 19), p. 692. The author of the article generally agrees with those instances.

²¹ See F. Werro, V. V. Palmer (eds.). *The Boundaries of Strict Liability in European Tort Law*. Bern: Stämpfli Publishers Ltd. 2004, p. 29.

²² C. von Bar. *The Common European Law of Torts*. Volume Two. *Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences*. Oxford University Press 2000, p. 535.

is to be regarded as accepting it. The LOA does not contain a provision similar to that article of the CFR and the current case law has yet to specify the issues related to the voluntary acceptance of risk.

4. Strict liability related to an immovable

Pursuant to Article 3:202 (1) of the CFR, a person who independently exercises control over an immovable is accountable for the causation of personal injury and consequential loss, loss within Article 2:202, and loss resulting from property damage (other than to the immovable itself) by a state of the immovable itself which does not ensure such safety as person in or near the immovable is entitled to expect having regard to the circumstances including (a) the nature of the immovable; (b) the access to the immovable, and (c) the cost of avoiding the immovable being in that state.^{*23} The LOA has a similar provision, § 1059, under which the owner of the land under a structure or a person who owns another real right on the basis of which the structure is created, shall be liable for damage caused by the collapse of the structure and for damage caused by loosened and falling parts of the structure, icicles and so on, unless the owner proves that the damage is caused by *force majeure* or an act of the victim. Article 3:202 (1) of the CFR sets out the damage for which a person who exercises independent control over an immovable may be accountable for. Such damages may be loss from personal injury and consequential damages (e.g., the cost of providing care to the victim), as well as property damages. Loss in the meaning of Article 2:202 is loss suffered by third persons as a result of another's personal injury or death. Under the LOA too, the legal remedies are restricted: pursuant to the second sentence of § 1056 (1) of the LOA, strict liability shall apply where the death of, bodily injury to or damage to the health of a victim is caused or the thing of a victim has been damaged. As the issue of compensation in the CFR provisions analysed below is regulated identically in Article 3:202 (1) and as the second sentence of § 1056 (1) of the LOA applies to all elements of strict liability, it will not be dealt with in detail in the remaining part of this article.

One of the fundamental differences between the LOA and CFR regulations is in that while the CFR ties liability to the independent control over an immovable, under the LOA, ownership of the immovable (or ownership of the real right under which a structure has been erected) is the determining factor. More specifically, it embodies being the owner at the very moment when an accident occurred.^{*24} Such difference in content is levelled by the fact that under Article 3:202 (3) of the CFR, the owner of the immovable is to be regarded as independently exercising control. As already mentioned, the owner of an immovable can prove that he was not the one independently exercising control. Under the LOA, the person independently exercising control, such as a lessee or a tenant, may be liable if they fall within the definition of the manager of the major source of danger (§ 1056 of the LOA) or if general elements of a delict are identifiable in their behaviour. The owner of an immovable will, however, remain liable in any case.

Both of the provisions under scrutiny here provide for liability where damage is caused by the unfit state of a thing. Therefore, under those provisions no liability should ensue where, e.g., a construction worker repairing a roof throws down broken tiles and one of them happens to hit the victim. In such a case, the owner of the immovable can be accountable under other provisions (first and foremost, under § 1054 (3) of the LOA and Article 3:201 of the CFR).

Pursuant to Article 3:202 of the CFR, the safety a person was entitled to expect in or near an immovable is also significant from the aspect of liability. The nature of the immovable, access to it and the cost of avoiding the immovable being in that state must, *inter alia*, be considered. For example, the standard of safety is higher where the person was invited or permitted to be in the immovable and lower where the person enters a strange immovable against the will of the owner. Moreover, a thief, for example, is not entitled to expect the safety of an immovable.^{*25} The LOA does not contain a provision to that effect but liability may be excluded on the basis of *force majeure* or the actions of the victim. Based on the CCSC decision of 20 June 2006 (in case 3-2-1-4-06), actions of a victim as a factor excluding the application of § 1059 of the LOA means that the victim intentionally harmed himself because only such action would exclude the realisation of the risk characteristic to a structure as the major source of danger. The liability of the structure's owner for damage under § 1059 of the LOA cannot be excluded solely on the basis of the victim's negligence (including gross negligence). However, the victim's negligence may give rise to the reduction of the compensation for damage under § 139 (1) of the LOA.^{*26}

²³ Under Article 3:202 (2) of the CFR, a person exercises independent control over an immovable if that person exercises such control that it is reasonable to impose a duty on that person to prevent legally relevant damage within the scope of this Article. The owner of the immovable is to be regarded as independently exercising control, unless the owner shows that another independently exercises control (3).

²⁴ See CCSCd 2.11.2005, 3-2-1-105-05.

²⁵ C. v. Bar (prepared by). Non-Contractual Liability Arising out of Damage Caused to Another. Principles of European Law. Study Group on a European Civil Code. Sellier. Berne: European Law Publishers, Bruylant, Stämpfli Publishers Ltd. 2009, p. 661.

²⁶ In this case, due to the heaviness of snow, a rain pipe from the house owned by the defendants fell onto the car of the plaintiff.

Likewise, in invoking *force majeure*, it must be established that *force majeure* was the sole cause of the damage: if a storm rips off a part of the roofing, the cause may also have been that it had not been properly installed.

5. Strict liability related to an animal

Pursuant to Article 3:203 of the CFR, a keeper of an animal is accountable for the causation by the animal of personal injury and consequential loss, loss within 2:202, and loss resulting from property damage. In Estonia, the liability of a keeper of an animal without a fault is provided for in § 1060 of the LOA.

Liability under § 1060 of the LOA does not necessarily ensue where an animal causes damage. Section § 1060 of the LOA cannot obviously be applied where a person stumbles upon an animal lying on the ground and suffers bodily harm as a result of the fall.^{*27} A dog, e.g., can be seen as a major source of danger because it can attack and bite a person.^{*28}

The main issue that arises in connection with the liability of a keeper of an animal is in who should be understood to be such a keeper.^{*29} The keeper of an animal is not defined in the LOA. It would not be right to proceed solely from the definition provided in the Animal Protection Act, under which a keeper of an animal (for the purposes of that Act) is a person who owns an animal (the owner of an animal) or who, on the basis of a commercial lease or other relationship with the owner of the animal, is engaged in keeping an animal. A keeper of an animal may be defined in quite a different manner for the purposes of the LOA on the basis of the existing case law. In providing content to the term 'a keeper of an animal' the most relevant case in Estonian judicial practice is the decision of the CCSC in case 3-2-1-75-07 of 24 September 2007. According to the facts of the case, a vehicle and a dog that had run onto the motorway collided. The Supreme Court concluded that for the purposes of § 1060 of the LOA, a keeper of an animal is the person who acts as the master of an animal, i.e., who uses the animal by controlling it. In that sense, a person directly possessing but not owning the animal, but also a person who, while not owning or possessing the animal, decides alone or with someone else on the issues related to the upkeep, care and supervision of the animal, may be understood to be a keeper of an animal. In comparison, under Article 3:203 of the CFR, a keeper of an animal should be understood as a person who benefits from the animal or has physical control over the animal and exercises such control.^{*30}

The question of the moment when the status of a keeper of an animal passes from one person over to another is also an intriguing one. When A transfers his dog to B, then obviously A will no longer be the keeper of the animal. The matters complicate when A only leased the dog to B (or rendered the use of the dog to B on another contractual basis).

Unlike § 834 of the BGB, the LOA does not provide that a person who, under contract, takes over the supervision of an animal from its keeper shall be liable for the damage caused by the animal to a third party as indicated in § 833. He shall not be accountable if, in supervising the animal, he has exercised due care or if the damage had occurred irrespective of such care. P. Schlechtriem has noted that under German law, treatment of the lessee of a horse as the supervisor of the animal should release the lessor (the keeper of an animal) from liability.^{*31}

The issue of the animal owner's accountability under the strict liability principle also remains debatable in the cases where an animal has been lost or has run away. The author of this article believes that in such a case the owner should continue to be treated as the keeper at least until a third person takes care of the animal with the intent of keeping it.

Article 3:208 of the CFR sets out that for the purposes of this section, a person remains accountable for an immovable, vehicle, substance or installation which that person abandons^{*32}, until another exercises independent control over it or becomes its keeper or operator. This applies correspondingly, within reason, in respect to a keeper of an animal.

²⁷ About this, see CCSCd 18.04.2007, 3-2-1-27-07.

²⁸ About this, see CCSCd 22.10.2008, 3-2-1-85-08. About the realisation of a typical animal risk as a condition precedent to liability in other European countries, see F. Werro, V. V. Palmer (Note 21), p. 431.

²⁹ One might also discuss who an animal is. E.g., under § 2 (1) of the Animal Protection Act (Loomakaitseadus. Adopted on 13 December 2000. – RT I 2001, 3, 4; 2009, 62, 405 (in Estonian)) an animal is (for the purposes of the Act) a mammal, bird, reptile, amphibian, fish or invertebrate. In the context of § 1060 of the LOA, bacteria and viruses as well as insects cannot obviously be treated as animals because they cannot have a keeper. See P. Varul *et al* (Note 19), p. 700.

³⁰ C. von Bar (Note 25), p. 675.

³¹ P. Schlechtriem. *Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk* (Law of Obligations. Special Part. Fourth, revised edition). Tallinn: Õigusteabe AS Juura 2000, p. 284 (in Estonian).

³² Abandonment requires conscious and intentional giving up of control over a thing. See C. von Bar (Note 25), p. 742.

Despite the LOA not having a similar provision, a keeper of an animal should also not be released from strict liability under the LOA if he abandons the animal (e.g., by driving it out of the house). What might be considered though is the release of a keeper of an animal from strict liability where the animal has been stolen—in such a case, his potential liability under the general elements of delict should, however, not be excluded.^{*33} As a rule, after stealing a dog the thief becomes its keeper; Article 3:203 of the CFR should be understood in this vein.^{*34}

6. Strict liability related to a motor vehicle

Pursuant to Article 3:205 (1) of the CFR, a keeper of a motor vehicle is accountable for the causation of personal injury and consequential loss, loss within Article 2:202, and loss resulting from property damage (other than to the vehicle and its freight) in a traffic accident which results from the use of the vehicle. Pursuant to Article 3:205 (2), ‘motor vehicle’ means any vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.

In Estonia, strict liability for damages caused by a motor vehicle is provided in § 1057 of the LOA. The respective regulations of the CFR and the LOA can be compared mainly as regards the following issues: (a) what is a motor vehicle, (b) who is the obligated subject, and (c) which damage the obligated subject is liable for under the strict liability principle.

The LOA does not provide for a legal definition of a motor vehicle. Pursuant to § 12 (2) of the Traffic Act^{*35} a power-driven vehicle is a vehicle which is powered by an engine. Motor assisted cycles, mopeds and power-driven rail-borne vehicles are not deemed to be motor vehicles. Pursuant to § 12 (1) of the Traffic Act, a vehicle is a device which is intended to be driven on a road or which is driven on a road, and which is power-driven or propelled in some other manner. The Traffic Act, however, is not a proper source for providing content to a motor vehicle in the context of the LOA. Namely, it derives already from § 1057 3) of the LOA^{*36}, that the definitions of a motor vehicle as used in the LOA and the Traffic Act do not overlap; particularly true is the claim that the LOA uses a broader definition.

And in comparing the definition of a motor vehicle in the CFR and the LOA we also encounter several differences. Firstly, unlike the LOA, the CFR does not treat aircraft as a motor vehicle. Furthermore, the LOA (unlike the CFR) does not exclude treating a power-driven rail-borne vehicle as a motor vehicle. Thus, as far as these two terms are concerned, the definition of a motor vehicle in the LOA is broader than the corresponding term in the CFR.^{*37} The third important difference between the CFR and the LOA is in that unlike the LOA, the CFR also deems a trailer to be a motor vehicle. The author of this article believes that an interpretation to the effect that the motor vehicle specified in § 1057 of the LOA also includes a trailer would be too daring as the regulation makes no *expressis verbis* mention of a trailer.^{*38}

To sum up, although the regulations of the LOA and the CFR do not completely coincide as regards providing content to the term ‘motor vehicle’, they both cover the most commonplace case—the one where damage is caused by an ordinary automobile.

While pursuant to 3:205 (1) of the CFR, a keeper of a motor vehicle is accountable for damage caused by a motor vehicle, under § 1057 of the LOA, the direct possessor is the obligated person. Obviously, a keeper and a direct possessor are not completely overlapping persons. Pursuant to § 33 (1) of the Law of Property Act^{*39} (hereinafter ‘LPA’), a possessor is a person who has actual control over a thing. The relationship between direct and indirect possession is explained in subsection (2) of the same section: a person who possesses a thing on the basis of a commercial lease, residential lease, deposit, pledge or other relationship which grants the person the right to possess the thing of another person temporarily is a direct possessor, while the other person is an indirect possessor.

³³ It should be added that, e.g., under French law, an owner or a keeper of an animal is liable, on the basis of strict liability, for the loss or escape of the animal if there is a sufficient causal relationship between the loss or escape. See C. van Dam. *European Tort Law*. Oxford University Press 2006, p. 357.

³⁴ See C. von Bar (Note 25), p. 677.

³⁵ Liiklusseadus. Adopted on 14 December 2000. – RT I 2001, 3, 6; 2009, 68, 463 (in Estonian).

³⁶ Pursuant to § 1057 3) of the LOA, a direct possessor of a motor vehicle shall be liable for any damage caused upon the operation of the motor vehicle, unless the damage is caused by *force majeure* or by an intentional act on the part of the victim, unless the damage is caused upon the operation of aircraft. Thus, unlike the Traffic Act, the LOA treats aircraft as a motor vehicle.

³⁷ Instead, as regards the conditions discussed here, the regulations of the CFR and the Traffic Act are similar.

³⁸ A trailer, like a motor vehicle, is required to be covered by a compulsory traffic insurance contract. See § 4 (1) of the Traffic Insurance Act (Liikluskindlustuse seadus. Adopted on 10 April 2001. – RT I 2001, 43, 238; 2009, 62, 405 (in Estonian)).

³⁹ Asjaõigusseadus. Adopted on 9 June 1993. – RT I 1993, 39, 590; 2009, 68, 463 (in Estonian).

It may be asserted that a keeper of a motor vehicle is a broader term than a direct possessor of a motor vehicle. Thus, an owner of a motor vehicle who has granted the use of the vehicle to another person under a contract might also qualify as a keeper of a motor vehicle. Pursuant to § 1057 of the LOA, such an owner would apparently not be liable.

It should be noted that pursuant to § 1057, the so-called possession servant, i. e., a person who exercises actual control over a thing according to the orders of another person in the housekeeping or enterprise of the other person, should also not be liable. Pursuant to § 33 (3) of the LPA, such a person is not deemed to be a possessor. In legal literature it has been opined that an employee may be liable on the basis of the general elements of strict liability (§ 1056 of the LOA) where he uses his employer's vehicle beyond the performance of his work duties. He may be liable while fulfilling his duties on the basis of the fault-based delictual liability.^{*40} The author of the article believes that the liability of an employee under § 1056 of the LOA is not completely excluded even if he caused damages while performing his duties. This is the question to which the future judicial practice needs to provide an answer. Article 3:205 of the CFR does not apply to a driver of a vehicle who is not the keeper of that motor vehicle.^{*41}

On the basis of the general elements of strict liability, it is in principle possible to hold liable also an owner of a motor vehicle who has, e.g., leased the vehicle and is thus an indirect possessor of the vehicle.

Based on this reasoning it may be asserted that although the content of the terms—keeper and direct possessor—respectively used in the CFR and the LOA does not coincide, the LOA allows holding liable also those persons connected with a motor vehicle who are not direct possessors but may be treated as the keepers of the vehicle in the meaning of the CFR. It means that a majority of individual cases would be settled in the same way, irrespective of whether on the basis of the LOA or the CFR.

Article 3:205 (1) of the CFR sets out the damage for which a keeper of a motor vehicle is liable. The set of legal remedies protected by the LOA is provided for in the second sentence of § 1056 (1). Pursuant to § 1057 (1) of the LOA, strict liability does not apply where the damage is caused to a thing being transported by the motor vehicle (which is not worn or carried by a person in the vehicle). Since logic dictates that § 1057 of the LOA would also not apply where the motor vehicle itself is damaged, it can be said that as far as the damage subject to compensation is concerned, both the CFR and the LOA have largely similar regulation.^{*42}

Furthermore, § 1057 of the LOA does not apply where the damages is caused by *force majeure* or by an intentional act on the part of the victim (clause 3), the victim participates in the operation of the motor vehicle (clause 4), or the victim is carried without charge and outside the economic activities of the carrier (clause 5). The differences, seemingly rather substantial at first glance, may be regarded as not so significant if we look at the final outcome: thus, a person has, under Article 5:302 of the CFR, a defence if the damage is caused by an abnormal event; where the person suffering the damage is at fault, the reparation is to be reduced (Article 5:102 of the CFR). An intentional act of the victim may break the causal chain also in the context of the CFR. Finally there is Article 5:101 of the CFR, which excludes the liability of the person who caused the damage where the person suffering the damage agreed to the damage or acted at his own risk.^{*43} It should be added, the presence of the circumstances set out in clause 1–5 of § 1057 of the LOA do not restrict the victim's right to claim compensation under the provisions regulating fault-based liability.

7. Strict liability related to dangerous substances or emissions

Article 3:206 (1) of the CFR sets out that a keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within Article 2:202, loss resulting from property damage, and burdens within Article 2:209, if: (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and (b) the damage results from the realisation of that danger.^{*44} It is necessary to take

⁴⁰ P. Varul *et al* (Note 19), pp. 694–696.

⁴¹ C. von Bar (Note 25), p. 705.

⁴² There are certain differences. Strict liability is not applied, under the LOA, also where, e.g., the damage is caused to a thing deposited with the possessor of the motor vehicle (§ 1057 2) of the LOA). At the same time, it can be debated whether a thing deposited is also the freight of the vehicle damage to which shall not be compensated under Article 3:205 (1) of the CFR.

⁴³ The author concedes that the agreement of the victim to a damage and acting upon one's own risk are not identical to the cases specified in §§ 1057 4) and 5) of the LOA.

⁴⁴ Under Article 3:206 (2) of the CFR 'substance' includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances. Under Article 3:206 (3) 'emission' includes: the release or escape of substances; the conduction of electricity; heat, light and other

account of the amount of the substance or emission as certain substances and emissions become dangerous only in very large amounts (e.g., water).⁴⁵

Instead of the liability of a keeper of a substance or an operator of an installation, § 1058 of the LOA speaks about the liability of an owner of a dangerous structure or a thing. Subsection 1058 (1) of the LOA sets out that the owner of a structure shall be liable for damage caused as a result of particular danger arising from the structure due to the production, storage or transmission in the structure of energy, substances which are flammable, involve a radiation hazard or can cause combustion, or toxic, caustic or environmentally hazardous substances, and for damage caused as a result of particular danger arising from the structure for any other reason. The owner of a thing shall be liable for damage caused as a result of particular danger arising from the thing due to its flammable, radiation, combustible, toxic, caustic or environmentally hazardous characteristics, and for damage caused as a result of particular danger arising from the thing for any other reason.

Subsection 1058 (2) of the LOA shifts the burden of proof in the favour of the victim: If a dangerous structure or thing is a potential cause of damage, it shall be presumed that the damage is caused as a result of particular danger arising from the structure or thing. This does not apply if the structure or thing is operated according to requirements and if the operation thereof is not disturbed.

The Supreme Court has concluded that there is no basis, under §§ 1056 and 1058 of the LOA, to treat a fish factory as a major source of danger because of a risk that it might clog the public sewerage system as the realisation of such a danger and causation of damage are avoidable provided that due care expected from a professional is employed.⁴⁶

Pursuant to Article 3:206 (5), a person is not accountable for the causation of damage under this Article if that person: (a) does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or (b) shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

The LOA does not contain a provision similar to the restriction arising out of Article 3:206 (5) (a) of the CFR. The regulation arising out of § 1058 (4) of the LOA is comparable to paragraph (b), restricting the liability of an owner of a dangerous structure or a thing: if a dangerous structure or thing is operated according to requirements and the operation thereof is not disturbed, the owner of the structure or thing is not liable for damaging a thing of the victim in so far as the thing is not materially damaged or, if it is damaged, to an extent deemed to be normal considering the local circumstances.

In addition, § 1058 (3) sets out three cases where the liability provided for in the same section does not apply: (a) the damage is caused within the boundaries of a marked immovable in the possession of the owner of the dangerous structure; (b) the damage is caused by *force majeure*; (c) the victim participates in the operation of the dangerous structure or thing. In such cases (first and foremost, in the case of clauses 1) and 3)), liability on the basis of the general elements of delict is not excluded.

8. Conclusions

Strict liability is one of the instances of liability without a fault. Both the CFR and the LOA contain several elements of strict liability. It can be asserted that these elements are generally similar both in the LOA and the CFR; differences are only related to aspects which are not fundamental.

The most significant difference between the regulations of the LOA and the CFR is in that the CFR does not have the general elements of strict liability. Such lack of the general elements, on the one hand, contributes to legal certainty (no-fault liability cannot be applied in the cases not explicitly cited in the law), but, on the other hand prevents operative response to the changes that take place in society (application of strict liability to actions or things which, although dangerous, but whose evolution into a major source of danger was not yet foreseen when the law was adopted).

To sum up, despite such differences, in a majority of individual cases, a similar final outcome may be yielded both on the basis of the LOA and the CFR. Estonian judicial practice may certainly have a role in shaping Estonian law so that it becomes closer to the CFR regulation.

radiation; noise and other vibrations; and other incorporeal impact on the environment. Under Article 3:206 (4) 'installation' includes a mobile installation and an installation under construction or not in use.

⁴⁵ C. von Bar (Note 25), p. 721.

⁴⁶ See CCSCd 12.03.2008, 3-2-1-2-08.