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Subjective Fault as a Basis of Delictual Liability

Introduction

Fault is an element of delictual liability that contains a reproach on the person who has behaved wrongfully and has thus caused damage. So far, the law in force in the Republic of Estonia has relied on the definition of fault that was used in the Soviet civil law theory according to which fault is the relationship between a person's consciousness and the consequences of his or her action.[*1] Hopefully, the *Riigikogu* (Estonian parliament) will pass the Law of Obligations Act[*2] (hereinafter: LOA) in this year. The draft of the LOA is a modern draft that follows the traditions of continental Europe. Chapter 54 of the LOA regulates the infliction of damage by tort and draws a distinction between three elements of delictual liability: general elements of delict, risk liability and manufacturer's liability. In the preparation of the draft, there was no serious doubt as to whether the general elements of delict should include fault as one of the preconditions for liability because fault is generally recognised as a basis of delictual liability.[*3] What was definitely more interesting was the other aspect of fault which concerns the objectivity and subjectivity of fault. The authors of the LOA have taken as a basis the concept of subjective fault, which means that when deciding whether a person has behaved wrongfully not only the objective circumstances but also the personal qualities of the tortfeasor should be taken into consideration.

This article aims to find out if the choice made in the LOA in favour of subjective fault is justified or not. To achieve the aim, it is reasonable to compare and analyse the corresponding legal regulations and theoretical standpoints of other countries.

Origins of the problem

It is possible to draw a fundamental distinction between two main theories of delictual liability. Firstly, there is the so-called classical theory, which claims that fault is an obligatory element for the creation of liability, and secondly, there is the so-called objective theory, which does not consider the existence of fault to be the necessary precondition for the creation of delictual liability. The LOA is based on the classical theory. However, it should be noted that the concept of fault varies within

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1 J. Ananjeva *et al*. Nõukogude tsiviilõigus. Üldosa (Soviet Civil Law. General Part). Tallinn: Valgus, 1975, lk. 421 (in Estonian).

2 Võlaõigusseaduse eelnõu (Draft Law of Obligations Act). Justiitsministeerium, 2001 (in Estonian).

3 It should be noted that in the composition of the general elements of delictual liability, the LOA is largely based on the German model which specifies three elements as grounds to the creation of delictual liability: the objective elements of the act, unlawfulness and fault.

the classical theory, the variations being based namely on the approach to fault as objective or subjective fault. It is a matter of dispute on which the jurists have not reached a common view.

In case of subjective fault the focus is on the tortfeasor, on his or her individual qualities and peculiarities. However, this approach may often lead to a contradiction between theory and practice. Namely, it cannot always be assumed that when making the judgement, the judge is actually able to evaluate adequately the personal qualities of the tortfeasor, and yet it is on this basis that the diligence standards for this specific person are established. Therefore, the development of the law of tort led to the exclusion of personal qualities from the evaluation of a person's behaviour.

In case of the so-called objective fault the emphasis is laid on the violation of a behavioural norm. Here, the behaviour of a person is evaluated according to the question of whether he or she should have been able to foresee and avoid the infliction of damage. The answer to the question is generally found on the basis of the behavioural standard of a normal, reasonable man in the same situation in which the damage was caused on this specific occasion.

The concept of fault in the civil law in force in the Republic of Estonia

The Civil Code of the Estonian SSR passed on 12 June 1964[*4] (hereinafter: Civil Code) does not provide the definition of fault. Section 227 of the Civil Code provides intention and incautiousness as types of fault. The Soviet civil law theory explained fault as the relationship between the tortfeasor's consciousness and the consequences of his or her action. Thus, the question was posed whether the person wished or did not wish the consequences to emerge, whether he or she foresaw the consequences or had to foresee them.[*5]

Levels of incautiousness (incautiousness and severe incautiousness) were determined on the basis of specific circumstances. The aspects that were taken into account were the nature and conditions of the action as well as the personal qualities of the tortfeasor.[*6]

It can be concluded from the above that the law in force as a law reflecting the standpoints of the Soviet civil law theory relies on the concept of subjective fault with an emphasis on personal qualities rather than the violation of a behavioural norm. Judging the fault on each specific occasion, the primary task is to evaluate how the person himself or herself understood his or her action and whether he or she as an individual was not only obliged to foresee but was actually able to foresee that his or her behaviour might result in damage.

In my opinion, a great drawback of the Soviet law theory and thus also of the law in force is the overestimation of one aspect of negligence — the subjective attitude of a person to his or her action and its consequences. Resulting from this, not enough attention has been paid to the issue of whether and to what extent the person was able to avoid damage or mitigate the damaging consequences. Besides this, it is questionable if in case of unaware passivity it is possible to speak about the subjective attitude of a person to his or her action (inaction).

The concept of fault in the legal orders of continental European countries

In the civil law theory of the Federal Republic of Germany there is a multitude of opinions on the issue in question.

Sentence 2 of subsection 276 (1) of the Civil Code of the Federal Republic of Germany[*7] (hereinafter: *BGB*) provides that a person is negligent if he or she fails to fulfil the general duty of care (*allgemeine Verkehrspflicten*). This is the concept of objective fault. J. Esser claims that since negligence, for the

4 Eesti NSV tsiviilkoodeks (Civil Code of the Estonian SSR) – ENSV Ülemnõukogu Teataja 1964, 25 (234) lisa (in Estonian).

5 J. Ananjeva *et al*. (Note 1), p. 421.

6 *Ibid*., p. 422.

7 Bürgerliches Gesetzbuch. 6. Aufl. München: C. H. Bech, 1991.

purposes of sentence 2 of subsection 276 (1) of the *BGB*, is connected only with the general duty of care, the fault is no longer a precondition for liability in the sense of personal reproachability.*[8]

B. S. Markesinis explains the fulfilment of the general duty of care provided in sentence 2 of subsection 276 (1) of the *BGB* as follows: "It means doing something which a reasonable man would not have done, or not doing something which a reasonable man would have done". He claims that similar to common law, the standard of diligence in the law of the Federal Republic of Germany is objective and its test — *bonus pater familias* — sufficiently wide, leaving ample room for legal creativity. If a tortfeasor belongs to the representatives of a profession, he or she must exhibit the diligence required from the representatives of this specific profession. As a rule, the personal limitations of the tortfeasor are not taken into consideration, which the German authors often illustrate with the example of an amateur driver, who makes a mistake of the kind which a driver with his or her experience would not have been able to avoid in the first place.*[9]

Having emphasised the objective standard of the test, Markesinis adds that in pursuit of equalisation, there is still room for certain subjective elements in the determination of the existence of fault. Namely, the tortfeasor's behaviour is evaluated against the background of the behaviour of the hypothetical reasonable man who has been put in the same external situation as the person who has caused damage.*[10]

The author of this article believes that what was mentioned above does not add a subjective element to the concept of fault from the point of view of the personal qualities and abilities of the tortfeasor.

Evaluating the justification of the concept of objective fault, Markesinis notes that the objectification of negligence is in itself an intrusion into the principle of fault, but at the same time it is needed as a factor ensuring the modern law of tort.*[11]

P. Schlechtriem maintains that it is necessary to exhibit the "required" but not the "usual" diligence. According to the prevailing theory, the general duty of care is objectified and it requires the observance of standards applied to a specific profession. Therefore, there is no individual measure on which the obligated person could rely and claim that he or she was unable to meet the standards applicable to his or her profession due to his or her insufficient training, being in a bad mood at the specific time, *etc*.*[12]

According to Schlechtriem, it is extremely debatable if the violation of these objectified standards of diligence has to be accompanied with a subjective reproach in order to presume the creation of liability. He refers to the fact that the prevailing theory does not require the subjective reproachability.*[13] Based on the administration of justice and the prevailing view, the internal negligence (different from criminal law) is determined not according to the individual abilities of the tortfeasor but according to the abilities of the communication circle in which the tortfeasor acts. In most cases, the result of the objectification of internal diligence this way achieved is that the requirements come closer to external and internal diligence.*[14] Schlechtriem adds that a new theory tends to treat the violation of objective ("external") standards of diligence only as a basis to the determination of tort*[15], while the reproach for fault must be accompanied with subjective reproachability as a violation of internal diligence.*[16]

One of the representatives of the trend that considers both the external diligence and the subjective reproachability (from the point of view of internal diligence) to be necessary is E. Deutsch, who holds

8 J. Esser, H.-L. Weyers. Schuldrecht. Band II. Besonderer Teil. 7., neuarbeitete Aufl. Heidelberg: C. F. Müller Juristischer Verlag, 1991, S. 561.

9 B. S. Markesinis. A Comparative Introduction to the German Law of Tort. Oxford: Clarendon Press, 1986, p. 44.

10 *Ibid*., p. 45.

11 *Ibid*.

12 P. Schlechtriem. Võlaõigus. Üldosa (Law of Obligations. General Part). 2., ümbertöötatud trükk. Tallinn: Õigusteabe AS Juura, 1994, lk. 107 (in Estonian).

13 *Ibid*., p. 108.

14 P. Schlechtriem. Võlaõigus. Eriosa (Law of Obligations. Special Part). 4., ümbertöötatud trükk. Tallinn: Õigusteabe AS Juura, 2000, lk. 262 (in Estonian).

15 About different theories of the determination of tort in the Federal Republic of Germany see: K. Kraavi. Generaaldelikti võrdlus Prantsuse ning Saksa õiguses ja võlaõigusseaduse eelnõus, piiritlemine alusetu rikastumisega (Comparison of general tort in French and German law and in the draft Law of Obligations Act; determination with unjust enrichment). Lõputöö. Juh. dots. H. Sepp. Tartu, 1999, p. 24–33 (in Estonian).

16 P. Schlechtriem (Note 12), p. 108.

the view that diligence is formed by a behaviour programme consisting of external and internal components.

The external or objectively required diligence lies in appropriate behaviour. Behaviour can be considered appropriate if behavioural norms are followed or a required attitude to the benefit of law is expressed.*[17] According to E. Deutsch, the civil law generally deems behaviour to be negligent if it fails to meet the objectified and typified requirements for diligence, which result from the principle of "objective undertaking": each person is expected to fulfil the duty of care which is commonly expected from him or her or his or her position. For this purpose, the so-called "groups of duty" (*Verkehrsgruppen*) have been composed on the basis of different professions and risk areas. The representatives of a certain profession must observe the diligence of a proper representative of the profession. Nevertheless, there are exceptions to the objectively required diligence — old people and youngsters are not subject to normal requirements of diligence, for their diligence has to be evaluated in the context of their own kind.*[18]

In Deutsch's opinion, however, the internal or subjectively possible diligence reflects an intellectual/emotional process that may consist of several parts. The internal diligence is based on the sense of the possible realisation of the necessary elements of the act, and thus also on the observance of external diligence. A person must control himself or herself in a way that would enable the realisation of the behavioural obligation resulting from external diligence.*[19] Thus, according to the aim of the norm, it is possible that the subjective/individual obligation of diligence is violated. A person can only be obliged to behave in a way that he or she is able to behave in. Physical, intellectual and emotional abilities are presumed only if they really exist.*[20]

Deutsch finds that negligence only exists when both the external and the internal diligence (in the sense of personal reproachability) have been violated. If the external diligence has not been observed, we are dealing with a violation of an obligation. As a rule, it can be said on the basis of empirical knowledge that in this case, the internal diligence has also been violated.*[21]

In Deutsch's view, it is necessary in case of violation of the defence law to check the disregard of internal diligence at the third element of delictual liability, which is the fault. Upon violation of external diligence (which must be proved by the damaged person), the violation of internal diligence is presumed.*[22]

The fact that the different approaches of Deutsch and Schlechtriem to fault may lead to different solutions in specific cases is illustrated by the example in which it is asked if a doctor can be reproached for negligence if his or her hand is trembling during an operation because he or she went to play tennis right before work. During the operation, the doctor observes his or her internal diligence and controls his or her behaviour as required — which is why the only violation is that of the external diligence obligation. E. Deutsch believes that in this case, the doctor cannot be reproached for negligence.*[23] Schlechtriem, on the contrary, finds that in this event the subjective fault of the doctor lies in undertaking an activity at which he or she is unable to meet the objective standards of diligence*[24] required for the activity — it is the so-called undertaking fault.*[25]

Thus, it can be claimed on the basis of legal literature that so far, the theory of objective fault has been generally accepted in the law of tort of the Federal Republic of Germany, but several distinguished jurists have lately started to have doubts about its expediency. While Schlechtriem supports the concept of objective fault, Markesinis basically "comes to terms" with the concept of objective fault, considering it necessary for the modern law of tort. Deutsch, on the other hand, is a convinced supporter of the so-called "double fault" concept.

Articles 1382 and 1383 of the French civil code (*Code Civile*) establish the general clause of delictual liability. Article 1382 prescribes that any damage wrongfully caused to another person is liable to be

17 E. Deutsch. Academia Iuris. Unerlaubte Handlungen, Schadenersatz und Schmerzengeld. 3., ergänzte Aufl. Köln-Berlin-Bonn-München: Carl Heymanns Verlag KG., 1995, S. 65.

18 *Ibid*., p. 68.

19 *Ibid*., p. 65.

20 *Ibid*., p. 68.

21 *Ibid*., p. 65.

22 *Ibid*., p. 66.

23 *Ibid*., p. 65.

24 If the "average" doctor had been able to perform the operation successfully, the theory of objective fault would really suggest that we recognise the wrongful behaviour of the doctor whose hand was trembling.

25 P. Schlechtriem (Note 12), p. 108.

compensated by the tortfeasor. Thus, unlike the general practice of German civil law, the unlawfulness resulting from damage to the benefit of law is not the most important precondition for delictual liability. What matters is the violation of the behavioural obligation to avoid causing damage to another person. The intentional infliction of damage in itself is against the obligation, but any violation of an obligation generally paves the way for fault. Article 1383 provides that a person is not only liable for damage caused intentionally, but also for damage caused negligently and incautiously.*[26]

In French civil law theory, the principles of the classical and the objective theory are opposed, the latter of which represents an innovatory approach to the foundations of liability law.

Similar to their German colleagues, the supporters of the classical theory divide the concept of fault into two elements: the objective fault and the subjective fault. The theory of objective liability, which says that the tortfeasor's fault is not at all necessary for the creation of liability, has also received remarkable support.*[27]

The concept of fault in common law

British jurists P. J. Cooke and D. W. Oughton note that the subjective study of each person's abilities and competence would not be sufficient and efficient.*[28] It is the dominating opinion that obligations applied to the acting party have no place in the law of tort.*[29] Therefore, decisions on fault are made on the grounds of the forms of expression of external behaviour. The standard behaviour, which is the target, is described as the "behaviour of the reasonable man" in the law of England as well as the United States of America. The reasonable man is a fiction to which the judge gives a meaning in each separate case on the basis of his or her set of values.*[30] The reasonable man knows the things that are generally known at the time.*[31] Negligent behaviour is that below the required standard which has been established to protect other persons from an unreasonable risk of damage. This standard of behaviour has been usually measured in the light of what the reasonable man with common foresight would have done under the same circumstances.*[32] D. Howarth poses a control question or a test, the answer to which enables to solve the issue of fault in each specific case, the question being: "How would the reasonable man behave?" It has often been said that the reasonability of the tortfeasor's behaviour is the matter of fact.*[33]

The question of what kind of behaviour can be expected from an underage person has been a matter of dispute. In the judgement of the court case *McHale v. Watson* it was noted that the correct diligence standard for an underage tortfeasor is of the kind that is expected from a reasonable minor of the same age, intelligence and experience.*[34] In addition to this, the standard of the reasonable man has certain subjective features if the person has a physical disability: in that case, the basis is the behaviour of a reasonable man with a similar physical disability.*[35]

With regard to the question if fault has to do with the relation of the tortfeasor's consciousness to the cause of damage, J. G. Fleming has claimed that it is important to proceed from the fact that negligence is not a state of mind but rather a kind of behaviour that is below the standard which is considered normal or is required in the society. He maintains that the subjective meaning of a person's fault has long been renounced in favour of the impersonal standard — how the reasonable man would have behaved under the same circumstances.*[36]

26 C. Autexier, H. J. Sonnenberger. Einführung in das französische Recht. 3., umarbeitete Aufl. Heidelberg: Recht und Wirtschaft, 2000, S. 138.

27 K. Kraavi (Note 15), p. 12–13.

28 P. J. Cooke, D. W. Oughton. The Common Law of Obligations. London-Edinburgh-Butterworths, 1984, p. 169.

29 D. J. Cooke, D. W. Oughton. The Common Law of Obligations. 2nd ed. London-Dublin-Edinburgh: Butterworths, 1993, p. 173.

30 P. J. Cooke, D. W. Oughton (Note 28), p. 169.

31 E. J. Kionka. Torts. 2nd ed. Minn: West Publishing Co. St Paul, 1933, p. 137.

32 J. G. Fleming. The Law of Torts. 9th ed. The Law Book Company Limited, 1992, p. 105.

33 D. Howarth. Textbook on Tort. Buttenworths-London-Dublin-Edinburgh, 1995, p. 37.

34 D. J. Cooke, D. W. Oughton (Note 29), p. 174.

35 E. J. Kionka (Note 31), p. 138.

36 J. G. Fleming (Note 32), p. 102.

Markesinis also believes that there is a crucial difference between negligence as a state of mind and delictual negligence. Different from intention and recklessness, negligence as a state of mind means the failure to foresee the consequences of an action that creates the risk of damage to other persons.*[37] Foresight is one side of the concept of the violation of an obligation. The violation of an obligation*[38] exists if the defendant's behaviour is also unreasonable in the sense of the non-observance of a proper diligence standard.*[39]

G. H. L. Fridman asserts that for several reasons it cannot be said that the law of tort is firmly based on the idea that liability may not be created without fault, be it intention or negligence. On the other hand, wrongful behaviour may not always lead to delictual liability, either: there is no congruence between wrongful behaviour and delictual liability and there is no reason to believe that such a congruence will eventually occur.*[40] According to Fridman, the use of subjective fault is not justified for the above-mentioned reasons.

Consequently, it can be claimed on the basis of special literature that in common law, similarly to the Federal Republic of Germany, the concept of objective fault is dominating and it seems to be relatively deeply rooted and steady in legal science as well as in the administration of justice. There are no sufficiently convincing arguments that would lead the common opinion to the acceptance of subjective fault.

The concept of fault in the draft Law of Obligations Act

Section 1155 of the LOA provides the definitions of intention, negligence and severe negligence. Pursuant to the first sentence of subsection 1155 (2) of the LOA, a person is negligent if he or she fails to observe the general duty of care expected from him or her under certain circumstances, taking into consideration, among other things, the situation, age, education, knowledge, abilities and other qualities of the person. Pursuant to the second sentence of subsection 1155 (2) of the LOA, severe negligence is the considerable non-observance of the general duty of care expected from a person. Subsection 1155 (3) of the LOA provides that intention is a person's wish for the unlawful consequences of his or her behaviour to realise. Subsection 1155 (1) provides an important rule about the division of the duty to prove the fault, according to which the tortfeasor will not be liable for the damage he or she has caused if he or she proves that he or she is not guilty of causing the damage, unless otherwise provided by law.*[41]

Thus, the LOA has abandoned the approach to fault that was favoured in the Soviet legal theory (see above). It should be noted that the abandonment of the hitherto dominating approach is well justified because the approach that considers the fault to be the tortfeasor's attitude to his or her unlawful act and its consequences represents subjectivity in the extreme. In addition to this, it is obvious that what has occurred in a person's consciousness cannot be objectively grasped and evaluated by other persons, including judges as the main administrators of justice, and that the respective judgements have to be made on the basis of circumstantial evidence.*[42]

On the basis of the comparison and analysis of the concept of negligence contained in the LOA and in *BGB*, we can draw the conclusions below. Taking as a basis the first two clauses of subsection

37 B. S. Markesinis, S. F. Deakin. Tort Law. 4th ed. Oxford: Clarendon Press, 1999, p. 75.

38 *Ibid*., p. 74. The concept of obligation in the view of Markesinis has been sometimes used in a different and more specific meaning: for the diligence obligation to be created in a specific case, the occurrence of damage must be foreseeable namely in connection with the individualised damaged person.

39 B. S. Markesinis, S. F. Deakin (Note 37), p. 75.

40 G. H. L. Fridman. Torts. London-Ontario-Canada: Waterlow Publishers, 1990, p. 18.

41 On account of the limited volume of this article, the problems of the division of the duty to prove the fault will not be tackled here.

42 It can be noted that there is no fundamental difference between the solution of a case according to the LOA or the present law: if a person behaved incautiously according to the Civil Code, we would in most cases deduce from the LOA that he or she has behaved negligently. Both regulations take account of the specific person and first of all his or her personal qualities. The only difference lies in the different meaning given to the concept of fault, but both the LOA and the Soviet civil law theory proceed from the concept of subjective fault.

1155 (2), we will come to the first part of the definition of negligence, which says that negligence is the non-observance of the general duty of care expected from a person under certain circumstances. Virtually the same meaning has been given to the concept of negligence in the second sentence of subsection 276 (1) of the *BGB*. The difference stems from the fact that the LOA prescribes directly that a person's situation, age, education, knowledge, abilities and his or her other qualities must also be taken into consideration when determining the degree of care generally expected from the person.

The enumeration of aspects to be considered is the cause of a split between the standpoint that is generally accepted in German legal science and practice and what has been provided in the LOA: while the German civil law theory relies on the diligence standards established for the specific profession (the fault is objective), the LOA considers it necessary to provide general guidance to the administrators of justice (not leaving the solution of the matter to theory, either) and enacts the concept of subjective fault taking into account the individual abilities and other qualities of a person.

In my opinion, professional standards of diligence have to be taken into account in some cases on the basis of the LOA, too, as it is done in the legal practice of the Federal Republic of Germany. The definition of negligence provided in the second sentence of subsection 1155 (2) of the LOA does not exclude the possibility. For this purpose, groups of the respective typical cases have to be established by legal practice. An example could be a case in which a hiker who has been trained for this is negligent when making a campfire and the forest catches fire. In this case, we could proceed from the diligence standard of hikers as a social group. In the event of the violation of the standard, it should be considerably harder for the tortfeasor to prove his or her innocence than it would be for a casual hiker who does not belong to a hiking club and who has not been trained for hiking.

Although I consider the subjective approach to fault to be more reasonable, the following analysis of the pros and cons of this approach should enable the readers of this article to evaluate whether or not the decision made in the LOA is justified.

The first argument in favour of objective fault could be the fact that objective fault has been accepted in all countries studied.*[43] Therefore, the opposite position of the LOA would need a special justification. Secondly, it is reasonable to claim that the determination of subjective fault in each separate case would be definitely more complicated and time-consuming than the establishment of behavioural standards for our own "reasonable man". Consequently, it is more comfortable to implement the objective fault in practice. It has also been claimed that checking the subjective fault (if we assume its possibility) in each separate case is not sufficient and efficient. The last (although, perhaps artificial) argument could be the fact that in case of the fault of a legal person, for instance, it is not possible to take subjectivity into consideration.*[44] This, on the other hand, would lead to different solutions in the determination of the fault of natural and legal persons, although pursuant to the first sentence in section 12 of the Constitution of the Republic of Estonia, everyone is equal before the law. Thus, the supporters of objective fault could raise a question of the unequal treatment of people that occurs together with the application of subjective fault.

Despite the arguments above, I still support the theory of subjective fault. First of all, we should take into consideration the discussion among German scientists. As was mentioned earlier, the dominating opinion is no longer absolute in Germany — several well-known jurists (*e.g.* E. Deutsch) wish to abandon the concept of objective negligence.

I think that an important argument in favour of subjective fault lies in the fact that the society is not entitled to require a person to behave in a manner in which the person is subjectively unable to behave and then impose liability on him or her for the non-observance of the kind of behaviour that is impossible for the person. This takes us to the following argument according to which only the consideration of the personal qualities of an individual in the determination of his or her fault can result in real liability for fault and in a fair judgement. The objectification of negligence, on the other hand, would often lead to the violation of the principle of fault, as a result of which the so-called

43 Similar to the principles commonly accepted in the Federal Republic of Germany, in France and in common law, the liability in the codes of the three Scandinavian countries (Finland, Sweden and Norway) is based on personal fault, *i.e.* on the so-called rule of fault. The standard of diligence in the law of these countries is completely objective, even children and mentally ill people may have behaved wrongfully in this sense. See W. V. Gerven, J. Lever, P. Larouche, C. v. Bar. Common Law Europe Casebooks. Torts. Scope of Protection. Genevieve Viney. Oxford: Hart Publishing, 1998, pp. 44–45.

44 The liability of a legal person may arise from (1) the delict of a member of the organisation — in this case, the main emphasis is on the fault of the natural person as a tortfeasor, or (2) from organisational deficiencies – in this case, it is not possible to consider the subjective fault at all.

faultless liability for fault might occur, which should not be allowed at least until we recognise fault as a basis of delictual liability.

Hence, even if the use of the concept of objective fault in practice is a comfortable solution, it is difficult to find an answer to the question of what remains of delictual liability if we remove personal reproachability from the essential elements of delictual liability.

The definition of fault as provided in the LOA must also be favoured for the reason that the consideration of the tortfeasor's personal qualities helps to achieve a more fair judgement in separate cases (at least if certain persons are involved such as children, disabled persons, elderly people, but probably also other persons).*[45]

To conclude, it is worthwhile referring to two jurists whose ideas are worthy of support. So, for instance, T. Honore believes that the standard of objective diligence has more in common with risk liability than with the real principle of fault because it makes a person liable for mistakes which he or she is subjectively unable to avoid.*[46] Markesinis is also right when he asserts that the objectification of negligence is an intrusion into the principle of fault. In practice, the theoretical distinction between delictual liability and risk liability is often very vague. This change has been accompanied with the transformation or even unnaturalness of the traditional doctrine and the concept of fault.*[47]

As an objection to the assertion of the advocates of objective fault that the checking of subjective fault is not sufficient and efficient (if it is possible at all), it should be remarked that as a rule, the supporters of objective fault also acknowledge the need to take into consideration the subjective peculiarities of certain persons (*e.g.* underage people, disabled persons).*[48] It could be asked why it is possible and acceptable to take into consideration the personal qualities of certain people and why it is impossible or at least insufficient in case of all the others.

Conclusions

The authors of the LOA have made a choice between subjective and objective fault at a time when the issue of the concept of fault is an object of discussion in many countries.

Although there are strong arguments in favour of both, the author still supports the solution of the LOA whereby subjective factors are taken into consideration for the determination of fault in case of delictual liability.

On the grounds of arguments provided in the main part of the article, another interesting conclusion can be drawn: namely, while the arguments in favour of subjective fault are theoretical in nature, the arguments that support objective fault are of a more practical nature. I believe that the concept of objective fault cannot be considered justified for the sole reason that this is the more efficient and comfortable way to administer justice. Efficiency and comfort should not be the arguments that make us abandon the traditions of the law of tort and distort the principle of fault as the main basis of delictual liability.

Since the LOA has not yet been passed by the *Riigikogu*, it is the optimum time to have a wider discussion on the issue herein tackled. Knowing the differences in the solution of separate cases resulting from the objective and subjective approach to fault and the importance of the issue for the law of tort as a whole, it is difficult to overestimate the need for relevant discussion prior to the final resolution of the matter.

45 In favour of the supporters of objective fault, it should be said that the correction of the judgement from the point of view of fairness is also possible pursuant to subsection 129 (1) of the LOA which provides that the court may decrease the legal compensation for damages if, taking into consideration the circumstances and mainly the nature of liability, the relationship between persons and their financial situation, including insurance, the full compensation for damages would be extremely unfair to the obligated person or reasonably unacceptable for any other reason.

46 S. R. Perry. Symposium: Corrective Justice and Formalism: the Care One Owes One's Neighbors: the Moral Foundation of Tort Law. – Iowa Law Review, 1992, p. 14.

47 E. Deutsch (Note 17), p. 45.

48 About common law, see: P. J. Cooke, D. W. Oughton (Note 28), p. 174; E. J. Kionka (Note 31), p. 138; about the Federal Republic of Germany, see E. Deutsch (Note 17), p. 68.