



Janno Lahe

*Docent of Civil Law,  
University of Tartu*

# The Importance of Distinguishing between Forms of Fault in the Law of Delict

## 1. Introduction

The tortfeasor's fault is one of the prerequisites for general delictual liability (general elements of a delict). Section 1043 of the Law of Obligations Act<sup>\*1</sup> (LOA) provides that a person (tortfeasor) who unlawfully causes damage to another person (injured party) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law. The burden of proving the lack of fault lies with the tortfeasor according to LOA § 1050 (1).

As a rule, the form of fault is irrelevant as regards the creation of delictual liability and the scope of the tortfeasor's liability. However, there are certain cases in the law of delict where the forms of fault have to be distinguished. Such distinction is often necessary to reach a fair final solution in a particular case.

The purpose of this article is to study the cases in which it is important to distinguish between forms of fault in the law of delict. The main sources for the article are the LOA, the Common Frame of Reference<sup>\*2</sup> (CFR) and the German Civil Code<sup>\*3</sup> (BGB). The article also makes use of relevant legal literature, case law, and the laws and regulations of various countries.

Apart from the introduction and summary, the article consists of six parts, the first of which gives a brief overview of the forms of fault, while the remaining parts analyse specific cases where a distinction between forms of fault may be relevant in the law of delict.

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<sup>1</sup> Võlaõigusseadus. – RT I 2001, 81, 487; 2007, 56, 375 (in Estonian). Available in English at <http://www.just.ee/23295>.

<sup>2</sup> The draft Common Frame of Reference, which may also be called the draft European Civil Code and which was prepared by the Study Group on a European Civil Code, is available at [http://www.sgecc.net/pages/en/texts/index.draft\\_articles.htm](http://www.sgecc.net/pages/en/texts/index.draft_articles.htm). 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.

<sup>3</sup> The text of the BGB is available at <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html>.

## 2. Forms of fault

The generally recognised forms of fault are intent, which is divided into direct and indirect intent, and negligence, which is divided into carelessness and gross negligence. According to LOA § 104 (2), the forms of fault are carelessness, gross negligence, and intent.

LOA § 104 (5) provides that intent is the will to bring about an unlawful consequence upon the creation, performance or termination of an obligation. CFR Article 3:101 provides that a person causes legally relevant damage intentionally when that person causes such damage either: (a) meaning to cause damage of the type caused; or (b) by conduct which that person means to do, knowing that such damage, or damage of that type, will or will almost certainly be caused.

LOA § 104 (5) defines the concept of direct intent. It may be said that the concepts of direct intent as defined in the LOA and CFR (Article 3:101 (a)) are principally similar in that they relate direct intent to a person's wish to cause damage or an unlawful consequence. As opposed to the LOA, the CFR also defines indirect intent (Article 3:101 (b)). In Estonia, indirect intent has been left to legal literature and case law to define.<sup>4</sup>

Like the concept of intent, the legal concepts of carelessness and gross negligence have been introduced in the Estonian positive law. LOA § 104 (3) provides that carelessness is failure to exercise necessary care. Necessary care should be assessed considering various aspects, especially the scope and likelihood of damage, as well as the expenses that a person should have incurred to avoid the damage.<sup>5</sup> It should be added that in the law of delict, carelessness should be also assessed under LOA § 1050 (2), which provides that the situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration upon assessment of the fault of the person.

According to CFR Article 3:102, a person causes legally relevant damage negligently when that person causes the damage by conduct which either: (a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the injured party from the damage suffered, or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case.

CFR Article 3:102 (b) is especially similar to LOA § 104 (3). An assessment of necessary care also involves deciding what kind of conduct could be expected from a reasonably careful person in the circumstances of the case. The Estonian law does not contain a provision similar to CFR Article 3:102 (a). However, there are provisions in the LOA that specify a person's care, see, e.g., LOA § 762 — the care of a provider of health care services. A major difference between CFR Article 3:102 and the LOA is that LOA § 1050 (2) requires that subjective circumstances should be taken into account when assessing carelessness.

Unlike the CFR, the LOA also defines gross negligence: LOA § 104 (4) provides that gross negligence is failure to exercise necessary care to a material extent. The meaning of "material extent" could be questioned. This is primarily a question of assessment that depends on the standards applicable in the relevant field. The author of this article believes that carelessness and gross negligence should be distinguished on the basis of factual circumstances and, in each particular case, one should try to answer the question of whether the person has failed to take the precautions that seem to be elementary in the particular situation.

## 3. Implication of forms of fault upon joint causation of damage

The importance of distinguishing between forms of fault may firstly become evident when determining the scope of liability in the relations between joint tortfeasors. Although joint tortfeasors bear solidary liability for compensating the injured party, their liability need not necessarily be equal. A fair division of liability can be reached and should be reached by taking various circumstances into account.

<sup>4</sup> See, e.g., I. Kull, M. Käerdi, V. Kõve. *Võlaõigus I. Üldosa* (Law of Obligations I. General Part). Tallinn 2004, p. 200 (in Estonian). It should be noted that indirect intent may be relevant, e.g., to the creation of liability under LOA § 1045 (1) 8), as well as, e.g., the division of the scope of liability in the relations between joint tortfeasors. The fact that LOA does not define indirect intent does not mean that indirect intent as such no longer exists.

<sup>5</sup> H. Kötz, G. Wagner. *Deliktsrecht*. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luchterhand 2001, p. 45. T. Tampuu has also stressed the importance of such factors. He believes that an assessment of a breach of the duty of care should also involve consideration of a reasonable person's understanding of the existence of duties of conduct or the circumstances precluding the unlawfulness of the act, and also whether the tortfeasor followed (especially public law) safety rules. See T. Tampuu. *Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus* (Tort Law in the Law of Obligations Act: General Problems and Liability). – *Juridica* 2003/2, p. 81 (in Estonian).

CFR Article 6:105 (1) provides that where several persons are liable for the same legally relevant damage, they are liable solidarily. As for the relationship between the solidary debtors themselves, the share of liability is equal unless different shares are more appropriate, taking into consideration all circumstances of the case and in particular fault or the extent to which a source of danger mentioned in Chapter 3 contributed to the occurrence or extent of the damage (2).

According to BGB § 426, joint debtors must compensate for the caused damage in equal parts, unless it is proved that the compensation obligation should be divided disproportionately. In the French law, the balance of liability in the event of joint liability depends on the weight of each person's breach. Where one tortfeasor is liable for strict liability and the other for *faute*, only the latter may remain liable as between the two persons.<sup>\*6</sup>

The form of fault is principally one of the factors regulating the relations between joint tortfeasors also in many other legal regimes. For example in Italy, the right of recourse of the person who compensated for damage depends on the person's fault and the gravity of the consequences of his or her act. The Hungarian jurist Harmathy claims that although the question of whether damage was caused intentionally or by negligence is usually irrelevant in cases of delictual liability, it is a decisive element in settling the mutual disputes between tortfeasors themselves, and is probably even more important than the act that caused the damage.<sup>\*7</sup> Also, according to Swedish civil law, the type of the tortfeasor's fault is decisive when determining the division of the tortfeasors' liability.<sup>\*8</sup>

In the Estonian law, the solidary liability of joint tortfeasors is set forth in LOA § 137 (1).<sup>\*9</sup> The relations between joint tortfeasors are governed by LOA § 137 (2), according to which in relations between the persons specified in subsection (1) (joint debtors), liability shall be divided taking into account all circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person.

This provision establishes an open list of circumstances that have to be taken into account in the division of liability between solidary debtors. The gravity of the non-performance should be thus considered in the first order, followed by the unlawful character of other conduct and finally the intensity of the risk (the degree of risk of the major source of danger). What should be taken into account as regards the unlawful character of other conduct may remain unclear, because the law does not distinguish between degrees of unlawfulness. One should probably be guided by the understanding that where, e.g., damage is caused by a violation of a provision of the Penal Code, the degree of unlawfulness is greater when compared to a violation of, e.g., property maintenance rules.

A comparison of LOA § 137 (2) with relevant provisions of the CFR shows that as opposed to the CFR, the LOA stipulates no direct obligation to take fault into account. However, considering that the fault of the tortfeasor is the most important aspect in the relations between several tortfeasors in the legal regimes of all the observed countries, it should be considered natural that "all circumstances" in LOA § 137 (2) cover the fault of the tortfeasors. The fact that the division of liability between solidary debtors should consider their fault has also been noted by the Civil Chamber of the Supreme Court (CCSC) in its decision of 25 September 2006 in matter No. 3-2-1-70-06.<sup>\*10</sup> The decision also notes, with due justification, that in the event of a tortfeasor's malicious unlawful act motivated by lucrative interest, the court may, based on the principle of good faith, impose the entire liability for compensation on the one of the solidary debtors who acted maliciously and pursued a lucrative interest.

Distinction between forms of fault is decisive where the tortfeasors (or one or some of them) are liable under the provisions governing strict liability. In such case, the division of the compensation obligation between the liable persons should take into account the wrongfulness of the behaviour and the form of fault of the tortfeasors pursuant to LOA § 1050 (3).<sup>\*11</sup>

<sup>6</sup> C. v. Bar, P. Cotthard. *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen*. Landberichte Frankreich, Griechenland. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1993, p. 53.

<sup>7</sup> A. Harmathy. *Introduction to Hungarian Law*. The Hague, London, Boston: Kluwer Law and International 1998, p. 118.

<sup>8</sup> S. Strömholm. *An Introduction to Swedish Law*. 2<sup>nd</sup> ed. Norstedts 1998, p. 313.

<sup>9</sup> A difference in the legal bases for the liability of the tortfeasors is irrelevant to the creation of solidary liability. See CCSCd, 7.12.2005, 3-2-1-149-05. – RT III 2005, 45, 441 (in Estonian).

<sup>10</sup> RT III 2006, 32, 274 (in Estonian).

<sup>11</sup> A situation where two major sources of danger have mutually caused damage to each other should be regarded separately from the events governed by LOA § 1050 (3). In CCSCd, 8.02.2000, 3-2-1-11-00, the CCSC noted that where possessors of several major sources of danger have jointly caused damage to themselves, the culpability of each such possessor is relevant in determining their civil liability. See RT III 2000, 5, 54 (in Estonian). This position has been reviewed, however in CCSCd, 24.09.2007, 3-2-1-75-07, the court found that liability independent of the culpability of the possessor of a major source of danger, i.e., strict liability, is applied even where the possessor of the major source of danger who caused the damage was not culpable of causing damage to another possessor of a major source of danger. In the event of the defendant's strict liability, the possible role of the plaintiff as the possessor of another major source of danger in causing the damage should be assessed as a basis for possible reduction of compensation. See RT III 2007, 31, 255 (in Estonian).

## 4. Implication of forms of fault upon reduction of compensation

Distinction between the forms of fault may be relevant to limiting the compensation payable for damage based on the principle of fairness.

The drafters of CFR have also come to the conclusion that in certain cases, the tortfeasor should be relieved of liability in full or in part, as CFR Article 6:202 provides that where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.

Also, § 44 (2) of the Swiss Civil Code<sup>\*12</sup> (ZGB) provides that where the tortfeasor would meet economic difficulties as a result of fully compensating for the damage, and if the tortfeasor did not cause the damage by gross negligence or intentionally, the court may reduce the compensation. However, according to the BGB and the French *Code Civil*<sup>\*13</sup>, a low degree of the tortfeasor's fault does not serve as a basis for reduction of compensation.

LOA § 140 (1) provides that the court may reduce the amount of compensation for damage if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason. In such case, all circumstances, in particular the nature of the liability, relationships between the persons and their economic situations, including insurance coverage, shall be taken into account.<sup>\*14</sup> It means that where damage was caused jointly, each tortfeasor can be ordered to pay a different amount of compensation under LOA § 140 (1).

Although LOA § 140 (1) does not expressly require that fault should be taken into account, it could serve as one of the criteria in the application of this provision. Namely, a low degree of the tortfeasor's fault could serve as a basis for reduction of compensation in addition to the other circumstances specified in LOA § 140.

While the CFR expressly provides that relief from liability is out of the question in the event of damage caused intentionally, LOA § 140 (1) does not contain such a limitation. However, LOA § 140 (1) can certainly be interpreted similarly to CFR: e.g., reduction of liability under the LOA should be out of the question where this would be fair considering the relations between the persons and their economic situation, but where the tortfeasor caused the damage intentionally (or by gross negligence).

## 5. Implication of the forms of fault upon compensation for non-pecuniary damage

The importance of distinguishing between forms of fault may also be apparent in deciding on the amount of compensation for non-pecuniary damage. It should be noted that the type of the tortfeasor's fault is an import basis for ordering compensation for non-pecuniary damage in the Federal Republic of Germany. Schlechtriem argues that compensation should take into account both the economic situation of the tortfeasor and the degree of his or her fault.<sup>\*15</sup> The CFR does not specify which circumstances should be taken into account when ordering the payment of compensation for non-pecuniary damage. CFR Article 6:203 (2) provides that national law determines how compensation for personal injury and non-economic loss is to be quantified.

The provisions of the LOA governing compensation for non-pecuniary damage (LOA § 130 (2) and § 134 (2)–(4) are relevant to the law of delict) do not expressly require the tortfeasor's fault to be taken into account when determining the amount of compensation. However, one may take the view that since determining the amount of compensation for non-pecuniary damage is not subject to clear criteria, it may be considered reasonable that a person who caused non-pecuniary damage intentionally is liable to a greater extent than a person who acted carelessly.<sup>\*16</sup>

<sup>12</sup> Schweizerisches Zivilgesetzbuch. Zürich: Schulthess Poligräphischer Verlag 1996.

<sup>13</sup> The French Civil Code. Text as published in: C. v. Bar, P. Gotthard (Note 6).

<sup>14</sup> It should be noted that the application of LOA § 140 (1) may fail as a result of the provisions of LOA § 139 (3). See CCSCd, 26.06.2006, 3-2-1-53-05. – RT III 2006, 33, 283 (in Estonian).

<sup>15</sup> P. Schlechtriem. *Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk* (Law of Obligations. Special Part. Fourth, revised edition). Tallinn: Õigusteabe AS Juura 2000, p. 302 (in Estonian).

<sup>16</sup> A direct reference to the requirement to consider the type and degree of culpability when determining the amount of compensation for non-pecuniary damage is made in § 9 (2) of the State Liability Act (riigivastutuse seadus). – RT I 2001, 47, 260; 2006, 48, 360, in Estonian).

The need to consider fault when deciding on compensation for non-pecuniary damage has also been confirmed by Estonian case law (e.g., CCSCd, 17.10.2001, 3-2-1-105-01<sup>\*17</sup>). Also in its decision of 22.10.2008, in matter No. 3-2-1-85-08, the Supreme Court noted that when ordering the payment of a reasonable amount of compensation for non-pecuniary damage, the court takes into account, regardless of the requests of the parties, the type and gravity of the offence, the offender's fault and its degree, the economic situation of the parties, the injured party's own role in causing the damage, and other circumstances, disregard for which could result in unfair compensation.<sup>\*18</sup>

## 6. Implication of the forms of fault upon reduction of compensation due to the injured party's own role in causing the damage

### 6.1. General

The delict law of most countries contains provisions according to which compensation can be reduced or refused if the injured party's own role in causing the damage (or his or her fault) is proved. However, there is no common position as regards, e.g., the form in or degree to which the injured party's fault may be considered when adjusting the compensation.

In order to explain the conceptual apparatus, it should be noted that the laws and theoretical literature of most countries mention namely the fault of the injured party as a basis for reduction of compensation: in the Federal Republic of Germany the relevant term is contributory fault (*Mitverschulden*); common law countries speak about contributory negligence.<sup>\*19</sup> In Estonia, LOA § 139 does not use the concept of the injured party's contributory fault. LOA § 139 (1) provides that if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage.<sup>\*20</sup>

It is noted in the decision of the CCSC of 11.05.2005, matter No. 3-2-1-38-05, that application of LOA § 139 (1) and (2) does not involve an assessment of the injured party's negligence, i.e., compensation can be reduced under the above provision even if the injured party was not culpable of causing the damage.<sup>\*21</sup> The author of this article agrees that LOA § 139 (1) is essentially also applicable where the injured party is not culpable. For example, the injured party's fault need not be taken into account if the damage was partly caused as a result of a danger for which the injured party is responsible, or if the damage resulted from the actions of persons for whom the injured party is responsible. However, the author still considers that in other cases, the question of whether the damage was partly caused by circumstances dependent on the injured party should often be answered with due regard to whether the injured party can be reproached for his or her conduct. As a rule, if the injured party has not behaved reproachably, the damage cannot be claimed to have resulted (at least) in part due to circumstances dependent on the injured party.<sup>\*22</sup>

From the legal dogmatic viewpoint, it is important to distinguish between the injured party's contributory fault and his consent to the damage being caused. The former concerns the scope of compensation; the latter is a circumstance precluding unlawfulness (LOA § 1045 (2) 2)).

It is noted in special literature that voluntary acceptance of risk is similar, though not identical to the consent of the injured party. A person acts at the person's own risk when the person voluntarily places himself or herself

<sup>17</sup> RT III 2001, 28, 105 (in Estonian).

<sup>18</sup> RT III 2008, 41, 282 (in Estonian).

<sup>19</sup> Markesinis notes that the continental European concept of the injured party's fault is a broader concept than contributory negligence, as it may also cover the injured party's intentional activity. See B. S. Markesinis. *The German Law of Obligations. Volume 2. The Law of Torts. A Comparative Introduction.* 3<sup>rd</sup> ed. Oxford: University Press 1997, p. 103.

<sup>20</sup> LOA § 139 (2) allows for a reduction of compensation also if the injured party failed to draw the attention of the person causing the damage to an unusually high risk of damage or to prevent the risk of damage or to perform any act which would have reduced the damage caused if the injured party could have reasonably been expected to do so.

<sup>21</sup> RT III 2005, 18, 187 (in Estonian).

<sup>22</sup> Even when compensation is reduced because of the inculpable injured party's role in causing the damage, the person's behaviour still needs to be assessed. Legal literature also generally affirms the possibility of taking an inculpable injured party's behaviour into account, because the question is not in the person's liability but in the principle that every person, even an inculpable person, has to incur the damage caused to the person by circumstances dependent on himself/herself. An example from general case law is the case where an 11-year-old child ran to the carriageway to get his ball and suffered damage as a result of a car running over him. In this case, the compensation was reduced by 75%. See R. Tieman. *Tort in a Nutshell.* 4<sup>th</sup> ed. London: Sweet & Maxwell 1996, p. 46.

in a situation the risky nature of which is generally known — *volenti non fit iniuria* (a plaintiff who risks the defendant's potential careless behaviour risks losing his defence).<sup>\*23</sup> CFR Article 5:101 (2) also mentions that the same applies (i.e., a person is relieved of liability to the injured party and any other damaged party) if the injured person, knowing the risk of damage of the type caused, voluntarily exposes himself to that risk and is to be regarded as accepting it. The LOA does not contain any provision similar to CFR Article 5:101 (2).<sup>\*24</sup>

## 6.2. Consideration for the injured party's contributory fault upon reduction of compensation

Before the LOA entered into force, the amount of compensation could be reduced in Estonia only in the event of the injured party's gross negligence (and intent) (Civil Code of the Estonian Soviet Socialist Republic<sup>\*25</sup>, § 462 (1)). The injured party's carelessness was knowingly left out of the bases for reduction of compensation.<sup>\*26</sup> This paved the way for a number of court decisions whose fairness is arguable: e.g., the compensation was not reduced in a situation where the injured party ran to the football goal after another player had scored a goal and lifted himself up on the goal's crossbar using his hands, as a result of which the goal fell on the injured party. The court admitted that although the injured party behaved carelessly, this did not serve as a basis for reduction of compensation.<sup>\*27</sup> LOA § 139 (1) does not limit the reduction of compensation the way § 462 (1) of the Civil Code of the Estonian Soviet Socialist Republic did.

It should be added that the Estonian courts have repeatedly taken the view that a compensation claim may be precluded or the tortfeasor's liability also limited, e.g., where the injured party failed without good reason to dispute an administrative act from which the damage resulted, while disputing the act would have prevented the occurrence or escalation of the damage.<sup>\*28</sup>

In the Federal Republic of Germany, if the injured party's culpable behaviour has contributed to the damage, the obligation and scope of compensation depend on various circumstances, especially the degree to which one or the other party caused the damage (BGB § 254 (1)). LOA § 139 (2) is similar to BGB § 254 (2). In German law, the contributory fault of the injured party does not result in a clearly defined legal consequence. The injured party's contributory fault may be so small that it is not considered at all, or it may be so important that it precludes a claim entirely.<sup>\*29</sup>

The injured party's fault or participation in the causation of damage as a basis for reduction of compensation is recognised in most legal orders. For example in France, where the injured party's participation in causing damage leads to the division of damage (with the exception of personal injury caused by a motor vehicle);<sup>\*30</sup> Switzerland (see ZGB § 44 (1)); as well as Sweden, where only the injured party's intention or gross negligence is taken into account<sup>\*31</sup>, etc.

In the UK, an injured party was not able to claim compensation before 1945 if the injured party himself was culpable in the damage (regardless of the extent). From 1945, when the Contributory Negligence Act came into force, an injured party's claim must not be dismissed if the injured party contributed to the damage. However, compensation is reduced to the degree deemed fair by the court, considering the injured party's role in causing the damage.<sup>\*32</sup>

<sup>23</sup> C. v. Bar, J. Shaw. *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales.* Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1993, p. 35.

<sup>24</sup> About voluntary acceptance of risk see, e.g., J. Lahe. *Riigikohtu praktika tähendus riskivastutuse edasiarendamisel (Implication of the Supreme Court Case Law for the Development of Strict Liability).* – *Kohtute aastaraamat 2007 (Courts Yearbook 2007).* 2008, pp. 99–105 (in Estonian).

<sup>25</sup> The Civil Code was passed by the Supreme Council of the Estonian Soviet Socialist Republic on 12 June 1964. – *ÜNT* 1964, 25, 115; *RT I* 1997, 48, 775 (in Estonian).

<sup>26</sup> E.g., a situation where a person ineptly performed a trampoline jump and received injuries has been classified as carelessness. The Tallinn Circuit Court found that since the plaintiff was a beginner firefighter/rescuer and had no theoretical preparation for or practical experience in trampoline jumps, the lack of skill to perform a trampoline jump correctly could not classify as gross negligence. See Tallinn Circuit Court decision, 24.05.2000, II-2/698/2000. Also classified as gross negligence by the Supreme Court was an employee's conduct who started to fix a breakdown in an electrical system on his own initiative and without guidance. See CCSCd, 13.06.2002, 3-2-1-79-02. – *RT III* 2002, 19, 230 (in Estonian).

<sup>27</sup> Tartu CCd, 30.04.2002, 2-2-151/2002.

<sup>28</sup> See, e.g., CCSCd, 24.12.2002, 3-2-1-153-02 (*RT III* 2003, 2, 25; in Estonian) and Tartu CCd, 27.12.2002, 2-3-206/2002.

<sup>29</sup> E. Deutsch. *Unerlaubte Handlungen, Schadenersatz und Schmerzengeld.* 3., ergänzte Aufl. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1995, p. 91.

<sup>30</sup> C. v. Bar, P. Cotthard (Note 6), p. 46.

<sup>31</sup> S. Strömholm (Note 8), p. 312.

<sup>32</sup> V. Harpwood. *Principles of Tort Law.* 4<sup>th</sup> ed. London, Sydney 2000, p. 460; C. v. Bar, J. Shaw (Note 23), p. 34.

CFR Article 5:102 (1) provides that where the injured person contributes by their own fault to the occurrence or extent of legally relevant damage, reparation is to be reduced according to their degree of fault. However, pursuant to CFR Article 5:102 (2), no regard is to be had to: (a) an insubstantial fault of the injured person; (b) fault or accountability whose contribution to the causation of the damage is insubstantial; (c) the injured person's want of care contributing to that person's personal injury caused by a motor vehicle in a traffic accident, unless that want of care constitutes profound failure to take such care as is manifestly required in the circumstances. According to CFR Article 5:102 (3) and (4) compensation is likewise to be reduced if the person for whom the injured person is responsible contributes by their fault to the occurrence or extent of the damage, and if and in so far as any other source of danger for which the injured person is responsible under Chapter 3 contributes to the occurrence or extent of the damage.

While LOA § 139 (1) is principally similar to CFR Article 5:102 (1), although the former does not mention the injured party's fault, the LOA does not contain any provisions similar to CFR Article 5:102 (2) (a) and (b). LOA § 139 (1) does, however, allow for disregarding the injured party's insubstantial fault. Comparable to CFR Article 5:102 (2) (c) is LOA § 139 (3), but the latter applies not only to traffic accidents but to all events resulting in the death of or damage to the health of a person.<sup>\*33</sup>

The LOA does not contain any provision similar to CFR Article 5:102 (3), but it may be asked in the context of the LOA whether the injured party's role involves the culpable conduct of persons for whom the injured party is responsible. LOA § 139 allows for an affirmative answer, because the conduct of persons for whom the injured party is liable is a circumstance dependent on the injured party. However, it should be noted that the author of this paper considers possible an interpretation according to which in the events when the damage to the injured party was caused by a person for whom the injured party is responsible and by a third person, these persons should be treated as joint tortfeasors and LOA § 139 should not be applied.

LOA § 139 is not consistent in its non-use of the concept of the injured party's fault. Namely, where damage takes the form of a person's death or damage to their health, compensation may be reduced only if the injured party's intent or gross negligence contributed to the damage. Therefore, in the event of causing the death or damage to the health of a person, compensation cannot be reduced on the grounds that the injured party behaved carelessly or the damage resulted from a danger for which the injured party was liable, but in the realisation of which the injured party was not at fault (by way of gross negligence or intent). The reasons behind these special provisions are not unambiguous: it is not clear whether the tortfeasor's stricter liability can be justified only by a grave adverse result. A court could also make a fair decision without the special provisions because its discretionary power under LOA § 139 is wide enough.

The author believes that regulation which does not distinguish between the forms of fault of the injured party and allows for a reduction of compensation taking into account the injured party's culpable conduct in any form is justified. A fair decision can be made only if all the circumstances of causation of the damage are assessed thoroughly, including both the tortfeasor's and the injured party's fault.<sup>\*34</sup> The relevant provisions of the German and Swiss civil codes, which are essentially close to the Estonian law of delict, employ the same principle.

Where causation or escalation of the damage was caused by the injured party's intentional act, the question arises whether and on what conditions the tortfeasor should be claimed compensation at all if the injured party's self-damage was intentional.

It is noted in the decision of the CCSC of 22.10.2008, matter No. 3-2-1-85-08, that the injured party's intent according to LOA § 139 (3) means the intent of self-damage, not the injured party's intentional acts that only contributed to pecuniary damage. The injured party's intent as a contributor to damage and a circumstance reducing compensation for pecuniary damage under LOA § 139 (3) may occur when the injured party intentionally increased his or her damage after the damage was caused, such as having refused treatment. Also, in the application of LOA § 130 (2), if the injured party's non-pecuniary damage increased as a result of the injured party's intent; this influences the amount of monetary compensation for non-pecuniary damage.

As regards the injured party's intent, it has to be identified to what extent the damage was caused by the injured party's act. It may be concluded that the injured party's intentional act was decisive in the causation of damage. It may also be revealed that the chain of causality was broken as a result of the injured party's act. In such case, the question no longer concerns reduction of compensation but the lack of causality between the tortfeasor's act and the damage. Where the injured party's intentional act has not fully replaced the cause, both the tortfeasor's and the injured party's contribution to the damage must be assessed and LOA § 139 must

<sup>33</sup> According to LOA § 139 (3), in the event that the death of a person or damage to the health of a person is caused, the compensation for damage may be reduced on the grounds of the aggrieved person's contribution to the damage only if the aggrieved person contributed to the damage intentionally or through gross negligence. The restriction does not apply to the extent that the injured party is compensated for the damage by an insurer (LOA § 139 (4)).

<sup>34</sup> Markesinis is sceptical of the practical application of the equal assessment of both parties' faults; he finds that the courts may be much less eager to assess the injured party's fault than to establish the tortfeasor's fault, especially where, e.g., the tortfeasor's liability was insured. See B. S. Markesinis (Note 19), p. 104.

be applied accordingly. The question of whether the chain of causality was broken as a result of the injured party's act should be answered based on the circumstances of the particular case.

## 7. Implication of the forms of fault in a delict arising from violation of a protective provision or conduct contrary to good morals

While the previous parts of the article focused on the importance of distinguishing between forms of fault in the context of the scope of liability, forms of liability may also be relevant to the creation of liability. This means that a specific delict may presume a certain form of the tortfeasor's fault. A delict arising from the violation of a protective provision is one such delict.

Conduct contrary to protective provisions is primarily understood as action that violates a legal duty and results in damage to another person. Schlechtriem lists the provisions of the Penal Code, as well as relevant provisions of the Constitution, private law, procedural law, and administrative law as the main protective provisions.<sup>35</sup>

BGB § 823 (2) I provides that anyone who violates a law enforced to protect another person also has the obligation to compensate for the damage referred to in subsection 1 of the same section. The second sentence adds that if according to the content of the law its violation is possible without fault, the compensation obligation arises only in the event of culpable violation. A protective provision may be constructed so that its violation can be only intentional. It is also possible that a protective law can be violated both intentionally and by negligence. The cases where intent is a precondition for violation of a protective provision are identified by way of interpretation of the provision.<sup>36</sup>

Violation of a protective provision is also the basis for liability in the British<sup>37</sup> and French law. According to the *Code Civil*, violation of a legal provision, which may be a formal law or the legislation of an administrative body, results in *faute*.<sup>38</sup>

LOA § 1045 (1) 7) provides that the causing of damage is unlawful if, above all, the damage is caused by behaviour which violates a duty arising from law. The author finds that "a duty arising from law" should be interpreted expansively in this provision: a duty may be contained in a law in the formal sense or in another type of legislation. A protective provision may thus consist in a provision of property maintenance rules, which obliges the owner of an immovable to maintain the sidewalk adjacent to the immovable (e.g., de-icing in winter). If the owner of the immovable breaches this duty, his or her behaviour is unlawful pursuant to LOA § 1045 (1) 7) and the provision that prescribed the duty.

A provision of the Penal Code may also serve as a protective provision. In such case, the prerequisites for criminal liability are relevant to the law of delict, because a protective provision of penal law can be claimed to have been violated only if the offender's conduct contains all the prerequisites for criminal liability, including fault.<sup>39</sup>

If a protective provision can only be violated intentionally, one may ask whether careless violation can also result in a compensation obligation, because fault seems to be present. This question has to be answered negatively, because if the subjective element of intent is a necessary prerequisite for violation of the protective provision, then careless violation is not violation of the provision at all. At the same time, such behaviour can be unlawful for other reasons, such as damaging an absolutely protected legal right.

Intentional behaviour against good morals is a delict that is related to a specific form of fault. The German BGB § 826 sets out the (minor) general elements of compensation for damage: a person who, against good morals, intentionally causes damage to another person, must compensate the other person for the damage caused.<sup>40</sup>

<sup>35</sup> P. Schlechtriem (Note 15), p. 263.

<sup>36</sup> O. Mühl, W. Hadding. *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Band 5/2. Stuttgart, Berlin, Cologne: Verlag W. Kohlhammer 1998, pp. 118–119. It should also be noted that the German civil law presumes the fault of a person who violates a protective provision.

<sup>37</sup> C. v. Bar, J. Shaw (Note 23), p. 42.

<sup>38</sup> K. Larenz. *Lehrbuch des Schuldrechts*. Erster Band. Allgemeiner Teil. 13., neuarbeitete Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung 1982, p. 834.

<sup>39</sup> See also D. Medicus. *Bürgerliches Recht*. 18. neuarbeitete Auflage. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag 1999, p. 456.

<sup>40</sup> E.g., the Swiss ZBG § 41 (2) establishes similar elements of liability to BGB § 826. The British law also contains certain delicts in which case the compensation obligation depends on the tortfeasor's intent, such as trespass. See G. H. L. Fridman. *Torts*. London, Ontario, Canada: Waterlow publishers 1990, p. 12. The Civil Code of the Estonian Soviet Socialist Republic did not contain this type of a basis for liability.

Intent has to be aimed only at causing damage (not at being contrary to good morals), so it is sufficient to know the factual circumstances. In this context, intentional causing of damage also occurs in the event of merely indirect intent.<sup>\*41</sup> Schlechtriem notes that in addition to contrariness to good morals, intention has to be established separately, while behaviour contrary to good morals may be an indirect proof of intent.<sup>\*42</sup>

LOA § 1045 (1) 8) provides that the causing of damage is unlawful if, above all, the damage is caused by intentional behaviour contrary to good morals. This is the “small general clause” of delictual liability. LOA § 1045 (1) 8) is based on relevant examples from the Germanic law. These are the subjective elements of an act, which the author believes can be also considered met if a person acted with indirect intent. It should be stressed that the delict described in LOA § 1045 (1) 8) cannot be committed by way of carelessness or grave negligence. The CFR does not contain the small general clause of delictual liability similar to LOA § 1045 (1) 8).

There is no universal answer to the question of what constitutes behaviour contrary to good morals. The Supreme Court has found that when a person purchases a thing from a person who may be subject to an obligation under the sales contract due to the exercise of a right of pre-emption with respect to the same thing, this does not constitute intentional behaviour contrary to good morals within the meaning of LOA § 1045 (1) 8) even if the person discloses the possibility of exercising the right of pre-emption.<sup>\*43</sup>

If A asks B the way and B intentionally guides A in the wrong direction, as a result of which A misses his flight and loses an opportunity for a good business deal, this could be regarded as behaviour against good morals. In this example, B’s behaviour could be motivated by B’s own wish to sign a contract with A’s business partner. In such case, B would have to compensate A for the damage caused (purely economic damage in this case). If B was careless in his guidance (e.g., B himself was not quite sure if he was correct), no liability should ensue.

## 8. Conclusions

While distinction between forms of fault is usually of little relevance in the law of delict, there are certain groups of cases where forms of fault can be decisive to the final solution of the case. It should be kept in mind that distinction between forms of fault may be very important, even where the relevant legal provisions do not directly refer to the need for such distinction. In the context of the Estonian law of delict, forms of fault are relevant in the following cases:

- division of liability between tortfeasors;
- reduction of compensation under LOA § 140 (1);
- ordering the payment of compensation for non-pecuniary damage;
- reduction of compensation due to the injured party’s contribution to the damage;
- delicts arising from violations of protective provisions and intentional behaviour against good morals.

These cases are not specific to Estonian law, but are more or less characteristic of most legal orders. It may be said that, e.g., in the German law, forms of fault are relevant to almost all of the aforementioned cases.

A comparison of the provisions of the CFR and LOA suggests that despite the different wording of some of the relevant provisions in these two instruments, they allow for arriving at the same end result in many cases. This is true both in the events of dividing liability between tortfeasors or reducing compensation according to the principle of fairness, but also where compensation is reduced due to the injured party’s own contribution to the damage.

<sup>41</sup> E. Deutsch (Note 29), p. 126.

<sup>42</sup> P. Schlechtriem (Note 15), p. 270.

<sup>43</sup> CCSCd, 8.05.2008, 3-2-1-37-08. – RT III 2008, 21, 144 (in Estonian).