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Fault in the Three-stage Structure of the General Elements of Tort

The three-stage structure of the general elements of tort distinguishes between the objective elements of the act, unlawfulness and fault. The objective composition is composed of three elements: a general distinction can be drawn between the tortfeasor's act, the damage suffered by the victim, and the causal relationship between the tortfeasor's act and the damage suffered by the victim. The general elements of tort require all these elements to be present in order for liability to be created. It is not always an easy task to draw a line between the elements of tort, but it is necessary, because even, e.g., the burden of proof may be distributed differently depending on the prerequisites for liability. Distinguishing fault from the other elements of tort may cause the greatest problem. Besides distinguishing between the prerequisites for general delictual liability, the mutual relations between the relevant prerequisites need to be understood for a better comprehension of the structure of delictual liability.

The main objective of this paper is to analyse the differences of fault as a prerequisite for general delictual liability as well as its points of contact with the other elements of tort. For example, an interesting issue concerns the distinction between fault and an act relevant to tort law, as well as the links and differences between causality and fault. An analysis of these points should be of interest to jurists of all countries. More than others, though, the discourse concerns those countries where the general elements of tort are structured similarly to Estonian law (especially countries belonging to the Germanic legal family).^{*1}

The author stresses that this paper does not discuss issues of unlawfulness as one of the general elements of tort; neither does it discuss the distinction between unlawfulness and fault. The reason for drawing this line is the broadness of the topics, on the one hand, and the fact that the author has already written about these issues, on the other.^{*2}

¹ For example, the structure of delictual liability recognised in countries of the Roman legal family and in common law countries has major differences from the German and Estonian model, and many of the issues discussed in this paper do not arise from the same aspect outside the Germanic legal family.

² See J. Lahe. *The Concept of General Duties of Care in the Law of Delict*. – *Juridica International* 2004, pp. 108–115. It should be noted that telling between unlawfulness and faulty is not, as a rule, complicated if unlawfulness is induced from damaging an absolutely protected legal benefit (e.g., life, health, ownership) (the so-called theory of wrongful consequence). Distinction is difficult especially where the tortfeasor's act requires additional assessment for establishing unlawfulness (the so-called theory of wrongful act). The issues of distinguishing unlawfulness from fault rise especially seriously where unlawfulness arises from violating general duties. About distinguishing between unlawfulness and fault see, e.g., E. Deutsch. *Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung*. Zweite Auflage. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1995, p. 478; F. G. v. Westphalen, etc. *Produkthaftungshandbuch: Vertragliche und deliktische Haftung, Strafrecht und Produkt-Haftpflichtversicherung*. München: C.H. Beck'sche Verlagsbuchhandlung 1989, p. 482; D. Howarth. *Textbook on Tort*. Buttenworths, London, Dublin, Edinburgh 1995, p. 267.

This paper has four parts. The first part analyses the concept, elements, and general structure of the elements of tort. The second part discusses the act as an objective element of tort and its relations with fault. The third part analyses the concept of damage and its relations to fault. The fourth part of the paper studies the concept of causality and the differences and points of contact between causality and fault.

1. Concept and structure of the general elements of tort

Unlawful behaviour that causes damage to another person (tort) is governed by legislation and results, if the relevant prerequisites for liability are present, in the tortfeasor's obligation to compensate for the damage. According to the generally accepted classification, such as the Law of Obligations Act³ (LOA), the institute of compensation for unlawfully caused damage is classified under non-contractual obligations (LOA Chapter 53).⁴ LOA Chapter 53 distinguishes between the general elements of tort (Division 1), strict liability (Division 2) and liability for defective products (Division 3). The general elements of tort can be defined as a set of certain prerequisites for liability, in which case the tortfeasor has the obligation to compensate the victim for the damage. The tortfeasor's fault is one of these prerequisites.⁵ In the event of delictual strict liability attention is paid not to the fault of the tortfeasor, instead it is checked whether the harmful consequence was caused by the realisation of an elevated risk characteristic of things or activities. In the event of a producer's delictual liability, the element of fault has not been completely discarded, but limits have been established to prove the lack of fault.

According to the Civil Code of the Estonian Soviet Socialist Republic⁶ (CC), which was in force until 1 July 2002, four prerequisites were required, as a rule, for creating an obligation arising from the causing of unlawful damage: (1) the victim must have suffered damage, (2) the tortfeasor's act was unlawful, (3) there was a causal relationship between the damage and the tortfeasor's act, and (4) the tortfeasor was at fault for causing the damage.⁷ The first three prerequisites were elements of the objective aspect of the offence, while fault characterised the subjective aspect.⁸

The existence of tort and the claim for compensation from damages arising from it is verified in German law on three different levels of the elements of a civil offence: the levels of the objective elements of tort (three conditions are checked: (1) act, (2) damage, and (3) a causal relationship between the act and the damage), of unlawfulness, and of fault. To "reach" each succeeding level, previous levels must be completed and all their conditions met because moving to the next level would otherwise be pointless, as no delictual liability would be created in the final stage.⁹

German tort law differs from that of many other continental European countries, particularly in the lack of one specific general clause or the general elements of tort.¹⁰ The latter claim can be justified with certain reservations, as e.g., the elements (intentional damage against good morals) provided in § 826 of the German Civil Code¹¹ (BGB) can still be regarded as a "small general tort".¹²

³ Völaõigusseadus. Passed 26.09.2001, entered into force 1.07.2002. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian).

⁴ Besides unlawful causing of damage, we may speak about non-contractual obligations if the case concerns a public promise to pay (LOA Chapter 49), presentation of a thing (LOA Chapter 50), *negotiorum gestio* (LOA Chapter 51), or unjustified enrichment (LOA Chapter 52).

⁵ Highlighted among the functions of fault should be, firstly, the liability generating function of fault (the legal dogmatic aspect), and secondly, fault is the dominant underlying principle of liability (legal policy aspect). See C. Oswald. *Analyse der Sorgfaltspflichtverletzung im vertraglichen wie ausservertraglichen Bereich*. Dissertation. Zürich: Schulthess Polygraphischer Verlag AG 1988, p. 37.

⁶ Eesti NSV tsiviilkoodeks. Passed 12.06.1964, entered into force 1.01.1965. – Ülemnõukogu Teataja (The Supreme Council Gazette) 1964, 25, 115; RT I 1997, 48, 775 (in Estonian).

⁷ E. Laasik. *Nõukogude tsiviilõigus. Eriosa* (Soviet Civil Law. Special Part). Tallinn: Kirjastus "Valgus" 1975, p. 337 (in Estonian).

⁸ J. Ananyeva et al. *Nõukogude tsiviilõigus. Üldosa* (Soviet Civil Law. General Part). Tallinn: Kirjastus "Valgus" 1975, p. 410 (in Estonian). It should be noted that the Civil Code of the Russian Federation (the general part of which was passed by the State Duma on 21 October 1994 and the special part was passed on 22 December 1995) is based on a method of regulation of the structure of tort which is essentially similar to the CC; the same (aforementioned) four prerequisites can be considered as the prerequisites for delictual liability.

⁹ K.-H. Gursky. *Schuldrecht. Besonderer Teil. 3. neuarbeitete Aufl.* Heidelberg: C.F. Müller Verlag 1999, pp. 189–194.

¹⁰ *Ibid.*, p. 189.

¹¹ Civil Code of the German Federal Republic. Text with commentaries in: O. Jauernig. *Eläutert von C. Berger, etc. Bürgerliches Gesetzbuch*. 10. Aufl. München: Verlag C.H. Beck 2003.

¹² Three types of elements of liability may be distinguished in the BGB context regarding delictual liability: firstly the general case of liability, secondly liability based on presumed fault (BGB §§ 831, 833, etc.), and thirdly, liability for damage caused by another person's fault (including state liability). See R. Schulze etc. *Bürgerliches Gesetzbuch. Handkommentar*. 3. Aufl. Baden-Baden: Nomos Verlagsgesellschaft 2003, p. 960.

The French *Code Civil*, like the CC, contains a general clause on delictual liability, according to which any damage caused by one person against his/her obligations to another is subject to compensation (see §§ 1382 and 1383 of the *Code Civil*). Acting against an obligation is a *faute*. Besides *faute* as a basis for liability, the general elements of tort, according to the *Code Civil*, are behaviour, damage, and causality.*¹³

The tort law of common law countries recognises three main elements as the prerequisites for delictual negligence liability*¹⁴, which is regarded in these countries as the most important elements of delictual liability (and the general clause at the same time): duty, breach of duty, and damage or injury. Naturally, a causal relationship is required to exist between the breach of duty and the victim's damage.*¹⁵ Therefore, the tort law of all common law countries is built on the duties that persons have to each other. According to Lord Atkins' classic formulation, which he presented in the case of *Donoghue v. Stevenson*, duty is defined as follows: You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. A person has a duty where it seems fair and reasonable in an analysis of the specific case. In addition to that, duty should be assessed based on the predictability of damage and the closeness of the parties to each other.*¹⁶ When assessing whether a duty has been breached, it should be analysed whether a person has acted reasonably.*¹⁷

U. Magnus has found that European tort law should also contain specific elements. Firstly, this includes such main elements as damage, causality, and the victim's complicity.*¹⁸ Proceeding from article 1:101 of the draft European Civil Code*¹⁹, a prerequisite of general delictual liability also includes the intention or negligence of the tortfeasor. Unlawfulness is not an express prerequisite for liability according to the draft.*²⁰

In the LOA applicable since 1 July 2002, the CC scheme of delictual liability has been abandoned and delictual liability is regulated based on the method characteristic of the Germanic legal family.*²¹ Similarly to German tort law, the three-stage structure of the general elements of tort in the LOA follows the classic scheme of penal law, which distinguishes between the objective elements of tort, unlawfulness, and fault. The burden of proof of the objective elements of tort and unlawfulness lies with the victim; the tortfeasor has to prove any circumstances precluding unlawfulness or the lack of fault (LOA § 1050 (1)).*²² The objective elements of tort are the act, the unlawful consequence (damage), and the causal relationship between them. The so-called small general tort of the LOA can be seen in the provision of LOA § 1045 (1) 8), which provides that intentional behaviour contrary to good morals is unlawful (the purpose and substance of this provision are principally the same as those of BGB § 826).

The author of this paper believes that the structure of the general elements of tort according to the LOA is justified, as it sets clear limits on the creation of delictual liability and thus ensures sufficient freedom of conduct: an individual can assess before acting whether the act is unlawful and could result in delictual liability.

¹³ M. Ferid; völlig neuarbeitete von H. J. Sonnenberger. Das Französische Zivilrecht. Bd. 2. 2. Aufl. Schuldrecht: die einzelnen Schuldverhältnisse. Sachenrecht. Heidelberg: Verlagsgesellschaft Recht und Wirtschaft GmbH 1986, p. 460.

¹⁴ It should be kept in mind that in the tort law of England (and other common law countries), negligence is a tort and not a form of fault. See 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, p. 15.

¹⁵ M. D. Bayles. Principles of Law. A Normative Analysis. Boston, Lancaster, Tokyo: D. Reidel Publishing Company 1987, p. 210.

¹⁶ C. von Bar, J. Shaw (Note 14), pp. 17–18.

¹⁷ See also C. von Bar. The Common European Law of Torts. Vol. 2. Oxford: Clarendon Press 2000, p. 249; P. Cane. Accidents, Compensation and the Law. 6th Ed. Butterworths, London, Edinburgh, Dublin 1999, p. 26; C. v. Bar, J. Shaw (Note 14), p. 15.

¹⁸ U. Magnus. Elemente eines europäischen Deliktsrechts. Zeitschrift für Europäisches Privatrecht. 6. Jahrgang. München: Verlag C.H. Beck 1998, p. 612.

¹⁹ Draft European Civil Code. Available at http://www.sgecc.net/index.php?subsite=subsite_4 (15.07.2007).

²⁰ C. von Bar. Konturen des Deliktsrechtskonzeptes der Study Group on European Civil Code – Ein Werkstattbericht. – Zeitschrift für Europäisches Privatrecht. 9. Jahrgang. München: Verlag C. H. Beck 2001, pp. 520–521. Namely the working group considered it reasonable not to use the concept *culpa in abstracto*, but to stress that important in the framework of negligence liability was the failure to exercise due diligence. *Ibid.*, pp. 520–521. The author of this paper deems it inevitable for the European CC to become a certain compromise between the provisions and principles of tort law applicable in different countries. Such a compromise can be reached if we take only the common part of domestic laws (however, e.g., a distinction between unlawfulness and fault is foreign to French law). About the feasibility of the European Civil Code and the idea behind it see M. W. Hesselink (ed.). The Politics of a European Civil Code. Hague: Kluwer Law International 2006, pp. 73–79.

²¹ The author admits that the main elements of delictual liability are the same in the CC and LOA; the differences concern the systematisation and regulation of these elements.

²² Decision 3-2-1-53-06 of the Civil Chamber of the Supreme Court of 26 September 2006 (RT III 2006, 33, 283 (in Estonian)) also mentions that in the event of general delictual liability, the employer as the tortfeasor is released from the obligation to compensate if the employer proves the presence of any of the circumstances precluding unlawfulness as specified in LOA § 1045 (2) 1)–4) or the lack of fault.

2. Act as an objective element of tort and fault

A person's act is the first objective element of tort and hence one of the main bases of liability.^{*23} In tort law, an act means the behaviour of a person which is controlled by the mind and the person's will and is thus controllable.^{*24} Gestures which are not controllable (e.g., those done when unconscious) or which result from direct physical duress, as well as reflexes, cannot be regarded as acts and do not give rise to civil liability.^{*25} Only a person who has acted on his or her free will can be liable.^{*26} An act may also lie in inactivity, but inactivity can result in delictual liability only if a person was under a duty to act but failed to do so. It is often difficult to draw a clear line between an act and inactivity: for example in a situation where a person suffers damage caused by a defective product it may be said that the producer acted when placing the defective product on the market, but was inactive when failing to check the product.^{*27}

It should be noted that the concept of an act is essentially the same under tort law and penal law. Professor J. Sootak mentions that the purpose of describing an act in criminal law is to delimit a person's relevant, i.e., will-driven behaviour from behaviour without social quality such as reflexive gestures, etc. Where behaviour does not constitute an act within the meaning of criminal law, naturally such behaviour cannot be legally assessed.^{*28} In penal law, an act is behaviour guided by a person's will, which is expressed in the external world. Thoughts, opinions, feelings, gestures resulting from *force majeure*, common somatic or pathological bodily reflexes, sleepwalking and an animal act do not constitute acts. However, learned reflexes or acquired automatism (such as gestures made while driving a car, writing), as well as acts performed under mental duress, constitute acts.^{*29}

Therefore, delictual liability may be precluded because of a lack of an act relevant for the purposes of tort law. In some cases, however, it may be difficult to decide whether a person's liability should be precluded because of the lack of an act or the lack of fault. For example, it is possible that a person suffers an epileptic seizure in an antique store and causes a valuable vase to break as he falls. In Estonian law, gestures caused by epilepsy should be regarded as acts for the purposes of tort law, but if the person had to be aware of the risk of a fit of a **certain** illness, his or her very entrance into the shop could be regarded as an act. When judging a person's act, it should be taken into account, amongst other things, what the doctor having treated the patient has said to the patient and the likelihood of attacks occurring, according to the doctor.

It is important to note that an inculpable person may commit a relevant act under tort law. In such a case, the parent, curator, or person supervising the inculpable person under a contract may be liable for the damage caused by the inculpable person (see LOA § 1053). However, the lack of an act by an inculpable person precludes the liability of the aforementioned persons. For example, if a 13-year-old is pushed onto the carriageway by a third party and a driver knocks over a traffic sign to avoid collision, it may be said that the child did not act and, hence, the persons listed in LOA § 1053 are not liable for the damage. However, if the child suddenly runs onto the carriageway on his or her own accord, a parent or curator or contractual supervisor may be liable for the damage (provided that the objective elements of tort are present, the child's behaviour was unlawful and objectively negligent). A person's inability to control his or her behaviour should therefore be distinguished from inculpability (LOA § 1052).

²³ E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld. 4, völlig überarbeitete und erweiterte Aufl. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 15.

²⁴ See O. Jauernig. Eläutert von C. Berger, etc. Bürgerliches Gesetzbuch. 10. neuarbeitete Aufl. München: Verlag C. H. Beck 2003, p. 1022; K. Larenz. Lehrbuch des Schuldrechts. Zweiter Band. Besonderer Teil. Zwölfte, völlig neuarbeitete Aufl. München: C. H. Beck'sche Verlagsbuchhandlung 1981, pp. 589–590.

²⁵ V. Emmerich. BGB-Schuldrecht. Besonderer Teil. 10. völlig neubearbeitete Aufl. Heidelberg: C.F. Müller Verlag 2003, p. 255.

²⁶ B. Berofsky (ed.). Free Will and Determinism. New York, London: Harper & Row Publishers 1966, pp. 59–63.

²⁷ About this see also C. Van Dam. European Tort Law. Oxford: University Press 2006, p. 205.

²⁸ See J. Sootak. Kuriteomõiste ja õigusriiklik kriminaalõigus. Kolme-elementilise kuriteomõistest karistuseseadustiku üldosa eelnõus (Definition of Crime and Criminal Law Based on Rule of Law. The Concept of Crime Consisting of Three Elements in the Draft General Part of the Penal Code). – Juridica 1998/1, pp. 23–27 (in Estonian).

²⁹ See J. Sootak. The Definition and Structure of Offence in the Penal Code. – Juridica 2001/7, p. 451 (in Estonian).

3. Damage as an objective element of tort and fault

The causing of damage is the second of the objective elements of tort. Although it is difficult to present the one and only correct definition of damage, it could be said that any reduction of a personal or patrimonial benefit may be regarded as damage.^{*30} Section 1293 of the Austrian Civil Code provides a definition of damage: damage means any impairment caused to someone's property, rights, or person.^{*31} Soviet civil law theory understood patrimonial damage as the negative consequences in one person's proprietary sphere resulting from the unlawful behaviour of another person.^{*32} According to CC § 222, a distinction was made between direct damage, i.e., the expenses of a creditor, loss of or damage to the creditor's assets, and loss of profit. The principle of full compensation for damage was set forth in CC § 448 (1), according to which damage caused to a citizen's person or property, as well as damage caused to an organisation, is subject to full compensation by the tortfeasor.

In the currently applicable law, the objective of compensation for damage is provided in LOA § 127 (1). The latter provision refers directly to the requirement of applying the difference hypothesis known from German law. Types of damage are governed by LOA § 128, according to which damage subject to compensation may be patrimonial or non-patrimonial. Patrimonial damage is divided into direct patrimonial damage and loss of profit (subsection 2). Purely economic loss could be mentioned as a type of patrimonial damage, compensation for which cannot, as a rule, be claimed under tort law.^{*33} Non-patrimonial damage involves primarily the physical and emotional distress and suffering caused to the aggrieved person (subsection 5).^{*34}

In French law, as in most other countries, any patrimonial or non-patrimonial influence may serve as damage.^{*35} The draft European Civil Code also distinguishes between types of damage. Article 2:101:1 thus provides that loss, whether economic or non-economic, or injury is legally relevant damage (and subject to compensation) if: (a) one of the following rules of this Chapter so provides; (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection. In the latter two cases, it should be considered whether considering the loss or injury legally relevant would be fair and reasonable (article 2:101:2).^{*36}

From the aspect of fault it is important that two levels of damage as an objective element of tort are distinguishable. The first level is the level of unlawful elements of tort, which focuses mainly on the damage required for the emergence of liability. According to BGB § 823 (1), protected legal rights include, in the first order, life, physical freedom from injury, health, freedom and ownership.^{*37} Causality causing liability exists where a person's act has led to the damaging of a legal right. The second level is the level of the scope of compensation for damage; on this level it is checked whether the damage to the legal right has caused damage subject to compensation under delictual liability (causality fulfilling liability).^{*38} Relevant to this level are the types of damage (BGB also distinguishes between patrimonial and non-patrimonial damage) and the difference hypothesis, meaning a comparison between two situations of rights, the application of which ensures the realisation of the principle of total reparation.^{*39} It should be noted that fault must be verified only on the first level, i.e., the level of causality causing liability. It is therefore irrelevant whether and to what extent the

³⁰ Attempts have been made to bring up discussion on whether tort can exist without a consequence or damage. See W. Münzberg, *Verhalten und Erfolg als Grundlagen der Rechtswidrigkeit und Haftung*. Bd. 4. Frankfurt am Main: Vittorio Klostermann 1966, p. 34. The author of this paper is of the opinion that damage is a prerequisite in order to claim compensation or it must be clear that damage will occur in the future (see LOA § 127 (7)).

³¹ The Austrian Civil Code entered into force in 1812. See R. Dittrich, *Das Allgemeine Bürgerliche Gesetzbuch*. 18. völlig umarbeitete Auflage. Wien: Manzsche Verlags- und Universitätsbuchhandlung 1997.

³² J. Ananyeva et al (Note 8), p. 411.

³³ See CCSCd 30.11.2005, 3-2-1-123-05 (RT III 2005, 43, 427 (in Estonian)) and CCSCd 13.06.2005, 3-2-1-64-05 (RT III 2005, 23, 244 (in Estonian)).

³⁴ About compensation for non-patrimonial damage in the Estonian judicial practice see CCSC decision 3-2-1-11-04 of 11 February 2004 (RT III 2004, 6, 66 (in Estonian)), according to which the court has to decide on a case by case basis whether non-patrimonial damage, which needs to be compensated for financially, has occurred or not.

³⁵ See C. von Bar, P. Gotthard, *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland*. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, p. 22.

³⁶ About legally relevant damage 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 2007, pp. 64–74.

³⁷ K. Larenz, C.-W. Canaris, *Lehrbuch des Schuldrechts. Zweiter Band. Besonderer Teil. 2. Halbband*. München: C. H. Beck'sche Verlagsbuchhandlung 1994, p. 949.

³⁸ For details on causality causing and fulfilling liability, see, e.g., P. Schlechtriem, *Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk (Law of Obligations. Special Part. Fourth, revised edition)*. Tallinn: Õigusteabe AS Juura 2000, pp. 256–259 (in Estonian).

³⁹ The main issues in German law concern the type of damage that is to be compensated for (in marginal cases such as an unwanted child or unused holiday) and how to correctly take account of the benefits received from the damage when determining the amount of compensation. About this see P. Schlechtriem, *Võlaõigus. Üldosa. Teine, ümbertöötatud trükk (Law of Obligations. General Part. Second, Revised Edition)*. Tallinn: Õigusteabe AS Juura 1994, pp. 71–77 (in Estonian).

tortfeasor wished to cause damage.^{*40} For example, a shoplifter cannot claim that he or she only wanted to steal things and had no intention of reducing the shopkeeper's income.

It also arises from the above that when it comes to prerequisites of liability, it is not the occurrence of damage but whether it was legal rights that were damaged. Whether damage to a relevant legal right led to legally relevant damage needs to be assessed when determining the scope of compensation (see also, e.g., decision of the Civil Chamber of the Supreme Court of 13 February 2002, in matter 3-2-1-14-02).

4. Causal relationship as an objective element of tort and fault

4.1. Concept of causal relationship

A causal relationship between an act and damage is the third objective element of tort. The importance of establishing a causal relationship lies in the principle that a person should be liable only for such damage and to such an extent that he or she has caused by his or her acts. In other words, in order for a person to bear civil liability for the damage he or she caused, a causal relationship must be established between his or her unlawful act and the consequence. Various theories have been developed for establishing a causal relationship.

Soviet legal theory did not contain generally recognised criteria of causality. Sometimes, for example, the categories of possibility and actuality by O. Joffe were occasionally accepted.^{*41} The theory, which is based on classifying relationships into inevitable and objectively accidental, was more widely recognised. There was no consensus as to whether liability could be based on only inevitable relationships or it follows from both types of relationships.^{*42}

LOA § 127 (4) provides that a person shall compensate for damage only if the circumstances on which the liability of the person is based and the damage caused are related in such a manner that the damage is a consequence of the circumstances. According to the draft European Civil Code, liability depends on a causal relationship between the defendant's act and the damage caused.^{*43} As noted above, causality causing liability is distinguished from causality fulfilling liability.

Causality is established in two stages: at first, the test of the necessary cause or the equivalence theory is applied — it is asked whether the consequence would have arrived without the act in question (the *condition sine qua non* rule or the but-for test).^{*44} The elimination and substitution methods are expressions of the *condition sine qua non* rule. In the first case, the defendant's act is removed from the "arena" and it is checked whether the consequence would have arrived or not. This method is applicable especially to active behaviour. In the substitution method, the defendant's unlawful act is substituted with a lawful one and it is checked whether the consequence would have been avoided by the lawful act. This method is applied especially in the event of passive behaviour.^{*45} The Civil Chamber of the Supreme Court applied the necessary cause test, e.g., in its decision of 10 December 2003 in matter 3-2-1-125-03^{*46}, in which the court found that an offence and damage are causally related if the damage could not have occurred without the offence. Causality needs to be affirmed if the tortfeasor's act triggered a chain of events that eventually caused the damage. The author of this paper would also add that if we speak about a causal chain, it is usually in a case of the joint causing of damage.

M. Schultz has proposed the replacement of the *condition sine qua non* test with the so-called NESS test (Necessary Element of a Sufficient Set). According to this theory, a condition causes a consequence if the condition was a necessary element for the consequence, on the one hand, and sufficient for the consequence,

⁴⁰ The Civil Chamber of the Supreme Court has also pointed this out in its decision of 27 November 2002 in matter 3-2-1-129-02 (RT III 2002, 35, 386 (in Estonian)). See also J. Kropholler. *Bürgerliches Gesetzbuch. Studienkommentar*. 6. neuarbeitete Aufl. München C.H. Beck 2003, p. 583.

⁴¹ About this theory see J. Ananyeva et al (Note 8), p. 420.

⁴² J. Ananyeva et al (Note 8), pp. 418–419.

⁴³ See article 4:101:1 of the draft European Civil Code. The fact that the victim is especially susceptible to damage does not release the tortfeasor from liability; the predictability of damage is not relevant in such case (2).

⁴⁴ O. Jauernig (Note 11), p. 1022. About judicial practice regarding the establishment of the necessary cause in European Union countries see R. Zimmermann, B. Winiger, B. A. Koch, H. Koziol (eds.). *Essential Cases on Natural Causation*. Wien: Springer Verlag 2006.

⁴⁵ See also T. Tampuu. *Deliktioõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus* (Tort Law in the Law of Obligations Act: General Problems and Liability). – *Juridica* 2003/2, p. 76 (in Estonian).

⁴⁶ RT III 2004, 1, 9 (in Estonian).

on the other. Therefore, if A and B shoot C and C dies, the act of A or the act of B in a separate capacity is not a necessary condition under the *conditio sine qua non* rule, but it is under the NESS test.^{*47}

The act of a third party or the victim himself or herself, or *force majeure*, may have broken the causality.^{*48}

Lately there have been problems in Estonian judicial practice involving cases where it is not quite clear whether the damage was caused by circumstances arising from the victim or from the tortfeasor's behaviour. In its decision of 3 October 2006, in matter 3-2-1-78-06^{*49}, the Civil Chamber of the Supreme Court noted that if the plaintiff's personal injury could alternatively have arisen due to a treatment error or other circumstance (such as his own health status) for which the doctor is not liable, causality between a treatment error and the damage has to be presumed. If the plaintiff's personal injury and damage was caused by both a treatment error and (an)other circumstance(s), for which the doctor is not liable, this does not release the defendant from liability, because the defendant's act also caused damage.^{*50}

After the but-for test, causality is assessed using the legal cause test, because using the but-for test only can lead to an inadmissible situation where a compensation claim can be submitted against an unreasonably wide circle of persons.^{*51} In German law, the expressions of the legal cause test are, primarily, various modifications of the adequacy theory established in 1888 by von Kries, and the purpose of a provision theory.^{*52}

According to the adequacy theory, an act can be regarded as the cause of a consequence if the act considerably heightens the risk of damage, considering the knowledge of an average person and the circumstances in which the damage occurred.^{*53} It could be said that the adequacy theory precludes liability in an unusual, onetime and not reasonably predictable course of events.^{*54} In research and judicial practice, adequacy is mainly understood via predictability.^{*55} For example, if A runs his or her car over B's lapdog, it may be argued, under the adequacy theory, whether B's heart attack resulted from A's act.

The purpose of provision theory asks whether the purpose of the violated provision or duty was to protect the victim and, if so, to protect him or her against the damage suffered in the particular case.^{*56} The necessity to apply these theories arises from LOA § 127 (2) and § 1045 (3). The purpose of a provision theory should be applied if unlawfulness is derived under LOA § 1045 (1) 7)^{*57} or from a breach of general duties.^{*58}

⁴⁷ See M. Schultz. Further Ruminations on Cause-In-Fact. P. Wahlgren (ed.). Scandinavian Studies in Law. Volume 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, pp. 485–486.

⁴⁸ C. von Bar, J. Shaw (Note 14), p. 32. Neither is damage caused by *force majeure* legally relevant under article 6:108 of the draft European Civil Code. It should also be noted that LOA § 103 (2) allows for an interpretation to the effect that *force majeure* may indeed lie in the intentional behaviour of a third party or the victim, amongst other things. About this, see also the decision of the Civil Chamber of the Supreme Court of 20 June 2006 in matter 3-2-1-64-06 (RT III 2006, 26, 241 (in Estonian)), in which the Chamber found that the victim's activity as a circumstance precluding the application of LOA § 1059 logically means the victim's self-damage, because only such activity of the victim precludes the realisation of a danger characteristic of a structure as a major source of danger.

⁴⁹ RT III 2006, 34, 289 (in Estonian).

⁵⁰ See about a similar case in the decision of the Civil Chamber of the Supreme Court of 26 September 2006 in matter 3-2-1-53-06 (RT III 2006, 33, 283 (in Estonian)), in which the court found that for the defendant to be released from liability in the event of rivaling causes of damage, the defendant had to prove that his act did not cause the death, i.e., that the other alternative circumstance caused the death.

⁵¹ About this see also M. Adams. Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung. Heidelberg: R. von Decker's Verlag, G. Schenck 1985, p. 117.

⁵² Recent decisions in the German Federal Republic have shown that the issue of causality cannot be decided by mere logic and abstract standards, but it involves a substantial degree of value decisions. See K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd Ed. Oxford: Clarendon Press 1998, p. 602. Of the same opinion are French judges, who find that the issue of causality needs to be decided applying common sense and justice. See C. von Bar, P. Cotthard. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, p. 29. The author of this paper takes the view that causality theories actually enable judges to exercise their own values and sense of justice quite freely when deciding on liability.

⁵³ M. L. Müller believes that the adequacy theory is not a causality theory, but is rather decisive in establishing unlawfulness. See P. Sourlas. Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach § 823 Abs. 1 BGB. Berlin: Duncker&Humblot 1974, p. 137.

⁵⁴ V. Emmerich (Note 25), p. 255.

⁵⁵ P. Sourlas. Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach § 823 Abs. 1 BGB. Berlin: Duncker&Humblot 1974, p. 155. About the adequacy theory see also K.-H. Gursky (Note 9), p. 190; C. Oswald (Note 5), p. 28.

⁵⁶ V. Emmerich (Note 25), p. 256.

⁵⁷ Liability under BGB § 823 (2) also presumes that the victim belongs to the circle of protected persons and that damage was caused for the reason that the law intended to avoid. See O. Mühl, W. Hadding. Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Bd. 5/2. Stuttgart, Berlin, Köln: Verlag W. Kohlhammer 1998, p. 152.

⁵⁸ An interesting issue related to causality concerns consequential damage. Namely, disputes may arise over whether or not there is a causal relationship between the tortfeasor's behaviour and the victim's damage which occurred significantly later. For example, if A caused a leg injury to B and B is run over by a car years later because of the injury, it is questionable whether A should be liable also for that damage. According to newer understanding, the prerequisites for liability, including unlawfulness and fault, need to be justified again if consequential damage arises. On another hand, a simpler way has been taken in solving the problem: it is found that if a person was culpable of committing the first offence, he or she can be charged with any consequential damage which can be reasonably predicted to occur as the potential consequence of the initial offence. See P. Sourlas (Note 55), pp. 152–153.

4.2. Distinction between causality and fault

Civil law dogmatics has not adopted a common position on the issue regarding the relation between adequacy theory and the purpose of provision theory, on the one hand, and unlawfulness and fault, on the other hand.^{*59} While according to the classic elements of tort, causality is part of the objective elements and fault is verified separately, on a third level, then in practice the distinction between causality and fault is not clear at all.

Namely, the issue of whether a person exercised due diligence is often decided on the level of causality, applying the adequacy theory and answering the question of whether the damage was predictable, avoidable and reckonable.^{*60} Dogmatically, negligence is certainly a form of fault. It has been found that diligence and adequacy judgments have the same point of content, formally the same content (namely the recognisability of the consequence) and principally the same function of regulating human behaviour^{*61} and limiting liability.

Dividing predictability into objective and subjective predictability still does not completely clarify the issue. Although it could be said that objective and subjective predictability of damage should be assessed in the adequacy test and at the negligence level, respectively, we have to admit that in most legal orders, fault is objective and neither are the tortfeasor's personal qualities taken into account when testing for predictability.^{*62} As the LOA uses a subjective fault standard, causality and fault can still be delimited in the Estonian legal order based on the aforementioned division.

However, attempts have been made to distinguish between causality and fault based on objective negligence. It is claimed that where the unlawfulness of an act is established using the theory of wrongful consequence^{*63}, an adequacy judgment may be viewed as a preliminary decision on the breach of duty and, hence, adequacy is viewed as a preliminary step of fault.^{*64} This argument can be justified by the fact that adequacy and negligence judgments differ in their emphasis. They overlap only with their relation to the predictability of damage, but it is clear that when judging negligence, many other circumstances have to be checked, as negligence pertains to a person's behaviour. In other words, it may be said that the tortfeasor is released from liability if the damage was predictable, but the tortfeasor exercised due diligence (e.g., damage could not be avoided at reasonable cost). It should also be kept in mind that various groups of actors are expected to exercise various degrees of diligence: while a judgment on the predictability of damage is entirely objective on the level of causality, a subjective element is added when it comes to fulfilling a duty.

An interesting question is whether a person should be liable for the damage he or she predicted only because his or her personal qualities allowed him or her to do so.^{*65} The author of this paper finds that if a person has unusual abilities, those should be taken into account in judging the predictability of damage. For example, if the tortfeasor is a medical specialist and among the best experts in his or her field, the predictability of damage should be assessed not from the viewpoint of an average medical specialist, but from what was predictable for a top specialist in the field.^{*66} This approach serves the purpose of giving the victim broader protection.

The link between negligence and the purpose of provision theory has been seen in the fact that where liability is based, e.g., on a breach of duty, such breach is not sufficient for establishing negligence. In addition, the duty must have served the purpose of preventing damage to this very type of legal right.^{*67}

This viewpoint is supported by the fact that a provision can serve the purpose of preventing only the type of damage that is recognisable for the addressee of the provision so that he or she can reasonably take it into account.^{*68} Therefore, if a legal right, which was beyond the scope of protection of a provision, was damaged, the tortfeasor could not predict the damage and we cannot speak about the tortfeasor's negligence, although his or her liability is already precluded on the level of causality. Predictability of damage is thus a "preliminary step" of negligence even when the purpose of a provision theory is applied.

⁵⁹ *Ibid.*, p. 123.

⁶⁰ *Ibid.*, p. 125. It suffices for establishing civil law negligence if the tortfeasor was able to predict at least some degree of damage. For example, if a mother is shocked seeing the injuries of her child who has been run over by a car, the check of negligence does not test whether the tortfeasor was aware of the child having a parent, but whether he or she had to reckon the parent's extreme reaction. *Ibid.*, p. 159.

⁶¹ *Ibid.*, p. 140.

⁶² C. Oswald (Note 5), p. 26.

⁶³ According to the theory of wrongful consequence, damage to an absolutely protected legal right induces unlawfulness.

⁶⁴ P. Sourlas (Note 55), p. 140.

⁶⁵ C. Oswald (Note 5), p. 27.

⁶⁶ The negligence of persons with unusual abilities should be judged using the same logic.

⁶⁷ P. Sourlas (Note 55), p. 156.

⁶⁸ *Ibid.*

5. Conclusions

While as a rule, distinguishing and finding connections between and the prerequisites for delictual liability is of interest only to legal science, in certain cases it also has a practical meaning. For example, when judging the creation of liability, the issue of whether the person was not at fault in causing the damage or has not even committed an act relevant to tort law can be decisive. In the same way, the choice of which circumstances are to be proved by the victim and which ones by the tortfeasor depends on the distinction between causality and fault. The principle that whether and to what extent the tortfeasor wished to cause damage is irrelevant is important with respect to the scope of compensation for damage.

The author of the paper is convinced that a discussion over the content and meaning of the prerequisites for delictual liability help to better understand the nature of delictual liability and thereby guide the Estonian judicial practice in a single and desired direction.