The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective

Janno Lahe

Abstract

The fault of the wrongdoer is one of the preconditions for general tort liability. Nowadays, fault-based liability and strict liability are two equally important forms of liability that are not polar opposites but, rather, complement one another. This article focuses on the meaning of the fault of a tortfeasor. It considers the notion of fault in two European model rules (the Draft Common Frame of Reference and the Principles of European Tort Law), in the Estonian Law of Obligations Act, and also makes reference to German, French, English, and Russian tort law. We shall begin with a comparative discussion of the questions of general liability based on fault, fault capacity, various forms of fault, the burden of proving fault, and the importance of differentiating those forms of fault. Thereafter, we will treat the issues of fault in the context of liability for torts committed by another person and, also, borderline issues between fault-based liability and strict liability. This analysis seeks to offer the reader a basis for determining whether the regulations of Estonian tort law are justified or whether amendments should be considered within such a comparative-law framework.

Keywords

burden of proof, fault, negligence, standard of care, tort law

1. Introduction

One of the main areas of research in the field of tort law is the question of what triggers tort liability, i.e., the grounds for tort liability. The fault of the wrongdoer is one of the preconditions for general tort liability and, at the same time, one of the oldest topics of debate in jurisprudence.

This article focuses on the meaning of the ‘fault’ of a tortfeasor according to the tort-law part of the 2009 Draft Common Frame of Reference (DCFR), the 2005 Principles of European Tort Law (PETL) as composed by the European

---

Group on Tort Law, and the Estonian Law of Obligations Act (LOA). The author of this work has decided to compare Estonian tort law with the DCFR and PETL because these model laws represent the best reflection of contemporary approaches to, and developments in, the field of European tort law. In doing so, addition, he also will consider the notion of fault in the three largest European Union jurisdictions—Germany, France, and England—as well as in the Russian Federation.

Thus, this article seeks to provide the reader with a comparative analysis of the concept of fault within the context of the DCFR, PETL, and the LOA—as well as the above-mentioned European countries—and also maps the similarities and differences in those legal acts with regard to the notion of the fault of the wrongdoer. Such an analysis offers one a basis to determine whether the regulations in the LOA are satisfactory or whether amendments should be considered based on the respective norms of the DCFR, PETL and/or (one or more of) the above-mentioned national laws. However, the reader should be aware noted that in this article, only Estonian case law has been exhaustively analyzed; to the contrary, the case law of Germany, France, England, and Russia represents an area in which further research should be carried out.

In terms of the scope of the analysis, only central topics regarding the concept of fault will be dealt with in this article. Several subjects—of potential interest—will not be discussed, e.g., the connections between fault and causality and the links between unlawfulness and fault. The problems concerning the fault of a legal entity also remain outside the scope of the article. As should already be evident from the title, the fault of the victim in the context of reducing damages also will not be discussed here.

The article consists of four parts: the first of which discusses general liability based on fault and fault capacity; the second part provides a discussion of the various forms of fault, the burden of proving fault, and the importance of differentiating between those forms of fault; the third is devoted to the issue of fault in the context of liability for torts committed by another person; while the fourth deals with borderline issues between fault-based liability and strict liability.

---

2 Principles of European Tort Law: Text and Commentary (Springer-Verlag, Vienna, 2005), available at <http://civil.udg.edu/tort/Principles>. PETL has been proposed as a comprehensive system for tort liability. It likewise is intended to serve as a guideline for national and EU legislators.

3 The most important Estonian legal acts are available in English at <http://www.legaltext.ee>.
2. Fault of the Tortfeasor as a Precondition for Tort Liability and Fault Capacity

2.1. Fault as a Precondition for Tort Liability

General tort liability may be defined as a bundle of certain preconditions that trigger the obligation of a tortfeasor to compensate the victim for damages caused by said tortfeasor. One of these preconditions is the fault of the person who has caused the damages. This means that not every event attributable to the tortfeasor inflicting damage upon the plaintiff will result in liability.

The role of fault as a prerequisite of tort liability has been described by Pierre Widmer in the mid-2000s as essential and decisive. Fault is often considered as the fundamental and—in a certain sense—socially and ethically pre-eminent principle of responsibility. Fault allows and justifies the imputation of liability.

An act that is performed with careless disregard for the rights and interests of others seems to be not only legally wrong but, also, a moral failing—people ought to bear the costs of their moral failings.

At the end of the 2000s, Jean-Sébastien Borghetti noted that legal or juridical fault is just one type of fault among many others and that it coexists with moral fault, political fault, fault in a sporting context, etc. It is true that the basis for such an essentialist position—which would postulate the existence of an absolute concept of fault without any qualifications or modifications—is debatable. To propose a single definition of civil fault is not as easy as it seems since there are, in fact, different types of civil fault.

Article 1:101(1) DCFR establishes the principle that a person who suffers legally relevant damage has a right to indemnification from the person who has caused the damage, whether intentionally or negligently, or who otherwise is accountable for causing the damage. Article 1:101(2) PETL provides that damage

---

6 Ibid., 334.
8 In different legal orders, fault can be defined in different ways. In the French context, for example, unlike in Germany, fault (das Verstoßden in German) is a broad concept that, in practice, is equated with wrongfulness. The fundamental differences between the German, English, and French tort laws are considered, for instance, in Cees van Dam “European Tort Law and the Many Cultures of Europe”, in Thomas Wilhelmsen, Elina Paunio, and Annika Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2007), 57-80.
may be attributed, in particular, to the person whose conduct, constituting fault, has caused said damage.\textsuperscript{10} Liability under the 1994 Russian Civil Code (CC) is also based on the fault principle.\textsuperscript{11} Article 1064(2) Russian CC provides that a person who has caused damage shall be released from a duty to indemnify the victim where the person proves that s/he was not at fault in causing the damage. However, it is appropriate to note here that the law also may provide for compensation of damage in the absence of the fault of the tortfeasor.\textsuperscript{12} Similarly, Article 1043 LOA provides that a person (tortfeasor) who unlawfully causes damage to another must compensate the victim for the damage if the tortfeasor is at fault in causing the damage or is liable pursuant to the law. According to a 2007 judgment of the Estonian Supreme Court, the element of fault is the last to be checked in the context of assessing general tort liability, \textit{i.e.}, before deciding on the question of fault, it must first be verified that the person has inflicted damage on another and that such acts were unlawful.\textsuperscript{13}

It can be asserted, however, that the question of the tortfeasor’s fault does not (yet) play a crucial role in the practice of Estonian tort law. By and large, disputes in the Estonian courts over the question of whether a tortfeasor is at fault are quite rare in practice. In general, the courts only state that the tortfeasor has satisfied the burden of proof that s/he is not at fault and pay no further attention to the question. Hence, it would be beneficial if the Supreme Court—every now and then—reminded the lower courts that fault \textit{can have} a decisive importance for the question of the defendant’s liability, and that fault \textit{must be assessed} as thoroughly as causation and unlawfulness, for instance.\textsuperscript{14}

\textsuperscript{10} According to the same PETL provision, damages are also attributable to a person whose abnormally dangerous activity has caused said damages or whose auxiliary caused the damages within the scope of his or her functions.


\textsuperscript{12} The Russian Federation (RF) Civil Code (30 November 1994, with subsequent amendments) No.51-FZ, \textit{Sobranie Zakonodatel’stva Rossii Rossiiskoi Federatsii} (hereinafter \textit{SZRF}) (1994) No.32 item 3301. There have been several translation of the RF CC; one is by Alexei N. Zhiltsov and Peter B. Maggs (transl.), \textit{Civil Code of the Russian Federation (English and Russian Editions)} (Infotropic Media, Moscow, 2010, 2nd rev. ed.).

\textsuperscript{13} Estonian Supreme Court (31 May 2007) Case No.3-2-1-54-07. The plaintiff claimed compensation from the defendant for the damage caused by a crossing gate that fell on the plaintiff’s head in the parking garage administered by the defendant. The lower courts dismissed the claim, but the Supreme Court sent the case for a new hearing to the Circuit Court so that it again could scrutinize the preconditions of the liability of the tortfeasor. The decisions of the Supreme Court are available in Estonian at <https://www.riigikohus.ee>.

\textsuperscript{14} For this reason, Estonia has little legal practice on the question of fault. In Estonian legal literature, however, the issue of fault has gained some attention. See, for instance, Janno Lahe, \textit{Süü deliktiõiguses} (University of Tartu, Tartu, 2005).
Nils Jansen has noted, in 2007, that fault-based liability is a cornerstone of European tort law; an assumption that wrongful behavior causing damage normally makes the wrongdoer liable for the damage caused.15

For the sake of clarity, it should be noted that the wrongdoer can be liable even without fault: this primarily relates to liability for damages arising from a major source of danger (e.g., under Arts.1057-1060 LOA, this could be a motor vehicle, a dangerous structure or other object, or a potentially dangerous animal) and liability for manufacturing defective products (Arts.1061-1067 LOA). Liability—regardless of fault—is regulated in Article 1079 Russian CC and in Articles 3:201–3:208 DCFR; PETL also includes provisions on strict liability (Chapter 5).

A question could be raised about the relevance of fault-based liability and the proportion of cases in practice that are resolved according to strict-liability rules. In this regard, a 2005 PETL commentary has argued that the bases of liability are not intended to be in a descending hierarchy. This means that liability based on fault is not seen as the fundamental category of liability and that all other forms of liability as exceptions but, rather, as different areas of liability based on different reasons that exist side-by-side.16

The author of this article concurs and is of opinion that fault-based liability and strict liability are two equally important forms of liability: not polar opposites but, rather, complementary to one another. The proximity of fault-based liability and strict liability—and how best to draw a line between the two—is another issue altogether (which will be dealt with in the last part of this article). To sum up, the fault of the tortfeasor as a precondition for liability is treated similarly in the LOA, the Russian CC, the DCFR, and PETL—all containing provisions governing both fault-based liability and strict liability.

2.2. Lack of Fault Capacity as an Exclusion to Liability

In order for a tortfeasor to be liable under the general fault-based liability rules, the tortfeasor must have “fault capacity” (die Deliktsfähigkeit in German, deliktivõime in Estonian, deliktosposobnost’ in Russian). This is the capacity of a person to be liable for the damages that s/he has caused; for example, such capacity may be lacking as the result of being underage or incapacitated.

So, under Article 3:103(2) DCFR, children under the age of seven are deemed to lack fault capacity. Children between the ages of seven and seventeen are deemed to have fault capacity but are deemed liable only if they have failed

---


16 Helmut Koziol, “Basic Norm”, in Principles of European Tort Law, op.cit. note 2, 20. Pierre Widmer (in Principles of European Tort Law, op.cit. note 2, 70) is quoted as describing fault to be “a pre-eminent basis of liability”.

---
to observe a level of care that could reasonably be expected of a child of the same age in the same situation (Art.3:103(1)). Consequently, in the case of underage children, a standard of care applies that takes their young age and limited experience into account.\(^\text{17}\) Contrary to the DCFR, PETL does not provide an absolute exclusion of liability for underage children, and there is no fixed age limit to mark the lack of fault capacity.\(^\text{18}\) Nevertheless, the standard of care required under Article 4:102(1) may be adjusted according to a person’s age (Art.4:102(2)). This rule also can be applied to individuals whose competences and capacities are diminished as a consequence of being elderly.\(^\text{19}\) It should be noted that, contrary to German law, there is no fixed age limit for fault capacity in French or English law.\(^\text{20}\)

Unlike the provisions in the DCFR and PETL, Article 1052(1) LOA provides that all children below the age of fourteen are deemed to lack fault capacity; the same age limit also is prescribed in the Russian CC (Art.1073(1)).

To sum up, the regulation regarding the fault capacity of underage children in the LOA, the DCFR, and PETL differs remarkably.\(^\text{21}\) The author is of opinion that the age limit prescribed in the LOA (and the Russian CC) should be lowered because children even below the age of fourteen often are capable of understanding the meaning of their actions. This can be claimed with greater certainty in the case of intentional acts; but, also, the same probably will hold true in the case of damage caused through negligence.\(^\text{22}\) Therefore, the DCFR rule—which

---

17 von Bar, *op.cit*. note 1, 603.
19 *Ibid.*, 80. This means that PETL has adopted a very flexible system. The question of whether or not a person had sufficient insight into, and control over, her/his behavior has to be answered on a case-by-case basis, according to the specific mental state of that person.
20 According to Art.828(1) German Civil Code (*BGB*) (available at <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html>), children up to the age of seven are deemed to lack fault capacity. Children between the ages of seven and seventeen are deemed liable if they had a proper understanding of their actions and the consequences entailing liability (Art.828(3)). Under French law, there is no specific age threshold at which children are deemed to obtain fault capacity. See von Bar, *op.cit*. note 1, 605-606. Likewise, English tort law has no fixed age of responsibility. In the case of negligence by a child, the question of breach of duty is determined by asking whether the defendant behaved like a reasonable child of that age. See W.V. Horton Rogers, “Fault under English Law”, in Widmer, *op.cit*. note 5, 71.
21 This may be due to the fact that this issue is treated differently in various national legal systems.
22 In Russian law, there has been some debate over the matter of lowering the age limit during the Soviet era, albeit for reasons other than the degree of a child’s maturity. According to Art.451 of the 1964 Russian Soviet Federative Socialist Republic (RSFSR) Civil Code, the minimum age for fault capacity of minors was fifteen. Given that for some serious offenses the minimum age for fault capacity was fourteen in the 1960 Russian Soviet Federative Socialist Republic Criminal Code (Art.10(1)), some argued for the need to unify the age limit of civil and criminal liability. See Nikolai Sergeevich Malein, “Poniatie i osnovanie imushchestvennoi otvetstvennosti”, *Sovetskoe gosudarstvo i pravo* (1970), 36-43, at 41. Consequently, the age limit was lowered to fourteen by the drafters of the RSFSR CC, after which there has been no particular discussion on the matter in the Russian legal literature. As for German,
allows flexibility with regard to torts committed by children between the ages of seven and seventeen—is more appropriate. The PETL rule likewise allows for flexibility but fails to answer the question of how precisely to verify the standard of care applicable to a two-year-old, for example. Consequently, the approach taken in Article 3:103 DCFR—according to which there is no need to evaluate expected standards of care with regard to children below the age of seven—seems more realistic since, in practice, verification of such a standard of care is hardly possible. Moreover, it seems reasonable to protect such young minors from tort liability to avoid situations where a person would be subject to considerable indebtedness for such cases by the time she reaches the age of majority.

In addition to the age factor, an individual may lack fault capacity due to a disability. According to the DCFR, mental disabilities do not automatically exclude tort liability. So, under Article 5:301(1) DCFR, a person who is mentally incompetent is liable only where this would be equitable, having regard to the mentally incompetent person’s financial means and, also, to all the other circumstances of the case. In the DCFR, liability is limited to reasonable recompense. Depending on the circumstances, mental disabilities may lead to a reduction of liability or even to the exclusion of liability. As opposed to the provision contained in the DCFR, PETL prescribes the same rules regarding those who are mentally challenged as it does with regard to underage persons; i.e., that they do not lack fault capacity per se but, rather, that the standard of behavior applicable to them should be adjusted according to their mental or physical capacities (Art.4:102(2)). Mental incompetence also excludes delictual liability in Russia and Germany, but not under French or English law.

French and English law, determining the age limit is not an issue since (as mentioned in footnote 20 above) the exact age of the minor is either not particularly critical (Germany and England) or totally irrelevant (France).

25 von Bar, op.cit. note 1, 604.
24 Ibid.
25 A person is to be regarded as mentally incompetent if s/he lacks sufficient insight into the nature of his or her conduct, unless the lack of sufficient insight is the temporary result of his or her own misconduct (Art.5:301(2)).
26 This is a compromise that should balance the interests of the tortfeasor as well as those of the victim. See von Bar, op.cit. note 1, 872.
27 Ibid., 581.
28 In particular, the liability of individuals without active legal capacity (declared by a court decision) is excluded; see Art.1076 Russian CC. Art.1077 Russian CC provides that damage—caused by a person with limited legal capacity as a consequence of the abuse of alcoholic beverages or narcotic substances—shall be compensated by the tortfeasor her/himself. As to the liability of a person who could not understand the meaning of her/his acts or direct them as a consequence of her/his psychic disorder, see Art.1078 Russian CC.
29 Art.827 BGB provides that a person is not liable for damage that s/he has caused to another while in a state of unconsciousness or in a state of pathological mental disturbance that precluded the exercise of free will. If the person has temporarily induced such a state in her/himself with alcoholic beverages
Article 1052(2) LOA provides that a person shall not be liable for causing damages if they could not understand the meaning of their actions or control them.\(^{30}\) The second sentence of this article establishes that temporary disorders—caused by alcoholic beverages or by narcotic or psychotropic substances—should be taken into consideration only in cases where the tortfeasor is under the influence of such substances through the fault of another individual.

In comparing the rules regarding incapacitated persons in the DCFR and the LOA, we see that the differences are insignificant as the Estonian legal order is also familiar with so-called 'justice-based liability' of individuals who lack fault capacity.\(^{31}\) Article 1052(3) LOA applies to both those below the age of fourteen and to those who lack fault capacity due to a mental disability. This provides that a person who—pursuant to sections 1 or 2 of Article 1052—is not liable for damage nevertheless is held to be liable for damage caused by her/himself if it would be unjustified with regard to the victim to release the person from liability considering the tortfeasor's age, stage of development and mental state, the type of act, the financial situation of the persons concerned (including existing insurance coverage or insurance that such persons could normally be presumed to have) as well as other circumstances.

However, the present author is of the opinion that such justice-based liability should presume the objective fault of the respective person who is lacking fault capacity. Namely, in the first stage of the application of justice-based liability, one should ask whether the tortfeasor's behavior would be reprehensible had s/he possessed full fault capacity. Only where the answer to that question would be in the affirmative should the remaining preconditions for the application of justice-based liability be checked. The need to take objective fault into account also is supported by Articles 3:103(3) and 5:301(1) DCFR (regulating justice-based liability of minors).\(^{32}\) In the context of PETL, this question does not arise directly.

Concerning the LOA, the above claim is further supported by the fact that justice-based liability does not apply where the tortfeasor possesses full fault or similar means, s/he is then responsible for the damage unlawfully caused in this state as if s/he were responsible as a result of negligence; responsibility does not ensue if the person came into this state without fault. Art.489(2) French Civil Code (available at <http://www.legifrance.gouv.fr>), provides that a person who has caused damage to another when s/he was suffering from a mental disorder nonetheless is liable to pay compensation. Under English law, the position of mentally incompetent persons is uncertain. See von Bar, \textit{op.cit.} note 1, 880.

\(^{30}\) A condition whereby an individual is incapable of understanding (or controlling) her own acts due to dementia or mental illness—although other illnesses may result in a similar condition. Old age alone is not sufficient if it is not accompanied by the inability to understand and control one's acts.

\(^{31}\) 'Justice-based liability': \textit{die Billigkeitshaftung} in German, öiglavastutus in Estonian; however, I am not aware of the use of a term to reflect this concept in Russian. Minors below the age of fourteen and mentally incompetent persons still might be liable according to Arts.1073(4), 1076(3) and 1078(1) Russian CC.

\(^{32}\) See von Bar, \textit{op.cit.} note 1, 604.
capacity but is not at fault with respect to causing the damages. It would undoubtedly devastate legal certainty if, in each individual case, one would have to evaluate what the sense-of-justice says rather than simply determine whether or not the preconditions for general tort liability have been fulfilled. Moreover, it would be illogical for the victim to be placed in a more favorable position when damaged by a person without fault capacity as opposed to being harmed by a person possessing full fault capacity but who was not at fault. Unfortunately, the present author is not aware of any Estonian court decisions in which a court has applied justice-based liability according to Article 1052(3) LOA.

In a nutshell, one could conclude that the issue of fault capacity and the lack thereof is dealt with in rather different ways in the sources of law compared above. Although, in clear-cut cases (e.g., damages caused by a three-year-old), the outcome under the DCFR, PETL, the Russian CC and the LOA would probably be similar, the same would not necessarily be true in more complex cases (e.g., damages caused by a twelve-year-old). Potential differences are smoothed over by the justice-based liability of minors and mentally challenged persons as recognized in both the DCFR and the LOA.

Nonetheless, the author is of opinion that—in a fashion similar to the DCFR and PETL—the age limit of fault capacity in the LOA should be adjusted to allow for more flexibility. As noted above, the rule contained in Article 3:103 DCFR appears to be quite reasonable since, on the one hand, it protects very young minors; on the other hand, it allows courts to take a more flexible approach with respect to torts committed by minors of a more mature age.

3. Forms of Fault and the Importance of Distinguishing Various Forms of Fault

3.1. Intent

Intent as a form of fault is certainly the clearest and strongest basis for liability; however, in tort law, intent is less significant than negligence since most torts are committed negligently. According to Article 3:101 DCFR, legally relevant damage is considered to have been caused intentionally when a person causes such damage either: (a) when meaning to cause damage of the type caused; or (b) through intentional conduct, knowing that such damage, or damage of that type, will or will almost certainly be caused.

Consequently, the DCFR provides definitions for both direct as well as indirect intent. However, PETL does not contain a definition of intent; according to Article 4:101, a person is liable on the basis of fault for an intentional or negligent violation of the required standard of conduct.

Article 104(5) LOA defines intent as the will to bring about an unlawful consequence upon the creation, performance, or termination of an obligation—
a definition of direct intent. While the LOA does not contain a definition of indirect intent, this does not mean that indirect intent is not recognized or does not exist in Estonian law.

It is important to highlight that, according to Article 5:401(1) DCFR—as well as under Article 1051 LOA—limitations on or the exclusion of liability for intentionally caused damages is not allowed. Professor von Bar argues that agreements concerning liability for damages to be caused intentionally in the future are immoral although Estonian courts have not yet applied Article 1051 in practice.

3.2. Negligence

Most national legal orders in Europe utilize objective criteria to define an expected standard of care; consequently, the subjective characteristics of the tortfeasor are not taken into account. The required standard of care is objective in Germany, France, and also in England. In his 2000 opus *The Common European Law of Torts*, von Bar also concluded that the notions *culpa in abstracto*, *objektive Fahrlässigkeit* (objective carelessness), and ‘reasonable-person standard’ clearly indicate that damages are attributable to the person who caused the damages and who failed to observe the standard of care expected in the respective situation.

In the course of preparatory work for the DCFR, the starting point for the required standard of care was the tendency—evident in almost all Member States of the European Union—according to which the concept of fault is based on objective criteria, i.e., the preconditions of fault being fault capacity and breach of objective requirements of care. Individual characteristics and abilities, normally, generally are irrelevant.

Article 3:102 DCFR states that legally relevant damage is considered to have been caused negligently when a person causes the damage through conduct that

---

33 According to the commentary to the LOA, in case of indirect intent, it is not the tortfeasor’s wish to see the unlawful result occur, but s/he nonetheless agrees with it. Paul Varul et al., *Võlaõigusseadus III. Kommenteeritud väljaanne* (Juura, Tallinn, 2009), 676.

34 As opposed to the regulation in the LOA, Art.5:401(2) DCFR provides for an additional restriction concerning contractual limitation or exclusion of liability in the event of damage caused by gross negligence.

35 von Bar, op.cit. note 1, 893.


37 For the German law, see Ulrich Magnus and Gerhard Seher, "Fault under German Law", in Widmer, *op.cit*. note 5, 101-122, at 109-110; for the French law, see Suzanne Galand-Carval, "Fault under French Law", in Widmer, *op.cit*. note 5, 89-100, at 91; and for the English law, see Rogers, *op.cit*. note 20, 65-88, at 72.


either: (a) does not meet the particular standard of care provided by a statutory provision the purpose of which is the protection of the injured person from the damage suffered; or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in similar circumstances.

This leads to a conclusion that the behavioral standard required by the DCFR is objective. Such a standard is not based on the individual abilities of the person in question but, instead, relies on what can reasonably be expected of that person. What constitutes ‘reasonably careful behavior’ in any particular case depends on a variety of circumstances that cannot be reduced to an exhaustive list.\textsuperscript{40} This should not be seen, however, as an invitation to arbitrarily raise the level of the required standard of care. Not only would it diminish the difference between risk liability and culpable liability but, also, could significantly decrease entrepreneurial activity.\textsuperscript{41} In other words, people would think twice before starting a business, for example, when the standard of care established by court practice would be set at too high a level.

The notion of gross negligence is set out in Article 5:401(2) DCFR, according to which gross negligence is a profound failure to take such care as is manifestly required in the circumstances.\textsuperscript{42}

The required behavioral standard according to the PETL also is objective. The yardstick is a standard of behavior that all people should follow regardless of individual characteristics; as such, this standard has nothing to do with blameworthiness.\textsuperscript{43} A reasonable person under PETL is a modern version of the Roman \textit{bonus pater familias}, i.e., someone who does not aspire to her/his own goals without first looking left and right and, rather, who takes the interests (which could potentially be harmed) of other individuals into account. The image of a reasonable person may vary and may be adjusted not according to the individual traits of the liable person but, rather, according to the category of people whom s/he represents.\textsuperscript{44} For example, a physician must follow the standard of care set for physicians, and a hunter the standard of care for hunters, etc.

Contrary to Article 3:102 DCFR, Article 4:102(1) PETL includes a list of circumstances based on the required standard of behavior which is to be assessed.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{40} von Bar, \textit{op.cit.} note 1, 585.
\item \textsuperscript{41} \textit{Ibid.}, 586.
\item \textsuperscript{42} \textit{Ibid.}, 894.
\item \textsuperscript{43} Widmer, \textit{op.cit.} note 18, 65.
\item \textsuperscript{44} \textit{Ibid.}, 76.
\item \textsuperscript{45} Art.4:102(1) PETL provides that the required standard of conduct is that of a reasonable person in the circumstances, which depends, in particular, on: the nature and value of the protected interest involved, the degree of danger of the activity, the expertise to be expected of a person carrying it out, the foreseeability of possible damages, the relationship of the proximity or special reliance between those involved, as well as the availability and cost of precautionary or alternative methods. Art.4:102(3) further provides that rules that prescribe or forbid certain conduct must be considered when establishing
Yet somewhat surprisingly and contrary to the DCFR, the required standard of care in the PETL is not merely objective. Namely, Article 4:102(2) provides that the above standard may be adjusted when—due to age, mental or physical disability, or due to extraordinary circumstances—the person cannot be expected to conform to it. According to a 2005 commentary on the PETL, this article allows courts to adjust the objective concept of fault to the age and mental and physical abilities of wrongdoers or to extraordinary circumstances in general. Although the regulation on the expected standard of care in Article 4:102(2) PETL differs from the approach taken in most European national legal orders, the reason behind the article is purely pragmatic. As mentioned above, a lack of fault capacity under the PETL does not absolutely exclude liability. Consequently, it is understandable that the PETL allows courts to adjust the standard of care applicable to minors, as well as to adults with physical or mental disabilities. Under the flexible system of the PETL, it is possible to assess the question of fault on a case-by-case basis (as we already have mentioned above).

In a nutshell, both the DCFR and PETL (Art.4:102(2) for special circumstances notwithstanding) set out an objective standard of care in tort law based on the behavioral standard of a reasonable person.

According to Article 401(1) Russian CC, a person is not at fault if, taking into account the extent of the care and caution—which is expected from this person—s/he has taken all the necessary measures for properly performing an obligation. This means that the required behavioral standard according to the Russian civil law also is objective. Fault is a failure to take all objectively possible measures to prevent the negative consequences of the behavior, as dictated by a concrete situation.

Article 104(3) LOA also provides that negligence is the failure to observe a required standard of care. However, Article 1050(2) LOA provides a different definition of negligence in tort law compared to the above-mentioned Article 104(3). Article 1050(2) sets out a subjective standard of care, i.e., when assessing an individual’s fault, her/his individual situation, age, education, knowledge, abilities, and other personal characteristics need to be taken into account.

the required standard of conduct.

Widmer, op.cit. note 18, 79.


Art.104(4) LOA provides that gross negligence is a failure to exercise necessary care to a material extent. The Estonian Supreme Court, (7 June 2011) Case No.3-2-1-35-11, noted that driving 5 kilometers per hour over the speed limit on a slippery road is gross negligence on the part of the driver. As the lower courts were of a different opinion, the Supreme Court sent the case back to the same circuit court for review.

In Austria, the required standard of care should include the idea of the subjectively reprehensible failure of an individual. See Helmut Koziol, “Fault under Austrian Law”, in Widmer, op.cit. note 5, 11-26, at
Therefore, in order to decide whether a certain person has acted in a negligent manner, it first must be determined whether s/he even is subjectively capable of observing an objective standard of care.\textsuperscript{50} Although the subjective approach to the concept of fault in the LOA raises doubts (considering that the DCFR and PETL, as well as most national legal orders, prescribe objective concepts of negligence), it is noteworthy that Article 1050(2) LOA plays only a minor role in Estonian legal practice since Estonian courts have started to impose significant limitations upon the application of this provision. One of those (rather remarkable) limitations is that it is not applied with regard to the tort liability of legal entities. In 2007, the Supreme Court noted that—according to the underlying meaning of Article 1050(2)—the subjective circumstances for evaluating fault may be taken into account only in case of individuals, not legal entities.\textsuperscript{51}

Furthermore, Estonian court practice appears to support a limitation whereby the negligence of the wrongdoer is not assessed based on subjective criteria in case of torts related to professional violations, \textit{i.e.}, when the tort was committed in the course of the tortfeasor’s professional activities.\textsuperscript{52} While assessing the tort liability of a physician, the Supreme Court held in 2006\textsuperscript{53} that it is necessary to assess whether s/he had exercised her/his profession at least at the same level as would be expected from an educated and experienced physician in the same field. If s/he had performed a medical treatment deemed to be of a lower quality than that which would be expected from an educated and experienced physician in the same field, then possibly an error in treatment might have occurred. In summary, it can be said that—when assessing the fault of legal entities and

\textsuperscript{50} The Estonian Supreme Court, (13 April 2011) Case No.3-2-1-11-11, also has noted that the defendant might be released from liability under Art.1050(2) LOA if s/he could prove that it would be unjust to apply an objective standard of care and the respective objective concept of negligence with regard to the defendant due to her/his specific characteristics and the nature of the case. In this case, the plaintiff sought compensation for the damage that was caused to his residential building by a fire that had broken out on the defendant’s property and spread to that of the plaintiff. The defendant asked the court to apply Art.1050(2) LOA on the basis that he had been deaf from an early age, had three small children to maintain and a fourth child was due any moment. The lower court found that such circumstances did not release the defendant from liability.

\textsuperscript{51} Estonian Supreme Court (31 May 2007) Case No.3-2-1-54-07. The facts of the case are presented in fn 13 above. Such limitation is important in legal practice because damage is often caused by legal entities; in those cases, Estonian courts usually pay no attention to Art.1050(2) LOA.

\textsuperscript{52} Causing damage in the course of one’s professional activities can in some countries lead to a reversal of the burden of proving fault (the tortfeasor must prove that s/he was not at fault). See von Bar, \textit{op.cit.} note 38, 324–325.

\textsuperscript{53} Estonian Supreme Court (3 October 2006) Case No.3-2-1-78-06. In this matter, the claimant had been diagnosed with lumbago, but the conservative treatment was not as successful as had been expected. As a result, the physician administered an anesthetic injection. After the injection, the claimant suffered from a balance disorder and numbness of the perineum and of the back of his thigh. The lower court denied the claim, but the Supreme Court overruled the decision.
professionals—they are treated differently in Estonia from ‘ordinary’ individuals (although, in the mind of the present author, there is still not enough court practice on this question).

In general, one could conclude that the Estonian courts have been very modest with regard to the application of Article 1050(2) LOA. Furthermore, the course of the present author’s research, no judgments of the Supreme Court or of circuit courts have been uncovered where the defendant has been relieved of liability on the basis of this article. This fact alone allows one to reach the conclusion that Article 1050(2) LOA, thus far, has had no effect in Estonian legal practice and, therefore, that the notion of a subjective standard of care bears only marginal relevance in Estonian tort law. It is possible, thus, that a subjective approach to negligence is simply not suitable for contemporary tort law. This conclusion is supported by the fact that both the DCFR and PETL have taken a different approach to the concept of negligence as compared to the LOA.

3.3. Burden of Proving Fault

Both the DCFR and PETL are guided by a general rule that says that—in addition to proving the other preconditions of the delictual liabilities of the defendant—the plaintiff must also prove that the defendant is at fault. The same principle guides tort law in Germany, France, and England. Pursuant to both the DCFR and PETL, the burden of proving fault can be reversed in certain cases (see, for example, Art.3:104(3) DCFR and Art.4:202(1) PETL). Furthermore, Article 4:201(1) PETL provides a rule allowing wide flexibility, according to which the burden of proving fault may be reversed in light of the gravity of the danger presented by the conduct in question.

In Estonia, the question of the burden of proving fault, in principle, is resolved in a different manner. Article 1050(1) LOA provides for the presumption of fault of the person who has caused the damages (also provided by Art.1064(2) Russian CC).

In Estonia the rule, according to which the fault of the tortfeasor is presumed, is not under dispute and, also, has been endorsed in legal practice. It should

54 The author has examined the practice of the Estonian Supreme Court and all the Estonian circuit courts since 2002 when the LOA entered into the force.
55 See von Bar, op.cit. note 1, 246; and Widmer, op.cit. note 18, 90.
56 The burden of proving fault is reversed according to Arts.831 and 832, the second sentence of Art.833, and Art.834 BGB. In some cases, the courts have also shifted the burden of proof from the victim onto the wrongdoer. See Magnus and Seher, op.cit. note 37, 103. For more about proving fault under French law, see Galand-Carval, op.cit. note 37, 97; under English law, see von Bar, op.cit. note 1, 263-264.
57 Estonian Supreme Court (28 May 2008) Case No.5-2-1-43-08.
be added, though, that—according to the above-mentioned provision—only negligence (but not intent\textsuperscript{59} or gross negligence) of the wrongdoer is presumed.\textsuperscript{59}

As such, the burden of proving fault in Estonian tort law is different not only from the traditional approach found in German, French, and English law, but the one in Russian law as well. Unlike the Russian CC—where, as a general rule, the burden of proof rests upon the tortfeasor—the LOA apportions the burden of proof depending on various circumstances. Aside from cases of intent and gross negligence, the burden of proving fault (although not expressly stated in the Estonian law) also may rest with the victim if her/his case is based on a claim that the tortfeasor caused damage through behavior that violated a duty arising under law (Art. 1045(1)(7) LOA). If the relevant duty can be violated only through faulty behavior, then the victim also inevitably must prove the fault of the tortfeasor. The situation is much the same where the victim accuses the tortfeasor of a breach of legal duties to maintain safety.\textsuperscript{60} In both cases, the tortfeasor still has an opportunity to prove the lack of her/his fault under the provisions of Article 1050(2) LOA.

Although the justifiability of the LOA’s presumption of fault may be disputable, in the context of Estonian tort law, this is not an unacceptable solution. While, on the one hand, the burden of proving the lack of fault puts the tortfeasor in an unfavorable position, this situation is balanced, on the other hand, by granting tortfeasors an opportunity to prove their lack of fault, based on subjective factors.

3.4. Importance of Distinguishing Among Various Forms of Fault

As a general rule, tort liability does not depend on the form of the tortfeasor’s fault. Therefore, in most cases, the obligation of the wrongdoer to provide compensation for damages remains the same regardless of whether the person acted negligently or intentionally. Nevertheless, in certain exceptional cases, the form of fault may be relevant.\textsuperscript{61}

\textsuperscript{58} For example, if the victim bases his/her case on Art. 1045(1)(8) LOA which provides that causing damage is unlawful if the damage is caused by intentional behavior contrary to good morals, s/he also has to prove the intent of the tortfeasor.

\textsuperscript{59} Estonian Supreme Court (12 January 2009) Case No. 3-2-1-127-08. In this matter, the defendant had evicted the plaintiff from her house. The plaintiff, who had been her cohabitant for several years, sought compensation from the defendant for the plaintiff’s property that had remained in the possession of the defendant. The plaintiff also sought compensation for bodily injuries and defamation caused to the plaintiff by the defendant. The Supreme Court overruled the Circuit Court’s ruling satisfying the claim of the tortfeasor in the amount of €767 and sent the case back to the Circuit Court for a new hearing.

\textsuperscript{60} Duty to maintain safety: Verkehrssicherungspflichten in German, käibekohustused in Estonian; here too, I am not aware of the use of a term in Russian which adequately reflects this concept.

\textsuperscript{61} For instance, Art. 2:102(5) PETL provides as a general rule that an interest may receive more extensive protection against intentional harm than in other cases.
First, it is important to distinguish among various forms of fault in situations where the harm was caused by more than one person in order to apportion liability among them.62 Article 9:102(2) PETL clearly provides that the form of fault must be taken into account in the internal relationship among joint tortfeasors in order to apportion liability among them. Also, according to Article 1081(2) Russian CC, the extent of fault is decisive in order to distribute liability among joint tortfeasors. Although the tort-law provisions of the DCFR do not expressly regulate the internal relationship among joint obligors, the extent of fault remains an important factor in the context of deciding on the apportionment of liability.63 Article 137(2) LOA provides that liability, in relations among the liable persons, shall be apportioned taking into account all circumstances (kiiki asjaoluid). Notably, the LOA does not require that the extent or form of fault of joint tortfeasors be taken into account. At the same time, it is logical that “all circumstances” within the meaning of Article 137(2) LOA also include the fault of the individuals who have caused damages. The Supreme Court noted in a 2006 judgment64 that—when apportioning liability among joint obligors—all circumstances should be taken into account, among which it specified, in particular, the nature and seriousness of the violation of the law and the degree of fault.

Second, the form of fault of the tortfeasor may be relevant from the point of view of reducing compensation for damages due to considerations of fairness. Article 6:202 DCFR, governing reductions in the amount of indemnification for damages, does not allow any such reduction in cases of intentionally caused damages. Under the limitation of liability provisions of PETL (Art.10:401), the basis of liability (with reference to Art.1:101) is an important criterion for deciding whether or not to reduce damage awards; this also is underscored in the 2005 PETL commentary in a reference to the form of fault as important when applying Article 10:401.65 According to Article 140(1) LOA—regulating the reduction of compensation for damages—the fault of the tortfeasor should be one of the aspects to be taken into account (although Art.140(1) LOA does not expressly require that fault be taken into account).66

63 von Bar, *op.cit.* note 1, 953. The internal relationships among joint obligors are regulated in DCFR Book III, Art.4:106.
64 Estonian Supreme Court (25 September 2006) Case No.3-2-1-70-06.
65 Widmer, *op.cit.* note 18, 73.
66 The form of fault of the victim may be relevant when reducing the compensation for damages due to the victim’s own contribution to the damage caused. This issue is regulated in Art.5:102 DCFR, Art.8:101 PETL, Art.1083 Russian CC, and Art.139 LOA. Reducing compensation for damages as a result of the fact that the victim contributed to the damages is an extensive topic, in and of itself, which exceeds the scope of this article; thus, no further attention will be paid to this topic herein.
The form of the tortfeasor’s fault also may be relevant in case of quantifying non-pecuniary damages.\(^6\) Whereas according to Article 6:203(2) DCFR, assessment of the amount of compensation for non-pecuniary damages is relegated to national legislation, Article 10:301(2) PETL refers to the fault of the tortfeasor: the degree of the tortfeasor’s fault should be taken into account only where it significantly contributes to the grievance of the victim. Article 1101(2) Russian CC provides that the amount of the compensation for non-pecuniary damages shall be determined by a court of law depending on the nature of physical and moral suffering caused to the victim and, also, on the degree of fault of the tortfeasor in cases when fault is a ground for compensation. Although the LOA does not expressly state that the fault of the tortfeasor should be taken into account when deciding on compensation for non-pecuniary damages, the need to assess the level of fault of the tortfeasor in case of indemnifying non-pecuniary damages is clearly recognized in Estonian case law. For instance, in a 2010 case where the plaintiff had been filmed by the tortfeasor’s film crew without the plaintiff’s permission (the film of which later was shown on the tortfeasor’s news program), the Supreme Court found that—with regard to quantifying reasonable compensation for non-pecuniary damages—the courts, regardless of the pleadings and submissions of the parties, should follow the principle according to which the type and gravity of the violation, the fault of the person causing the damages and the degree of fault, the financial situation of the parties, the role of the aggrieved person, and other relevant circumstances should be considered since a failure to take such circumstances into account could result in ordering payment of an unfair amount of compensation.\(^6\)

In addition to the above, the form of the tortfeasor’s fault—in the context of the LOA—also may be relevant when assessing the preconditions of tort liability. That would be the case if, for instance, the victim were to rely on provisions regarding intentional violations of good morals (heade kommete vastane) (Art.1045(1)(8) LOA) or of a protective norm where the violation presumed a certain form of fault (Art.1045(1)(7) LOA).

---

\(^6\) In Germany, for instance, the defendant’s intent can provide a basis for imposing greater compensation for non-pecuniary damages than those claimed by the plaintiff. See Basil Markesinis et al., Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline (Cambridge University Press, Cambridge, 2005), 79.

\(^6\) Estonian Supreme Court (13 January 2010) Case No.3-2-1-152-09. The Supreme Court had rendered similar opinions in the past: (17 October 2001) Case No.3-2-1-105-01; (27 September 2005) Case No.3-2-1-81-05; and (22 October 2008) Case No.3-2-1-85-08.
4. Fault in Case of Liability for a Tort Committed by Another Person

4.1. Fault in Case of Liability for a Tort Committed by a Minor

The DCFR does not contain separate provisions on liability for minors who lack fault capacity or for minors who may be held liable for torts. As noted above, children below the age of seven lack fault capacity under the DCFR (Art.3:103(2)). According to Article 3:104(1) DCFR, parents or other persons obliged by law to provide parental care for a person under fourteen years of age are liable for causing legally relevant damage where that underage person has caused the damage by conduct which would constitute intent or negligence if it were that of an adult.

If a minor causes damages and an institution (or other type of authority) exercises supervision over said minor, the supervising authority/institution may be held liable for the damages which the minor has caused where the following preconditions are met: (a) the damage involves a personal injury, a loss under Article 2:202 or property damage; (b) the person whom the institution (or other body) is obliged to supervise caused that damage intentionally or negligently or, in the case of a person under eighteen, through conduct that would constitute intent or negligence if it were that of an adult; and (c) the person whom they are obliged to supervise is a person likely to cause damage of that type (Art.3:104(2)).

The liability of persons mentioned in Articles 3:104(1) and (2) DCFR is reduced under Article 3:104(3) according to which supervising authorities are released from liability where supervision over the person who caused the damages has been properly exercised.

Therefore, according to Article 3:104(1) DCFR, one of the preconditions of parental liability (at least) is the objectively faulty conduct of a child under fourteen years of age. In other words, had an adult been in the position of the child under fourteen years of age and had the adult acted the same way as the child did, no parental liability can be invoked. The same principle is followed with regard to the liability of a supervising institution for torts committed by minors under eighteen years of age.

Although Article 3:104(1) DCFR prescribes parental liability with respect to torts committed by children under fourteen years of age, this does not mean that the parents of children between fourteen and seventeen years of age are not liable for the torts committed by their children. Parental liability also may

69 For example, it is likely that children in a group can cause damage by throwing snowballs.

70 von Bar, op.cit. note 1, 614.

71 This impression may easily be created based on Art.3:104 DCFR. Therefore, in order to avoid confusion, it also would be more appropriate to regulate liability for torts committed by children between the ages of fourteen and seventeen in Art.3:104 DCFR.
be invoked with regard to torts committed by children in the referred age gap provided that the victim proves that the parents failed to fulfill their supervisory obligations.\(^72\) Thus, here is another instance of overcoming the burden of proof.

According to the PETL, an individual’s young age in and of itself does not automatically release a person from liability. According to Article 6:101 PETL (which applies to all torts committed by a minor), a person in charge of another who is a minor or mentally challenged is liable for damage caused by the other unless the person in charge shows that s/he adhered to the required standard of conduct in cases of supervision. Therefore, parental liability under the PETL is also fault-based and only can be invoked where the applicable standard of supervision has not been observed.

Contrary to the regulations in the DCFR and PETL, the LOA contains distinct provisions governing liability for torts committed by minors who lack fault capacity and for torts committed by minors who have full fault capacity. With respect to the former, Article 1053(1) prescribes that the parents or guardian of a person under fourteen years of age shall be liable for damage unlawfully caused to another person by such minor regardless of the culpability of the parents or guardian (according to Art.1053(3) LOA, a person who, by means of a contract, assumes the obligation to exercise supervision over a child also is liable for damage caused by the child). Article 1073(1) Russian CC provides that parents or guardians are liable for damage caused by minors who have not attained fourteen years of age unless they prove that the damage has not been caused through their fault. The same principle also applies to institutions which are guardians according to the law (Art.1073(2)) and, also, to supervising institutions/persons (Art.1073(3)). In certain cases the minor herself/himself may be liable for the damage which s/he has caused (Art. 1073(4)).

Compared to the respective regulations in the DCFR and PETL, as well as the regulations in Russia, Germany and England,\(^73\) the regulation on parental liability in the LOA is remarkably strict.\(^74\) For example, if a four-year-old plays

\(^72\) von Bar, *op.cit*. note 1, 615.

\(^73\) For instance, according to the second sentence of Art.832(1) \textit{BGR}, parental liability depends on whether supervision exercised by the parents was sufficient. Under English law, parents are liable for the damages caused by minors in the same manner as for torts committed by the parents themselves, and the tortuous act would be the parents’ failure to meet their supervisory obligations. Neither a parent nor any person having a child in their care is vicariously liable for the torts of the child. See W.V.Horton Rogers, “Liability for Damage Caused by Others under English Law”, in Jaap Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (Kluwer Law International, The Hague, 2003), 63-84, at 67. Under French law, however, parental liability—which was long understood as founded on a presumption of fault—was turned into strict liability in 1997 by the Cassation Court. See Galand-Carval, *op.cit*. note 37, 97. The Court suggested in its end-of-year report for 2002 that—to avoid the prospect that the parents might not have liability insurance—the legislator should either make insurance mandatory for parents or set up a guarantee fund. von Bar, *op.cit*. note 1, 618.

\(^74\) Such strict parental liability may be more bearable where it would be supported by easily accessible insurance. For further thoughts on how insurance could affect tort law and, \textit{inter alia}, make vicarious liability stricter, see Malcolm Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First...*
with matches and causes a major fire, the parents of the child will be held liable regardless of whether they did anything objectionable in connection with the incident. The present author is of the opinion that, in order to avoid a gross injustice, the law should allow the courts to release people from parental liability in exceptional cases.\(^{75}\)

On the one hand, the application of Article 1053(1) LOA could be tied to the faulty behavior of the types of people indicated in that section; however, this assumes that the borderlines for assessing the fault of those people are clear. Their fault essentially boils down to a failure to exercise proper supervision over minors. This would be the only acceptable solution for defining the fault of those responsible for supervision because—should the fault of such people be reflected in the objectionable behavior of the minor and in shortcomings in her/his upbringing in general—the principle of fault-based liability would be violated. It should be a matter of case law to determine what level of supervision is required with regard to children of different ages. In the opinion of the present author, while the required level of supervision should primarily depend on the age of the child, it also can be affected by her/his mental abilities and whether s/he ever has committed torts in the past.\(^{76}\) Furthermore, this solution would not place the victim in an unfavorable position since the person responsible for supervision must prove the lack of her/his fault; as a rule, meeting such a burden of proof should be exceptional.

---

\(^{75}\) The same opinion has been expressed in the commentary of the LOA. See Tambet Tampuu and Martin Käerdi, “Kahju õigusvastane tekitamine”, in Paul Varul, Irene Kull, Villu Kõve, and Martin Käerdi (eds.), Võlaõigusseadus III. Kommenteeritud väljaanne (Juura, Tallinn, 2009), 622-710, at 681. The situation is somewhat alleviated by way of Art.140 LOA which allows for mitigation of compensation in order to avoid ‘gross injustice’ (äärmine ebaõiglus). It is worth mentioning that until the LOA entered into force, liability of parents for young minors was fault-based in Estonia. The rationale behind the switch to strict liability for young minors in the LOA is not fully clear, the current approach leaves much to be desired.

\(^{76}\) For more about proper supervision see Tampuu and Käerdi, ibid., 682-683. It is worth mentioning that determining the level of supervision may differ slightly from jurisdiction to jurisdiction. German case law indicates that courts may consider the particularities of the child in determining the level of supervision of parents. In one relevant case, the court held that it may even be necessary to perform a search of the child’s body if there is reason to believe that the child was in possession of matches and had a tendency to play with them. See BGH (1 July 1986), NJW-RR (1987)13,14. For French, English and Russian law, the particularities of the child generally appear to have little (or no) meaning. French courts, especially of late, have come to set the standard for parental supervision of minors so high that they can be held liable for the mere acts of their children. See Paula Giliker, Vicarious Liability in Tort: A Comparative Perspective (Cambridge University Press, Cambridge, 2010), 214. As for English courts, parental liability is not imposed when the parents themselves can be characterized as being “prudent or reasonable”. See Carmarthenshire CC v Lewis, AC (1955) 549 at 566. With regard to Russian law, Art.1073(1) Russian CC (as mentioned above in the present article) likewise imposes liability only upon proof of fault of the parents.
One potential solution could be to attribute the same meaning to Article 1053(1) LOA as in the respective provisions of the DCFR, i.e., that parents or guardians are liable for the damages caused by minors lacking fault capacity only where the behavior of the minor was objectively objectionable. Therefore, the precondition for invoking the liability of other people would be the objective fault of the person lacking fault capacity, and the yardstick for assessing such an objective fault should be the reasonable behavior of persons with full fault capacity in a similar situation.

Liability for minors with fault capacity is regulated in Article 1053(2) LOA which states that parents or guardians of a person between fourteen and eighteen years of age are liable for damage unlawfully inflicted upon another person by such minor regardless of the culpability of the parents or guardian—unless they prove that they have done everything that reasonably could be expected in order to prevent the damages. For instance, in a 2005 case involving a minor who took the plaintiff’s motor vehicle without authorization and caused a traffic accident with the vehicle, the courts held that—in applying Article 1052(2) LOA—an assessment needed to be made as to whether or not the guardian (the defendant) had done everything reasonable to prevent the damages. In this case, the defendant (the Estonian city of Pärnu) fail to submit to the court any evidence which would have exempted it from liability.

Since a minor with full fault capacity also may be liable for damages, the primary precondition for the application of parental liability according to Article 1053(2) LOA is that the minor her/himself must be found liable for the damages. For instance, if the minor caused damages without fault, consequently, parental liability under the LOA cannot be invoked.

Whereas the precondition for invoking parental liability under the LOA for torts committed by a minor with full fault capacity is that the minor is liable for the damages, this is not the case in the context of the DCFR, e.g., a thirteen-year-old could potentially not be liable for causing damages if the conduct in question causing the damage would not be objectionable for a child of the same age in the same situation. However, the same kind of behavior by an adult may be objectionable, which would be sufficient for invoking parental liability under the DCFR.

---

77 Under a judgment of the Estonian Supreme Court (22 November 2001) Case No.3-1-1-113-01, the obligations of a parent with regard to her/his child do not cease even where the parent and the child live separately and the parent does not participate in the upbringing of the child.

78 According to Art.1074(2) Russian CC, the parents or guardians (institutions) of a person between fourteen and eighteen years of age will be liable for damage caused by such minor only where the minor has no income or other property sufficient to compensate the damage. They will be relieved of liability where they can prove that the damage has not been caused through their fault. See, also, Art.1075 Russian CC which prescribes the liability of parents who have been deprived of parental rights.

79 Estonian Supreme Court (28 October 2005) Case No.3-2-1-101-05.
The present author believes—in the same fashion as do the draftpersons of the LOA and of the DCFR and PETL—that it is not unreasonable for parents or guardians) of a minor to be held liable for the child’s torts (where they have violated their supervisory obligations) until the child reaches eighteen years of age (in principle, such liability is common in all of the jurisdictions which have been the subject of examination in this article). Although a minor with full fault capacity is liable for damages under general tort rules, minors usually do not possess sufficient assets to provide for full compensation for damages which they have caused. Therefore, it is wise to provide for the liability of parents so as to ensure better protection for the victim. Such solution is expressly set forth in the LOA (Art.1053); the same conclusion also can be drawn from both DCFR (Art.3:104) and PETL (Art.6:101).

4.2. Fault in Case of Liability for a Tort Committed by a Mentally Challenged Person

According to the DCFR, an institution or authority exercising supervision over a person may be held liable for the torts committed by that person if s/he causes damages either intentionally or negligently (Art.3:104(2)(b). As mentioned above, the supervising authority may be relieved of liability where it proves that the supervision exercised over the person was sufficient and met the relevant standards (Art.3:104(3)). Under Article 5:301 DCFR, a mentally challenged person is not assumed to lack fault capacity and, thus, is not automatically relieved of liability.

It is debatable whether a person subject to supervision is capable of acting intentionally or negligently in the proper sense of the words. Supervision must be exercised over individuals who are not entirely capable of understanding the consequences of their actions. Therefore, the author is of the opinion that subsection b of Article 3:104(2) DCFR should refer to conduct that would constitute intent or negligence were it the conduct of a mentally competent adult.

Article 6:101 PETL governs liability for torts committed by mentally disabled persons; such liability is tied to the sufficiency of supervision. This regulation is analogous to the regulation regarding liability for torts committed by minors, and this analogy may be justified by the argument that people caring for those who are mentally challenged fulfill a social function which rarely provides any material gains. Article 1076(1) Russian CC provides that the damage caused

---

80 See supra note 73. For a general overview of parental liability in German, French, English, and Russian law, see Miquel Martín-Casals (ed.), *Children in Tort Law. Part I: Children as Tortfeasors* (Springer-Verlag, Vienna, 2006), 147-264, 345-368.

81 Other preconditions for liability listed in Art.3:104(2) DCFR (those preconditions are mentioned in section 4.1. of this article) also are important.

82 See, also, von Bar, *op.cit.* note 1, 617.

The Concept of Fault of the Tortfeasor in Estonian Tort Law

by person lacking active legal capacity must be compensated by her/his guardian or by the supervising organization, unless it proves that the damage has not been caused through their fault. Particularly interesting are the Russian Civil Code rules set forth in Article 1078(3); they provide that where damage is caused by a person who could not understand the meaning of her/his acts or could not direct them in consequence of her/his psychic disorder, the court may impose the duty to compensate the damage upon the tortfeasor’s spouse, parents, and children of age who knew about the psychic disorder of the tortfeasor but who failed to raise the question of the tortfeasor’s legal incapacity.

The liability of a guardian for damages caused by individuals with limited legal capacity is regulated in Article 1053(5) LOA; here, the guardian of a person with restricted active legal capacity who has been placed under guardianship due to a mental disability are liable for damage unlawfully caused by the person to another person unless the guardian proves that s/he had done everything that could be reasonably expected in order to prevent the ward from causing damage. In the context of the LOA, such a person with restricted active legal capacity also lacks fault capacity. In the opinion of the author, the liability of the guardian only should be invoked where the behavior of the person under guardianship is objectively objectionable (i.e., liability would not be invoked for behavior that would not amount to fault even if the damages had been caused by a person with full fault capacity).

To sum up, the precondition for invoking a guardian’s liability for torts committed by a mentally challenged person is the fault of the guardian, namely the failure of the guardian to exercise sufficient supervision.

84 Under the rules of Art.8(2) of the General Part of the 2002 Estonian Civil Code Act, individuals under the age of eighteen and those who, due to mental illness, mental disability, or other mental disorder are permanently unable to understand or control their actions, have restricted active legal capacity. Tsiviilseadustiku üldosa seadus (27 March 2002), RT I (2002) No.35 item 216.

85 In making this argument, the present author shares the opinion of Tampuu and Käerdi, op.cit. Note 74, 684. One might argue that limiting the liability of the guardian also is possible through ‘justice-based’ liability as provided for in Art.1052(3) LOA (and Art.1076(3) Russian CC). Although such an approach may provide the victim with a last resort, it is inadequate for protecting the guardian from compensation that would have been avoided had the person who caused the damage possessed full fault capacity. Therefore, imposing liability only where an objectively objectionable behavior of the person under guardianship can be proved should ensure that a just outcome is reached for the guardian.

86 The same is also prescribed in Art.832 BGB. Under French law, it is not an acceptable defense for the defendant to show that s/he is not at fault in exercising her/her power to organize, direct, and control the wrongdoer’s way of life. See Suzanne Galand-Carval, “Liability for Damage Caused by Others under French Law”, in Spier, op.cit. note 73, 85-104, 91. Under English law, the liability for torts of adults of unsound mind is similar to the liability for minors. Liability depends on breach of the duty of care. See Rogers, op.cit. note 73, 67.
4.3. Fault in Case of Liability for Torts Committed by an Employee or Service Provider

In addition to the above cases, it is also possible for a person to be liable for torts committed by another person if the latter is acting for the benefit of the former in one way or another. E.g., this person could be an employee or other type of service provider.

Article 3:201(1) DCFR provides that a person who employs or similarly engages another person is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged: (a) caused the damage in the course of employment or engagement; and (b) caused the damage intentionally or negligently (or otherwise is accountable for the causation of the damage). Therefore, under the DCFR, the liability of the person using the service offered by another is invoked regardless of the fault of the former. The fact that the employee or service provider has negligently or intentionally caused damages or that some other ground for liability exists (e.g., as the owner of a motor vehicle) is a sufficient precondition for liability. Article 3:201(2) DCFR stipulates that the same principle applies to representatives acting on behalf of a company or other legal entity. It is irrelevant which specific individual inside the corporate entity caused the harm in question.

In the context of the PETL, the liability of a person using the services of another is regulated under Article 6:102(1), according to which a person is liable for damage caused by her/his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct. Therefore, similarly to the rule in the DCFR, the liability of a service user depends on the liability of the service provider; namely, whether the latter’s conduct conformed to the required standard.

According to Article 6:102(2) PETL, an independent contractor is not regarded as an auxiliary for the purposes of this article. Also, Article 3:201 DCFR does not provide for any liability for independent contractors and their operatives. In Germany, France, and England, the general principle is that there is no vicarious liability in torts for harm caused by an independent contractor. The main reason for this is that it would be unfair to impose liability on a de-

---

87 See von Bar, op. cit. note 1, 632.
89 See Moréteau, op. cit. note 83, 118.
90 Art.831 BGB does not apply to the liability for damages caused by an independent contractor. See Jörg Fedtke and Ulrich Magnus, “Liability for Damage Caused by Oiers under German Law”, in Spier, op. cit. note 73, 105-132, at 120-121. For more concerning French law, see Galand-Carval, op. cit. note 86, 98. The general rule in English law is that of non-liability for the torts of an independent contractor; but there are situations in which the law imposes a non-delegable duty upon the employer of the contractor. See Rogers, op. cit. note 73, 75-76.
The Concept of Fault of the Tortfeasor in Estonian Tort Law

A defendant who exercises no control whatsoever over the wrongdoer in the way s/he performs the relevant task.\footnote{Suzanne Galand-Carval, “Comparative Report on Liability for Damage Caused by Others”, in Spier, \textit{op.cit.} note 73, 306.}

Article 1068(1) Russian CC provides that a legal entity or an individual must compensate for damages caused by an employee during the performance of labor (official) duties. Individuals performing their work on the basis of a labor contract (or under a civil-law contract) are deemed to be employees where they have acted (or should have acted) on assignment of the relevant legal entity or individual and have acted under their control.

An employer is liable regardless of whether or not the employer acted with the required care in the selection or supervision of the employee. The requirement for the employer’s liability is the liability (which, in general, requires the fault) of the employee.

According to Article 1054(1) LOA, if person A engages person B in A’s economic or professional activities on a regular basis, then A (as the person using the services) will be liable for any damage unlawfully caused by B (as the service provider) on the same basis as for damage caused by A where the cause of the damage is related to A’s economic or professional activities.

Notably, Article 1054 LOA does not expressly mention the fault of the service provider or the fault of the person using the services of another as a precondition of liability. Yet in 2005, the Estonian Supreme Court has interpreted the preconditions for invoking liability under Article 1054 LOA in the same manner as provided under the DCFR and PETL; namely, that both unlawfulness and fault must be verified in order to apply Article 1054(1) LOA. If a person has not engaged another person or used his or her services on a regular basis, liability may still be invoked under Article 1054(2) and (3) LOA for torts committed by a service provider where the service provider acted unlawfully and was at fault.\footnote{Estonian Supreme Court (28 May 2008) Case No.3-2-1-43-08. According to Art.831(1) \textit{BGB}, however, the precondition for the liability of a service user is her/his own fault in the context of selecting the service provider and exercising supervision over the latter. See, also, Othmar Jauernig and Christian Berger, \textit{Bürgerliches Gesetzbuch} (Verlag C.H. Beck, Munich, 2003), 1063. Contrary to the \textit{BGB} (Art.1384), the French Civil Code provides that, in order to invoke the liability of a service user, the service provider must be liable for the damages. Galand-Carval, \textit{op.cit.} note 86, 93. See, also, John Bell, Sophie Boyron,}
According to Article 1054(2) LOA, a service user can be found liable for a tort committed by a person who is engaged for the performance of another person’s duties (although there is no specification of which kind of duties are deemed to qualify under this provision for imposition of liability on the service user). Hence, the scope of application of the provision may be quite wide. It is possible that a person may use the help of an independent contractor to fulfill her/his duties. In a case where person A ordered snow-clearing service from person B, and B used a subcontractor to fulfill this duty, where the employee of the subcontractor caused damages to A (by stealing property), the Supreme Court held in 2009 that B, the person from whom the snow-clearing service was initially ordered may—according to Article 1054(2) LOA—be liable for the damage caused by the subcontractor’s employee.

It is also possible that the question of an independent contractor’s liability could arise under the provisions of Article 1054(3) LOA; they regulate the liability of service users for torts committed by another person who was engaged by the former to perform certain acts, provided that the service user had control over the service provider. Unlike the case of Article 1054(2), the precondition for applying Article 1054(3) is an exercise of supervision (or at least the relevant opportunity to exercise supervision) over the behavior of the service provider.

The fact that, under the LOA, the liability of the person using the services of another presumes the liability of the service provider may lead to several problems in practice. For instance, it is unclear how to resolve a situation where the service provider commits a tort while lacking fault capacity or where the service provider is released from liability due to certain subjective characteristics. In such cases, the service user would not be liable under Article 1054 LOA; but the problem may be resolved by invoking the liability of the service user based on so-called “organizational fault” under Article 1043 LOA. In the above cases, the service user is at fault for negligently choosing a service provider or for failing to exercise sufficient supervision over the service provider; thus, the service user is liable on the basis of her/his own fault for her/his own tort.

In short: the issue of fault in case of liability for torts committed by an employee or service provider is regulated in a similar manner in the DCFR, PETL, the Russian CC, and the LOA (as a result of the Supreme Court’s jurisprudence), and Simon Whittaker, Principles of French Law (Oxford University Press, Oxford, 2008), 393-399. In English law, the liability of a service user for torts committed by a service provider is vicarious liability. See Rogers, op.cit. note 73, 68-75.

However, the dividing line between dependent and independent work is not easy to draw. See Morétéau, op.cit. note 83, 117.

Estonian Supreme Court (17 June 2009) Case No.3-2-1-73-09. The present author would add that the question of whether or not the subcontractor was an independent contractor was not even raised in this matter.
and the fault of the person who caused the damages is deemed relevant rather than the fault of the person who used the service.

5. Is Fault-Based Liability Still Liability Based on Fault?

In analyzing contemporary tort law, we inevitably are faced with the question of whether, and to what extent, fault-based liability is based on the actual fault of a tortfeasor. And where can we draw the line between fault-based liability and strict liability—if, indeed, it is even possible to do so?

For instance, the DCFR proceeds from the basis that there are three distinct grounds of liability: intention, negligence, and objective responsibility for causing danger. But these three categories of behavior cannot clearly be separated. The fault element has undergone decisive change, and liability for misconduct is only exceptionally linked with personal blameworthiness. Fault-based liability does not require the tortfeasor to actually be at fault nor does it require the possibility of blaming the tortfeasor subjectively for the damage.

Pierre Widmer has noted that the concept of fault is in open contradiction to its original meaning but still is conserved as a fiction. There is no longer any clear borderline between liability based on fault and strict liability.

In this article, the author has mainly considered two aspects according to which conclusions can be made about the strictness of fault-based liability. One of these aspects is the objective standard of care required: where attention is paid not to the question of the degree of care with which the person in question was expected to comply but, rather, to the question of the type of behavior which is considered reasonable and appropriate. The relevant standard of care also may increase as liability insurance becomes more accessible.

It is clear that, in many cases, a tortfeasor cannot be accused of failing to comply with such a standard in real terms. For example, it is questionable whether we can blame a landowner who does not remove ice and snow from her sidewalk because she is ninety years old and ill. At the same time, she probably is at fault according to

---

96 von Bar, op. cit. note 1, 557.
97 Brüggemeier, op. cit. note 36, 57.
98 von Bar, op. cit. note 38, 338.
101 For more on how liability insurance affects courts’ assessment of the standard of care, see Gerhard Wagner (ed.), Tort Law and Liability Insurance (Springer-Verlag, Vienna, 2005), 323.
the objective standard of care. Herewith, the objective standard of care indeed makes differentiating strict liability from fault-based liability difficult.  

Second, fault-based liability is definitely being made stricter by placing the burden of proving the absence of fault on the tortfeasor. Widmer has succinctly noted that the reversal of the burden of proof is the beginning of a metamorphosis of fault-based liability into a new form of liability where fault is no longer a requirement or, at least, a purely formal and symbolic requirement. According to Widmer, such a reversal of the burden of proof is an improper and ‘cold’ way of metamorphosing fault-based liability into strict liability.

The strictness of no-fault liability also can be very different. On the one hand, liability may be absolute; or an act of God or another unavoidable event may be the only exemption from liability. On the other hand, defenses can be far-reaching and can come very close to the defense that the defendant acted without fault. This means that strict liability (as a hybrid institution) may reside somewhere between absolute and fault-based liability.

It turns out that both fault liability and strict liability can be more or less severe. The borderline depends on whether fault is assessed by a subjective or objective yardstick. The author of this article agrees with Widmer, who notes that only a reasonable, subjective assessment of fault allows one to maintain a distinction between objective and subject forms of liability.

Based on the above discussion, one can argue that the LOA contains ‘actual’ fault-based liability, since, as a rule, the fault of a tortfeasor must be assessed based on subjective factors. However, there are two reasons why this is not entirely correct. First, Estonian legal practice has placed considerable restrictions on tak-

102 For more about modifying fault liability to make it stricter by means of protective statutes and legal duties to maintain safety, see Koch and Koziol, op.cit. note 100, 434. See, also, Mathias Habersack (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (Verlag C.H. Beck, Munich, 2009, 5th ed.), 1700-1701.

103 Widmer, op.cit. note 5, 334.

104 Ibid., 356-357.

105 The term “absolute liability” sometimes is used interchangeably with “strict liability”. However, in a narrow sense of the term, liability is “absolute” when there is no possibility of exoneratation, provided the preconditions of liability are met.

106 Koch and Koziol, op.cit. note 100, 434-435. For instance, according to Art.1064(1)(5) LOA, the manufacturer of a product is not liable for damages arising from the product if s/he proves that, due to the level of scientific and technical knowledge at the time the product was placed on the market, the defect could not have been detected.

107 Brüggemeier, op.cit. note 36, 82.

108 Koch and Koziol, op.cit. note 100, 435.

109 Widmer, op.cit. note 5, 357-358. Although such a position is unique, there are those who share the view indirectly, by arguing for the need to avoid too objective an assessment of fault. See von Bar, op.cit. note 38, 263-266.
ing subjective factors into account. Second, in Estonia, as a rule, the burden of proving the lack of fault rests with the tortfeasor.

6. Conclusions

Fault is the essential prerequisite of tort liability that justifies the imputation of liability. Fault as a precondition of tort liability holds a firm and significant position in the DCFR, PETL, the Russian CC, and the Estonian LOA. Nowadays, fault-based liability and strict liability are two equally important forms of liability which are not polar opposites but, rather, which complement one another.

The rules on age limits for defining fault capacity in the LOA (which are similar to those contained in the Russian CC) should follow the example of the DCFR and PETL and allow more flexibility. The present author supports the regulatory solution in the DCFR which provides necessary protection to very young minors but, at the same time, which allows a more flexible approach to torts committed by minors of a more mature age.

Unlike the DCFR, PETL and the Russian CC, the concept of negligence is subjective under the LOA. Although such a significant difference with the model laws raises some questions, it nevertheless may be concluded from Estonian case law that the practical relevance of subjective fault in Estonia is marginal. Estonian courts seem to have taken the approach that a subjective concept of fault is not a suitable solution for contemporary tort law.

Compared to the DCFR, PETL, and the Russian CC, parental liability under the LOA for torts committed by children under the age of fourteen is quite strict. The present author is of the opinion that parental liability in Estonian law either should be fault-based or that the respective provisions in the LOA should be interpreted similarly to the DCFR, i.e., parental liability could be invoked for a child under fourteen years of age where the same kind of conduct could be deemed faulty had it been manifested by an adult.110 The LOA (as well as the Russian CC) also contains a clear rule on liability for torts committed by minors with full fault capacity. Yet the DCFR is ambiguous on whether parental liability also applies in case of torts committed by children between the ages of fourteen and seventeen. Whereas the DCFR, PETL, the Russian CC, and the LOA all tie the liability for torts committed by a mentally challenged person to the fault of the guardian, the liability for torts committed by employees or service providers hinges on the fault of the those employees and service providers.

In summary, many issues concerning the fault of a person who has caused damages are regulated in a similar fashion in the DCFR, PETL, the Russian CC, and the LOA; however, there are also several differences, some of which even appear to be fundamental (e.g., the subjective concept of negligence and

---

110 In the last alternative, the present author shares the views expressed in the LOA commentary. See Tampuu and Käerdi, op.cit. note 74, 681.
applicable standard of care in the LOA). Yet the application of the DCFR, PETL, the Russian CC, and the LOA to specific case scenarios rarely seems to lead to different solutions (although more thorough case-law research is needed to confirm this). Nevertheless, the Estonian legislator should seriously consider the need to amend national legislation on the basis of the respective provisions in the DCFR and PETL.

Assessing fault-based liability in its entirety, it can be noted that, essentially, fault-based liability also can be quite strict and that drawing a line between fault-based and strict liability may be rather complicated. Fault-based liability is made stricter by the objective standard of care required and reversing the burden of proving fault. On the basis of the LOA, the fault of a tortfeasor must be assessed on the basis of subjective factors; at the same time, the burden of proof regarding the lack of fault rests with the tortfeasor her/himself.