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# Scope of Claim for Consequential Damage in Delict Law

## 1. Introduction

The entry into force of the Law of Obligations Act (LOA)<sup>1</sup> on 1 July 2002 has generated the first discussions and positions regarding the implementation of the Act. Rules of compensation for damage must be based on clear conditions that are unambiguously intelligible for the parties, and ensure that civil relationships work in society fluently. Therefore, when regulatory law changes, a relevant legal theoretical basis needs to be created and developed for a better understanding of the changes and for assistance to the forming legal practice.

The purpose of this article is to analyse the question of the scope of claims for compensation of damage in delict law from the position of the persons whose damage consists of consequential damage only. The author therefore first tries to explain which damages may be treated as consequential damage and to point out the differences between consequential damage and direct damage. The analysis that follows mainly focuses on the circumstances and conditions under which the payment of or refusal to pay compensation is justified in the case of consequential damage.

The discussion is structured mainly according to the modern legal principles generally accepted in Europe, the regulation of the new Estonian Law of Obligations Act, as well as the traditions common to current judicial practice.

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<sup>1</sup> Völaõigusseadus. – Riigi Teataja (the State Gazette) I 2001, 81, 487; 2002, 53, 336 (in Estonian).

## 2. About the bases for distinguishing between direct and consequential damage

As a rule, compensation for damage is made possible to a person who incurs direct damage. Yet, it is questionable whether a person who only incurred consequential damage should have the right to claim compensation.<sup>\*2</sup>

To explain which persons who have incurred damage are entitled to compensation, a line should be drawn at first between direct and consequential damage.

According to the traditional approach, direct damage is understood as direct damage to or loss of property, as well as the expenses incurred in this relation. According to Estonian law, property damage also includes reasonable expenses on filing a claim for compensation and identifying the amount of damage, as well as on preventing or diminishing damage. Damage that does not fall within the scope of direct damage can thus be viewed as consequential damage.

Consequential damage may become apparent in different ways.

- (1) Consequential damage can imply a further negative impact caused by direct damage, particularly loss of income. For example, when a person who has suffered a car accident cannot undergo training and expect higher wages, the loss of income may be regarded as consequential damage.
- (2) Consequential damage may also become apparent independently of direct damage, in forms such as pure economic loss or non-patrimonial damage.

As opposed to Scandinavian countries and Germany, the Estonian regulatory law does not define consequential damage, but the term was used in the draft Civil Code of 1940 and signified the damage caused by the concurrence of special circumstances (§ 1371).

According to the delict law approach, loss of income (*lucrum cessans*) is expressed in the income that a person would probably have received as a result of his or her preparations if the damaging circumstance had not occurred.<sup>\*3</sup> In the legal theory of foreign countries, the term 'pure economic loss' has been used instead of loss of income. Legal theory speaks about pure economic loss where the damage does not pertain to persons or things, but to other matters related to economic activities.<sup>\*4</sup> In this sense, economic loss can be understood as damage arising from commercial transactions as well as other economic activities.

The author believes that it is not correct to equalise loss of income with pure economic loss. Pure economic loss is rather a part of loss of income, but the latter also includes the potential gain outside economic activities (such as the potential gain resulting from training). Distinction between direct or actual damage (*damnum emergens*) and loss of income (*lucrum cessans*) is familiar to all European law families. It is similar to the distinction between existing and future damage.

The Austrian Supreme Court has found that loss of income is direct damage, if receiving the income was almost certain. According to the position of the court, loss of income may be regarded as direct damage if the entitlement to income actually existed.<sup>\*5</sup> Estonian law does not allow for such interpretation, as according to the meaning of the Law of Obligations Act, direct damage includes reduction in value and expenses incurred in relation to damage, while loss of income associates with potential income.

## 3. Restrictions on compensation for consequential damage

### 3.1. General bases of restrictive approach

Compensation for consequential damage only is clearly limited in both the judicial practice and regulatory law of different countries. The Danish judicial practice has found that entitling a person who has suffered

<sup>2</sup> For example, when a surgeon working in a private hospital is injured in a car accident, he or she himself or herself may claim compensation for damage. The problem is allowing for compensation for damage to the employer, who loses additional income because of the incapacity for work of the surgeon (the damage is only consequential).

<sup>3</sup> Loss of income is defined in Estonian law in LOA § 128 (4).

<sup>4</sup> See for example J. Spier. How to Keep Liability Within Reasonable Limits? A brief outline of Dutch law. – J. Spier (ed.). The Limits of Liability: Keeping the Floodgates Shut. Kluwer Law International, 1996, p. 6.

<sup>5</sup> U. Magnus. Unification of Tort Law: Damages. The Hague: European Centre of Tort and Insurance Law, 2001, p. 11.

only consequential loss to compensation is not justified.<sup>6</sup> Article 1151 of the French *Code Civil* also provides *expressis verbis* that only damage that is “the immediate and direct consequence of the violation of an obligation” is subject to compensation. The predominant approach of German law in delimiting the circle of persons entitled to compensation is described in the writing by Karl Larenz.<sup>7</sup> According to this, third parties who have no absolute rights or to whom the protection set out by a legal provision does not extend, are not entitled to compensation. However, events where damage is being attempted against a third party directly under BGB § 826 are an exception.

The author of the article supports the restricted approach when defining the circle of persons entitled to compensation, mainly because giving the right of claim to a person who has only suffered consequential damage would result in an unreasonable extension of the sphere of application of delict liability. For example, it is not reasonable to give the right to a claim for compensation to persons whose damage is only expressed by the fact that they must visit a more distant supermarket because their nearby shop burned down.

Allowing for the right of claim to those who have suffered consequential damage only would also materially damage the legitimate expectations of the tortfeasor. It is important for every person who may potentially cause damage to know and be familiar with the practically recognised criteria of liability. Knowing such criteria would also enable an adequate and rational assessment of the potential risks of damage. The principle of private autonomy gives the tortfeasor the opportunity to manage their own liability risks based on their knowledge, by making choices between the permitted (obliged) and prohibited alternatives of behaviour. The limit of protected legal merits must be clearly understandable for participants in law. Uncontrolled risk may lead to an unreasonable limitation of people’s freedom to act, which would be contrary to the main goal of a market economy-based society.

The legal-economical aspect of the issue also justifies the limitation of the circle of persons entitled to compensation. When providing the right of claim not only to the person who incurs direct damage but to all other persons who have indirectly suffered from the event, the legal system would be overloaded by the number of claims, and this would significantly increase the cost of maintaining the legal apparatus. Payment of larger compensation for damage is often excessively ruining for the tortfeasor.

### 3.2. Teaching of legal protection of a provision as limiter of consequential damage

Teaching of the purpose of the protective provision helps to further delimit the circle of persons entitled to compensation for consequential damage. According to the theory of legal protection of a provision, the scope of compensation for damage is limited depending on whether the type and method of causing damage is covered by the aim of protecting the violated provision or not.

*Normzweck*’s teaching is reflected in Estonian positive law directly in LOA § 127 (2): “Damage shall not be compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose”. According to delict law regulation, the unlawfulness of causing damage is excluded if the purpose of the violated provision was not to protect the aggrieved person against that type of damage. Like Estonian law, the sphere of application of the legal provision is also limited in the Dutch Civil Code, according to which there is no obligation to compensate for damage if the purpose of the violated provision was not to protect against the type of damage that the aggrieved person incurred (6.163).

According to the position adopted by the Austrian judicial practice, the teaching on the protective provision allows for compensation for consequential damage only to the persons entitled to compensation for direct damage; damage to third parties is not covered by the protective purpose of the provision.<sup>8</sup> The author believes that Estonian legal practice should be shaped on the basis of the same position, by allowing for compensation of consequential damage only to persons who have incurred direct damage and whose absolute rights have been violated.

<sup>6</sup> A. Vinding Kruse. Law of Torts. – H. Gammeltoft-Hansen, B. Gomard, A. Philip (eds.). Danish Law. A General Survey. Copenhagen: G.E.C. Gads Publishing House, 1982, p. 174.

<sup>7</sup> K. Larenz. Lehrbuch des Schuldrecht. Part 1. 14<sup>th</sup> ed. München: C.H.Beck, 1987, pp. 598–599.

<sup>8</sup> H. Koziol. The Limits of Expanding Liability. – J. Spier (ed.). The Auditor-Case. Kluwer Law International, 1998, pp. 71–72.

## 4. Problems of compensating for consequential economic loss

### 4.1. Restrictive nature of pure economic loss

The patrimonial damage of the aggrieved person may consist of only economic loss. Satisfaction of a claim for compensation of pure economic loss has often met opposition and hesitation in Continental European courts.<sup>\*9</sup>

The cautious attitude to compensation for consequential economic loss is usually reasoned by the fear that because of the speculative nature of economic loss, compensation may place the aggrieved person in a better position than the aggrieved person would have been in if the damaging event had not occurred. Another powerful argument is the weak relation between pure economic loss and the damaging event, compared to direct damage, which is why the establishment of a lower protective standard toward this type of damage is justified.<sup>\*10</sup> An important argument in the restrictive attitude to economic loss is currently also the need of “keeping the floodgates shut” so to avoid an unlimited liability of the tortfeasor.

In the author’s opinion, broad-scale compensation for economic loss expressed as consequential damage only will result in the conflict of two major public interests. When weighing the aggrieved person’s interest in full compensation on the one hand and people’s general interest in freely determining and planning their behaviour on the other hand, the latter may prove to be a higher social value. For people to be able to reasonably use their freedom to act, they have to perceive the limits and legal consequences of their risks as clearly as possible. Uncontrolled extension of liability would not enable that if the venturer has no clear understanding of what kind of damage they might be liable for.

The judicial practice of European countries so far shows that the courts have accepted compensation for pure economic loss in a limited way in the case of property damage, not in other cases.<sup>\*11</sup>

As opposed to delict law, the need to compensate for loss of income has been broadly accepted in contract law in respect of contracting parties. This is because contracting parties can exactly shape their behaviour in respect of the other party and avoid risks according to all the contractual conditions.<sup>\*12</sup>

A restrictive attitude to pure economic loss is most apparent in the law of the Nordic countries. The Swedish law on compensation for damage provides for compensation for loss of income only in the case of a criminal offence.<sup>\*13</sup>

According to § 5 of the Finnish law on compensation for damage, compensation usually covers only personal injury and property damage, not pure economic loss. Economic loss is subject to compensation only if the law prescribes a punishment for the act, the act was performed by using public authority, or there are other highly important reasons.<sup>\*14</sup>

German law basically denies the possibility of compensation for pure economic loss, unless such loss is related to a violation of a personal right or property damage, except where the defendant violated the protective law or the court establishes that the rights of an incorporated and acting company have been violated.<sup>\*15</sup>

The Dutch *Burgerlijk Wetboek* as well as the Estonian LOA do not pose direct limits to compensation for pure economic loss. In limiting compensation for damage in the Netherlands, the main question is whether the purpose of the legal provision violated by the tortfeasor was to protect the aggrieved person against economic loss or not.<sup>\*16</sup> The same basic question has to be asked in Estonian law. Before deciding, we have to ascertain if there are any legal provisions that prescribe compensation for economic loss besides other damage in the event of an offence. In the author’s opinion, the LOA like the Germanic law primarily pro-

<sup>9</sup> A classical example of pure economic loss is the hypothetical case where the power supply of a city district is cut off when a building company negligently breaks the cable. The cable belongs to the power distribution company. The damage caused to the distribution company by the broken cable would be subject to compensation as direct damage, but the entitlement of the district’s inhabitants to compensation and the scope of compensation pose problems. According to the teaching on the legal protection of a provision, consumers of power are not protected if the purpose of the provision is merely to protect the supplier of power against loss.

<sup>10</sup> H. Stoll. *Consequences of Liability: Remedies*. IECL Vol. XI Torts. Tübingen: J.C.B.Mohr, 1972, p. 31.

<sup>11</sup> J. Spier, O. Haazen. *Preliminary Observations*. – J. Spier (Note 8), pp. 9–12.

<sup>12</sup> H. Koziol. *The Auditor-Case*. – J. Spier (Note 8), pp. 28–29.

<sup>13</sup> Chapter 2, article 4 of the Swedish law on compensation for damage. The law defines damage that does not simultaneously harm any person’s life, health, or property, as pure economic loss.

<sup>14</sup> E. Aurejärvi, M. Hemmo. *Velvoiteoikeuden oppikirja*. Helsinki, 1998, p. 147.

<sup>15</sup> K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. Vol. II. 3<sup>rd</sup> ed. Amsterdam, 1996, p. 298.

<sup>16</sup> J. Spier. *How to Keep Liability Within Reasonable Limits? A brief outline of Dutch law*. – J. Spier (Note 8), pp. 161–162.

ceeds from the need to protect absolute rights (property, life, and health). Hence, if the damage that an aggrieved person incurs is only pure economic loss, this cannot be regarded as the violation of an absolute legal right and the establishment of a strong protection standard is not justified.

The author finds that the question of compensation for pure economic loss should be solved, taking into account the meaning of § 483 (1) of the Portuguese Civil Code, according to which persons whose (absolute) rights have been directly violated may claim compensation.<sup>\*17</sup> Such a clause in regulatory law would clearly exclude the possibility of compensation for consequential damage only. As LOA does not contain such a restriction, it is up to judicial practice to determine the limits of compensation for consequential damage.

## 4.2. Issue of pure economic loss in Estonian legal practice

Very little attention has been paid to the issues of compensation for consequential economic loss in the Estonian legal practice so far. Judicial practice shows that Estonian courts are rather modest in ordering the payment of compensation for economic loss. By way of generalisation, it may be said that in most of the cases where a court has decided not to order compensation for economic loss or a court of higher instance has annulled a respective decision, impossibility to establish the damage has been specified as the reason.<sup>\*18</sup>

An example of an event that gives insight into the court's positions in the question of compensation for pure economic loss is a case where the plaintiff filed a claim for compensation against the Republic of Estonia for EEK 4,386,355 to cover the economic loss for not issuing a fishing permit. In this case, the Civil Chamber of the Supreme Court found: "Holding a fishing permit does not mean that the plaintiff would have caught and sold fish in the mentioned quantity. Therefore, the fact that the plaintiff could not exercise his right to fish commercially without a fishing permit is not sufficient to reason the causal relationship between the refusal to issue a fishing permit and the loss."<sup>\*19</sup>

According to the Chamber's position, loss of income could not be equalised with potential income. One may agree with the court's position on the basis that nobody can guarantee a certain income in a market economy.

Another example of Estonian legal practice is the judgment of the court of first instance where the aggrieved person claimed compensation for loss of income besides direct economic loss. In a judgment made by the Rapla County Court on default, the court ordered the payment of compensation for loss of income. According to the plaintiff, theft of goods from his kiosk resulted in decreased sales, as he was not able to buy new goods because of the loss of current assets. The court calculated the amount of lost income using the plaintiff's last three months' sales before the offence and ordered compensation according to it.<sup>\*20</sup>

The author believes that such a case should be settled according to the following principles.

- (1) In a market economy, loss of sales is a part of every businessman's risk. Proving one's supremacy over other competitors in the course of economic activities is the driving force of a market economy. If we prohibit all activities that are harmful to competitors (such as alluring clients with better service), it would have an inhibiting effect on enterprise and the development of society as a whole. Cases where changes in economic turnover have resulted from activities that violate the rights of another person (theft, fraud, violence, *etc.*) are an exception, in which case the changes in sales can be taken into account in deciding on compensation.
- (2) Economic turnover can be affected by a variety of circumstances and all the effects cannot probably be identified in reality. Therefore, identification of loss on the basis of previous periods' sales can be justified in exceptional cases. However, calculations of potential future income based on the overall economic situation and competitors should not be used to decide on compensation, as such calculations would be speculative.

To summarise the above, compensation for pure economic loss is justified in the author's opinion only if:

- a) the loss accompanies violation of absolute legal rights (*i.e.* direct patrimonial damage), and
- b) the relation between the loss and the violation is adequately proven.

<sup>17</sup> J. S. Monteiro. Comparative Law Report on Cases 3 and 4. – J. Spier (Note 8), p. 53.

<sup>18</sup> See *e.g.* decision of the Supreme Court Civil Chamber, 21 June 2001, 3-2-1-70-01. – Riigi Teataja (the State Gazette) III 2001, 23, 256 (in Estonian); decision of the Supreme Court Civil Chamber, 20 June 2001, 3-2-1-86-01. – Riigi Teataja (the State Gazette) III 2001, 22, 246 (in Estonian), *etc.*

<sup>19</sup> Decision of the Supreme Court Civil Chamber, 19 October 1999, 3-2-1-90-99. – Riigi Teataja (the State Gazette) 1999, 28, 270 (in Estonian).

<sup>20</sup> Judgment of the Tallinn Circuit Court, 9 November 2001, II-2/1710/01. The circuit court annulled the judgment of the Rapla County Court and referred it to a new hearing.

Also, it should be checked in the course of settlement whether compensation for such damage complies with the purpose of the protective legal provision and falls within its scope of application.

## 5. Issue of compensation for non-patrimonial consequential damage

The principle that patrimonial damage caused to an aggrieved person can sometimes be accompanied by further non-patrimonial damage to persons close to the aggrieved person is increasingly accepted in the European legal area on the level of regulatory law or judicial practice.

Subsection 134 (3) of the Estonian LOA sets out that in the case of an obligation to compensate for damage arising from the death of a person or a serious bodily injury or health damage caused to the person, the persons close to the deceased or the aggrieved person may also claim compensation for non-patrimonial damage if payment of such compensation is justified by exceptional circumstances.

Based on the analogy of a contract for provision of health care services, persons related to an aggrieved person may be understood as the relatives of the aggrieved person, *i.e.* the patient's spouse, parents, children, sisters and brothers, as well as other persons close to the patient, if this arises from the patient's living arrangements. The circle of persons close to the aggrieved person would also include the aggrieved person's unmarried partner, but not his or her employer or friends, who are not in such close relationship with the aggrieved person. The court has the discretion to identify the level of closeness and nature of a relationship in the case of each dispute.

What kind of exceptional circumstances could justify the payment of compensation to persons close to the aggrieved person? Finding an answer to this question is a complicated problem.

As the main characteristic of non-patrimonial damage is the lack of objective criteria that would enable a direct monetary assessment of the loss, it is difficult to identify the existence of such damage in reality at all.

The non-patrimonial damage incurred by persons close to the aggrieved person could be essentially regarded as consequential damage, if this:

- a) is expressed as non-patrimonial damage only;
- b) results from patrimonial damage to another person (direct patrimonial damage, loss of income).

From the position of the tortfeasor, the ground for the claim of a person who has suffered non-patrimonial damage only is weak, if the tortfeasor at the time of the offence did not and could not know that the personal injury caused by him or her to the particular person may have a negative impact on other persons. To avoid an excessive broadening of the limits of liability, there must be weighty arguments for compensation for such non-patrimonial damage. No such arguments have been found in the Estonian judicial practice so far, and the courts have dismissed the claim for compensation of a person close to an aggrieved person. For example, in 1998, the Civil Chamber of the Supreme Court dismissed a plaintiff's claim of EEK 360,000 for moral damage. According to the plaintiff's reasoning, his moral damage resulted from his spouse's death, which caused the need to use expensive paid medical aid.<sup>\*21</sup> In this judgment, the Supreme Court clearly assumed the position that a surviving spouse cannot be regarded as an aggrieved person.

However, the author finds it justified to compensate persons close to an aggrieved person for non-patrimonial damage if the tortfeasor did or had to foresee the possibility that the offence could result in significant physical and emotional pain and suffering, such as serious physical suffering or a permanent trauma. The Amsterdam Circuit Court has accepted the claim of parents for compensation of non-patrimonial damage in relation to brain damage caused to an infant.<sup>\*22</sup>

Compensation for non-patrimonial damage should always be justified if the actual aim of the offence is to cause damage to a person close to the aggrieved person. Such an example can be found from the Finnish legal practice, where compensation was ordered for the pain and suffering of the mother of a child who was killed in order to cause suffering to the mother.<sup>\*23</sup>

<sup>21</sup> Decision of the Supreme Court Civil Chamber, 8 December 1998, 3-2-3-16-98. – Riigi Teataja (the State Gazette) III 1999, 2, 26 (in Estonian).

<sup>22</sup> E. H. Hondius. Medical Liability in Dutch Law. – E. Hondius (ed.). Modern Trends in Tort Law: Dutch and Japanese Law Compared. Kluwer Law International, 1999, p. 12.

<sup>23</sup> Judgment of the Finnish Supreme Court, KKO 1983 II 8.

## 6. Third party incurring consequential damage

According to a generally accepted principle of delict law today, only the person who incurred damage, *i.e.* the aggrieved person is entitled to compensation. Estonian regulatory law contains this principle in LOA § 127 (1), according to which the aggrieved person should be placed in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred. It follows from the meaning of the provision that the circle of entitled persons can be limited to persons who incur such damage due to the offensive act which the legal order considers possible to compensate for.

Although the legal doctrine recognised in Continental Europe does not, as a rule, entitle a third party to compensation for damage, regulatory law provides for exceptions of compensation, where due to the special circumstances of damage, the law equalises a third party to the aggrieved person in their entitlement to compensation. Causing death is the primary exceptional circumstance that entitles a third party to compensation for damage.

### 6.1. Funeral expenses as consequential damage

Incurrence of funeral expenses by a third party upon causing the death of the aggrieved person may, in the author's opinion, be regarded as a special case of consequential damage.

If we regard causing death as direct patrimonial damage similarly to bodily injury or health damage, this results in further expenses for a third party because of the need to incur funeral costs. The author does admit that this does not constitute consequential damage in the traditional sense, as funeral costs can also be regarded as direct patrimonial damage.

A claim for compensation is justified if a third party has incurred expenses in relation to the event of damage. It is not wise to let the tortfeasor get away without paying compensation in such a situation. The law of Estonia and other Continental European states allows for compensation of funeral expenses to a person who has incurred them. The Danish judicial practice has assumed the position that as an exception, the circle of persons provided by law are entitled to compensation for consequential damage in the event of causing death.<sup>\*24</sup> According to LOA § 129 (1), upon causing death, a third party may claim compensation for the reasonable funeral expenses of the deceased person. However, only the person obligated to bear the funeral expenses of the deceased person or who actually incurred the costs may file such a claim. In the author's opinion, the reasonable limits of funeral expenses should be determined taking into account the funeral traditions and customs arising from the deceased person's nationality and place of residence. In the legal practice of the Russian Federation, expenses on a memorial dinner and rituals have been considered as reasonable expenses.<sup>\*25</sup> Besides, the social status of the deceased person has to be taken into account as well. Compensation for funeral expenses is distinguished from the traditional compensation for damage by the fact that nobody causes damage to the third party and the expenses are incurred voluntarily or on the bases provided by law.

### 6.2. Loss of maintenance as consequential damage

Entitling a third party to compensation sometimes serves the goal of ensuring social justice. Many states have considered it necessary to ensure social justice by providing in regulatory law a certain circle of persons, as an exception, who are entitled to maintenance in the event of the aggrieved person's death. Loss of the possibility of maintenance can be classified as damage under loss of income and this can be regarded as consequential damage. Although we assumed the position earlier that as a general rule, compensation for consequential damage only is unjustified, compensation for damage in the form of loss of maintenance as an exception is justified by the existence of mandatory regulation.

According to LOA § 129, the tortfeasor who caused death must pay reasonable compensation to the third parties whom the deceased person was obliged to maintain. When identifying the maintenance obligation, two groups of persons entitled to maintenance can be distinguished:

- a) persons whose entitlement to maintenance arises from family law (parents, children, grandparents);
- b) persons whose entitlement to maintenance is not provided by family law and arises from delict law regulation.

<sup>24</sup> A. Vinding Kruse (Note 6), p. 174.

<sup>25</sup> O. Sadikov. Kommentarii k Grazhdanskomu kodeksu Rossiiskoi Federatsii. Part II. Moscow: Infra-M-Norma, 1996, p. 701.

The Estonian law provides for filing claims for compensation on the grounds of delict provisions:

- to a person with whom the deceased person factually cohabited, or
- to a person who was maintained on the basis of a moral obligation.

The preconditions for entitlement to compensation in the case of the latter group of persons are as follows:

- (1) the person needs maintenance;
- (2) the person cannot receive maintenance in any other manner, and
- (3) the person whose death was caused would presumably have continued to maintain the person in the future.

Sweden uses a regulation similar to Estonia: according to its law on delict liability, the circle of persons entitled to maintenance covers the persons entitled to maintenance by law, as well as other persons whom the deceased person actually maintained when alive (such as factually cohabiting persons).<sup>26</sup> A child who has been conceived but is yet unborn may also be entitled to compensation.

In Estonia, a person who has been maintained is entitled to maintenance in the amount corresponding to the maintenance that the deceased person would have given to the person during his or her presumed lifespan. Thus, maintenance has to be decided, among other things, on the basis of the economic potential of the person claiming maintenance and his or her potential lifespan. The problem is how to consider a surviving spouse's chances of marrying again in the future. According to the Swiss legal practice, the possibilities of the dependant person to find alternative supporters have to be taken into account.<sup>27</sup> In Israel, assessing the chances of a surviving spouse to marry again is considered offensive.<sup>28</sup> Neither does the author consider it morally justified to weigh the chances of a surviving spouse in arranging their life in the future, as this would be clearly a speculative practice. Rather, the legal practice forming in Estonia should be guided by the facts known at the time when compensation is decided. If it is established later that the person has alternative supporters, the entitled person maintains the right to demand that compensation be changed according to the support he or she receives.

In the author's opinion, compensation for damage arising from loss of maintenance upon causing death is also justified by the requirement for ensuring prevention as one of the main aims of delict law. General prevention is effective when society as a whole considers causing unlawful damage immoral and unjustified. Thus, society should not give the tortfeasor a chance to escape civil liability in a situation where the aggrieved person can no longer protect their interests.

## 7. Conclusions

As a rule, the right of a claim is provided for a person who incurs direct damage due to a damaging circumstance. However, it is questionable whether those persons who only indirectly incur the negative impact should be entitled to compensation. The author believes that it is justified to limit the circle of entitled persons to only those persons whose absolute rights have been directly and immediately violated and who fall within the sphere of application of the protective provision. Compensation for consequential damage is justified only if the person also incurred direct loss as a result of the violation, and as an exception in the case of death, a person who incurred funeral costs and a person who was maintained by the deceased should be entitled to compensation.

Similarly (in the author's opinion) to Germanic law, the Estonian LOA is guided by the need to protect absolute rights (property, life, and health). Hence, if the damage incurred by the aggrieved person is pure economic loss, it cannot be viewed as violation of an absolute legal right, and the establishment of a strong protective standard is not justified.

Limitation of compensation for consequential damage is also justified in the author's opinion by the need to keep liability within reasonable limits and by the legal-economical aspect of application of liability.

Compensation for non-patrimonial consequential damage to a person close to the aggrieved person is justified if the tortfeasor did or had to foresee the possibility that the offence could result in significant physical and emotional pain and suffering, such as serious physical suffering or a permanent trauma. Also, compensation for non-patrimonial consequential damage may be considered justified if the damage was actually aimed at a person close to the aggrieved person.

<sup>26</sup> B. Bengtsson. *An Introduction to the Swedish Law*. 2<sup>nd</sup> ed. Norstedts, 1987, p. 309.

<sup>27</sup> P. Honegger. *Switzerland in European Product Liability*. – P. Kelly, R. Attree (eds.). *Product Liability*. Butterworths, 1992, p. 415.

<sup>28</sup> A. Porat. *Introduction to the Law of Israel*. – A. Shapira, K. C. DeWitt-Arar (eds.). *Tort Law*. Kluwer Law International, 1995, p. 152.