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Damage arising from Defect in Object of Contract to Creditor's Absolute Legal Rights: Contractual or Delictual Liability?

1. Damage to creditor's absolute legal rights by defect in object of contract

During the performance of a contract, the creditor's interests can suffer damage in a number of ways. For example, the debtor can be late with a delivery of raw materials, which could obstruct the activities of the creditor's entire enterprise. Or, the debtor can fail to supply any raw material at all, and the creditor will have to procure it from other sources for a higher price. In such cases, the creditor will be entitled to claim compensation for damage from the debtor under § 115 of the Estonian Law of Obligations Act. Furthermore, damage can also be caused if the debtor sells to the purchaser a car with faulty brakes, repairs the brakes deficiently or provides a leased apartment in a condition which is hazardous to health. Such defects can damage creditors' absolute legal rights, and particularly their life, health or property. It would be traditional to assert that any such damage to the other party's absolute legal rights can also be covered by the creditor's contractual claim for compensation for damage.¹ Nonetheless, this article is aimed at demonstrating that such an assertion is no longer absolutely valid in the context of the Law of Obligations Act^{*2} (LOA), which is presently applicable in Estonia. Rather, on the contrary: on the basis of the following examples we shall have to admit that as a rule, prevention of such damage is not the purpose of the debtor's contractual obligation (LOA § 127 (2)) and therefore, such damage is not compensable under the contract. Inasmuch as this regards legal rights that are absolute and are therefore protected by the law of delict, the debtor will be liable under LOA §§ 1043 et seqq.

¹ O. Palandt. Kommentar zum Bürgerlichen Gesetzbuch, 64. Aufl. H. Heinrichs, W. Weidenkaff (Contributors). C.H. Beck 2005, § 280, para. 18; § 536a, para. 14. As regards damage to property, see also: P. Schlechtriem, I. Schwenzer (eds.). Commentary on the UN Convention on the International Sale of Goods (CISG), second edition. H. Stoll, Dr. Gruber (Contributors). Oxford 2005, art. 74, para. 2 (protection of indemnity interest); O. Lando, H. Beale. Principles of European Contract Law. Kluwer Law International 2000, pp. 439, 441. See also CCSCd 3-2-1-69-05. Available at: www.nc.ee (in Estonian).

² Võlaõigusseadus (Law of Obligations Act). – RT I 2001, 81, 487 (in Estonian).

In order to explain this conclusion, which may seem surprising at first sight, I should like to describe two hypothetical cases. Let us suppose that an appliance shop sells to a purchaser an extension lead for a price of 50 krooni, and a latent defect in the extension lead causes a short circuit, which results in a fire accident in the purchaser's house leading to a damage of 500,000 krooni. Should the shop compensate for the damage caused to the purchaser's property regardless of the fact that the defect in question was not detectable upon external inspection and it would be unreasonable to expect the shop to separately test or disassemble each item on sale?

Or, let us take another example in which an elderly lady lets out a house inherited from her sister. Unfortunately, substances which are poisonous and hazardous to health have been used in the construction of the house. The lessor is unaware, and even cannot be aware, of that since it is not reasonable to assume that an ordinary lessor would order, before letting out a house, a general technical expert analysis to make sure that the house has been built completely safely. The lessee moves in and suffers damage to health, and maybe even dies, because of the poisonous substances. Should the lessor compensate for the funeral expenses, pay support to the lessee's dependants (LOA § 129) and additionally satisfy the Health Insurance Fund's recourse claim to the extent of the medical treatment expenses under § 26 of the Health Insurance Act?

In both of these cases, the debtors have breached their contractual duty to deliver a thing which conforms to the contract.³ Characteristically of both cases, the creditor's absolute legal rights have been damaged by a defective object of contract while the debtor was not, and did not have to be, aware of such defect. We also saw that such damage can be extremely large and, in the author's opinion, it is questionable in terms of legal policy whether a debtor can be expected to take such risks for e.g. a purchase price of 50 krooni or a monthly rent of 3000 krooni. This is particularly questionable in a situation in which all provisions regarding legal remedies available to the weaker party (i.e. the consumer or the lessee) are absolutely imperative: under Estonian law, neither the seller nor the lessor may contractually subject their liability to a condition of fault or limit their liability with regard to certain types of damage (LOA §§ 237 (1) and 275).⁴ It would also be unreasonable to expect lessors to insure their possible liabilities before concluding a residential lease contract — all the more so as, to the author's knowledge, conclusion of such insurance contracts in Estonia is presently not possible. But how then can such claims for compensation be avoided or limited?

2. Preclusion of claims for compensation on grounds of force majeure?

In the search for limits of contractual compensation for damage, the question of the existence of debtor's liability as such will inevitably come up: a distinction should be made between the question of the extent of the debtor's liability and the question of whether the debtor is liable at all.⁵ Even in the above-described cases, the question of the debtor's liability in general will be the first to arise.⁶ The sale of a defective thing or the delivery of a deficient work or defective object of lease may indeed be excusable by LOA § 103 but the question lies in whether the excusability can arise solely from the fact that the debtor was not, and did not have to be, aware of the defect in the object of contract.

In order to answer that question, the difference between fault-based liability and a stricter⁷, excusability-based type of liability must be explained in the first place. In Estonian legal literature, justified positions have been expressed that the practical difference between those concepts becomes apparent, first of all, in the case of 'result-oriented obligations' (i.e. *obligations de résultat* known in French law) referred to in LOA § 24 (1) (the first alternative).⁸ Both of our cases deal specifically with result-oriented obligations, in

³ As for the seller: LOA §§ 217 (1), 217 (2) 2); as for the lessor: LOA § 276 (1).

⁴ In Germany, on the other hand, the strict liability provided for in BGB § 536a, can be derogated by the contract and so the debtor's liability can be subjected to fault. C. Ahrens. Mietrechtliche Garantiehafung — Widersprüchlichkeiten im neuen Schuldrecht. — ZGS 2003/4, p. 138. For consumer sale contracts, a claim for compensation for damage can be also subjected to limitations to the extent that this will not conflict with the provisions in the regulation of standard conditions, see BGB § 475 (3). An absolutely imperative regulation of claims for compensation for damage suffered by consumers or lessees is probably not justified in Estonia, either.

⁵ H. McGregor. The Law on Damages. 15th edition. London: Sweet&Maxwell 1988, p. 61.

⁶ In accordance with LOA § 103 (1) and (2), a debtor is always liable for non-performance of the debtor's duties unless the non-performance is excused, i.e. the non-performance was due to *force majeure*.

⁷ K. Sein. Mis on vääramatu jõud (What is *force majeure*)? — Juridica 2004/8, p. 512 (in Estonian); I. Kull, M. Käerdi, V. Kõve. Võlaõigus I: üldosa (Law of Obligations I: General Part). Tallinn: Juura 2004, p. 195 (in Estonian).

⁸ I. Kull et al. (Note 7), pp. 192–193, where the contractor's duty to complete a work which conforms to the contract is provided as an example of a result-oriented obligation; O. Lando, H. Beale (Note 1), pp. 303–304. In other cases, a party is obligated to achieve the result, anyway, only by making such efforts as would be reasonably made by a debtor in the same field of activity, as provided in LOA § 24 (2).

which the debtor can be exempted from liability only by proof that the defect in the object of contract was caused by force majeure. In order to decide when a defect in the object of contract may be regarded as due to force majeure, let us take a look at the practice of interpreting article 79 of the Vienna Convention on Contracts for the International Sale of Goods (CISG), as the concept of strict liability provided in Estonian LOA § 103 has its origins right there.

In creating the CISG, the common-law concept of seller's absolute liability was not incorporated into the convention.⁹ However, at the same time, the principle of fault-based liability was also knowingly left aside.¹⁰ Therefore, correct interpretations of LOA § 103 should not be based on the principle, prevailing in German law, whereunder a seller is not liable for damage caused by selling a defective item to a purchaser if the seller was unaware of the defect, had obtained the sold item from a trustworthy source and would not have detected that defect even by such methods of examination as could have been reasonably expected from the seller in such situation.¹¹ The general position regarding CISG art. 79 is that the seller is liable even for such a thing the defects of which are hidden from the seller, and that is the case both when the sold item has not been manufactured by the seller but, rather, purchased from a third party (e.g. importer)¹² and (or particularly) when the sold goods have been manufactured by the seller.¹³ A few exceptions, e.g. if the defect is caused by terrorist act, are conceivable but extremely rare in real life.¹⁴

As demonstrated above, a defect in a sold thing belongs to the risk sphere of the seller, who thus cannot use LOA § 103 as an excuse.¹⁵ In the case of a residential lease contract, it must similarly be admitted that the lessor is practically always liable for damage caused by a defect in the object of lease under LOA §§ 276 (1), 115 and 103.¹⁶

3. Preclusion of claims for compensation under the foreseeability rule (LOA § 127 (3))?

Compensation for damage in the above-described cases could actually be precluded for the reason that the damage could not be reasonably foreseen by the debtor at the moment of concluding the contract (LOA § 127 (3)). It is often stressed in legal literature that strict liability and the foreseeability rule are closely or even inseparably interrelated.¹⁷ However, upon closer analysis it can be noted that the foreseeability rule is

⁹ In common-law countries, release of the seller from liability in the event of breach of warranty, i.e. the delivery of a thing which does not conform to the contract, would be absolutely out of the question. U. Krüger. *Modifizierte Erfolgshaftung im UN-Kaufrecht: die Haftungsbefreiung bei Lieferung vertragswidriger Ware gemäß Art. 79 CISG*. Frankfurt am Main, Lang 1999, pp. 34, 200. For English law, see: M. Schmidt-Kessel. *Standards vertraglicher Haftung nach englischem Recht: limits of frustration*. 1st ed. Baden-Baden: Nomos-Verl.-Ges. 2003, pp. 229, 235, 271.

¹⁰ C.M. Bianca, M.J. Bonell. *Commentary on the International Sales Law*. D. Tallon (Contributor). Milano 1987, p. 573. In the preparation of the CISG, jurists from common-law countries were afraid that in practice, article 79 would be equalised with fault-based liability by German courts. P. Schlechtriem. *Anmerkung zum Urteil des BGH v. 24.3.1999 – VIII ZR 121/98. – JZ 1999*, pp. 795, 797.

¹¹ In German law, contractual claims for compensation for damage are, as a general rule, based on the requirement of the debtor's fault, see BGB §§ 280 (1) and 276. A similar interpretation for CISG art. 79 is, however, supported by H. Stoll – P. Schlechtriem, I. Schwenzler (Note 1), art. 79, para. 40.

¹² U. Huber. *Die Haftung des Verkäufers für Verzug und Sachmängel*. *Österreichische Juristische Blätter*, 1989/5, p. 284; P. Schlechtriem (Note 10), pp. 796-797; C.M. Bianca, M.J. Bonell (Note 10), p. 580; German Federal Supreme Court Decision of 24 March 1999, CISG-online No. 396. As regards professional sellers, the irrebuttable presumption of the seller's awareness of the defect is applied also in France and Luxembourg. C. von Bar, U. Drobnig. *Study on Property Law and Non-contractual Liability Law as they relate to Contract Law*, p. 78. Available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf.

¹³ See German Federal Supreme Court Decision of 9 January 2002, CISG-online No. 651.

¹⁴ U. Huber (Note 12), p. 283. Similarly, M. Schmidt-Kessel (Note 9), p. 237.

¹⁵ The same position with regard to Estonian law has been taken by M. Käerdi. *Abgrenzung der vertraglichen und außervertraglichen Haftungssysteme im deutschen und estnischen Kaufrecht und im Einheitsrecht — eine rechtsvergleichende Studie* (yet unpublished; the author has a copy of the manuscript), pp. 117–118.

¹⁶ However, a different position towards this question has been taken by U. Huber (*Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*. Vol. I. Bundesministerium der Justiz (eds.). 1981, p. 722), in whose opinion a defect in the object of lease does not constitute a 'circumstance which should have reasonably been taken into account by the debtor'.

¹⁷ L. Vekas. *The Foreseeability Doctrine in Contractual Damage Cases*. – *Acta Juridica Hungarica* 2002 (43), p. 172; U. Huber (Note 16), p. 729. Both the foreseeability rule and the principle of liability without fault are based on the idea of a reasonable risk distribution, and the limitation of compensation for damage to only such damage as could be foreseen at concluding the contract should alleviate the strict liability, which otherwise could result in too adverse consequences. Therefore, in countries where the debtor must compensate for the damage caused only upon culpable breach, the need for any methods to additionally limit the extent of compensation for damage is less than in those countries which apply liability without fault.

not very suitable for application in the case of damaged absolute legal rights.^{*18} Namely, for the foreseeability of damage under LOA § 127 (3), it is not material whether or not the debtor foresaw or must have foreseen the breach of contract or, in other words, that the object of contract delivered by the debtor did not conform to the contract within the meaning of LOA § 217 (1) or § 276 (1). Hence the foreseeability of damage does not depend on whether the debtor was aware of the defect in the delivered thing: the only matter of relevance here is whether the debtor foresaw or must have foreseen that the defect in question could result in such damage.^{*19}

Therefore, in the described cases, we must ask the question of whether the lessor would have foreseen the damage to the lessee's health caused by the defect in the house if she had known of such defect at the time of concluding the contract. However, it is obvious that if the debtor had known that living in the house could be hazardous to health, she would have certainly, or at least must have, foreseen that this could result in health damage and medical treatment expenses. The same applies to the seller of the extension lead. Thus the foreseeability rule provided in LOA § 127 (3) will not enable, within its empirical sense, to reasonably limit a claim for compensation for damage since such damage is very often objectively foreseeable.

Commentaries on the CISG express the position that in such cases, the question is whether the damage has resulted from the realisation of the risk which has been caused by the seller by delivery of the defective thing and which must be borne by the seller.^{*20} Therefore this requires an assessment of which damage risks the seller was, by default, ready to be liable for upon concluding the contract. In other words, we must ask whether the breached obligation (i.e. the duty to deliver the thing without any defects) was aimed at protecting the creditor against such damage as has been caused by the defect (LOA § 127 (2)).

4. Preclusion of claims for compensation through the purpose of breached obligation (LOA § 127 (2))?

Under LOA § 127 (2), damage will not be compensated for to the extent that prevention of damage was not the purpose of the obligation due to the non-performance of which the damage arose. This so-called theory of the purpose of breached obligation^{*21} not only determines the extent of any claims for compensation for contract damage (LOA § 127 (2)) but in addition, the cumulation of contractual and delictual claims is thereby also precluded (LOA § 1044 (2)). Namely, damage to the other party's absolute legal rights will give rise to the question of whether the creditor can claim compensation for such damage on the grounds of contractual liability (LOA §§ 100 et seqq.) or the provisions on non-contractual liability (LOA §§ 1043 et seqq.).^{*22} In Estonia, the principle of *non-cumul* contained in LOA § 1044 (2) precludes, as a general rule, any delictual claims if a contractual claim exists, i.e. the free concurrence of claims cannot occur.^{*23} This is non-applicable only in the event of health damage (LOA § 1045 (3)).

Hence, if the duty to deliver an extension lead which conforms to the contract were primarily aimed at enabling the purchaser to use a thing matching his or her expectations, and not to protect the purchaser against any damage that may be caused to his or her property (LOA § 127 (2)), a contractual claim by the purchaser would lapse and a delictual claim would become an option (LOA § 1044 (2)).^{*24} This would mean that the protection of the debtor's absolute legal rights would not be included in the purpose of the lease or

¹⁸ L. Vekas (Note 17), p. 161; P. Schlechtriem, I. Schwenger (Note 1), art. 74, para. 47.

¹⁹ K. Sein. Kahju ettenähtavuse reegel kahjuhüvitise piiramise alusena (The rule of foreseeability of damage as a basis for limiting compensation for damage). – *Juridica* 2003/4, p. 245 (in Estonian); P. Schlechtriem, I. Schwenger (Note 1), art. 74, para. 47.

²⁰ P. Schlechtriem, I. Schwenger (Note 1), art. 74, para. 47; J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einföhrungsgesetz und Nebengesetzen, Ergänzungsband. U. Magnus (Contributor). Wiener UN-Kaufrecht: (CISG). Berlin: Sellier de Gruyter 1999, art. 74, para. 46.

²¹ That theory (*Schutzzwecktheorie* in German) originates from the German jurist, E. Rabel. See E. Rabel. *Das Recht des Warenkaufs*. Vol. 1. Berlin: Walter de Gruyter und Co 1936, pp. 495–511.

²² Violation of absolute legal rights is unlawful under LOA § 1045 (1) 1), 2) and 5). All over the world, such legal rights are traditionally protected through law of delict. C. von Bar. *Gemeineuropäisches Deliktsrecht*. Bd 1. C.H. Beck 1996, p. 439.

²³ The question of whether a claim is contractual or delictual has practical significance in Estonian law primarily in the following aspects: firstly, the standard of liability (independent of fault in the case of a contractual claim; fault-based in the event of a delict; cf. LOA §§ 103 and 1050); secondly, different limitation periods in cases other than health damage, cf. GPCCA §§ 146 (1) and 1050; and thirdly, several provisions precluding or limiting the debtor's liability in contract law, e.g. the examination and notification duty of a purchaser in economic activity under LOA §§ 219, 220. The liability, however, is presumed in Estonian law both in the case of contractual and delictual claims under LOA §§ 103 (1) and 1050 (1).

²⁴ Likewise, it can be stated that the purpose of the duty to deliver a non-defective object of lease is not to protect the lessee against possible damage to health but, rather, to enable the lessee to reside in the apartment, the condition of which is contractual.

sale contract, which, in turn, would result in a situation in which those legal rights would be protected not by contractual but only by non-contractual liability.

The answer to the question of when the duty to protect the other party's absolute legal rights is encompassed in a contract will, first of all, require an explanation of the functions and purposes of contractual and non-contractual liability, the differences between, and the interests and values protected by, those functions.

4.1. Functions of contractual and non-contractual liability

The law of delict provides rules of conduct which must be observed by everyone in respect of everybody else, i.e. which are 'generally and always applicable to interpersonal relations'^{*25}, and violations of which result in liability under the law. It is the function of the law of delict to protect persons' interests in that their legal rights may not be violated by other persons.^{*26} Hence the law of delict is directed to maintaining the status quo of a person's legal rights. By its very nature, the regulation of compensating for damage caused to absolute legal rights belongs specifically to the area of the law of delict (including, often, the liability of producer).^{*27}

Contract law, on the contrary, is aimed at effecting the transfer something of value from one person to another by means of the conclusion of contracts. Usually, the purpose of concluding a contract is to increase one's wealth^{*28} and not to protect one's existing legal rights, which the parties, as a general rule, do not even think of in the case of normal economic transactions. Nor has the risk of such damage been included in the contract price as a rule. Moreover, in most cases, only the object of contract and, often, the time and place of performance are expressly agreed in everyday transactions. Everything else is derived from either the law or interpretations of the contract or e.g. the principle of good faith. This means that through extensive interpretation, and interpretation based on the hypothetical intention of the parties, of the contract, its content is regarded as inclusive of also such terms that were never actually negotiated.^{*29} At the same time, the debtor's liability is thereby extended to include such risks of damage that have not been taken into account by the debtor at the time of concluding the contract. This is particularly problematic in a situation in which a mere fact of a breach of contract (delivery of a thing which does not conform to the contract) is sufficient to give rise to a claim for compensation for damage, without any need for the debtor's fault to be the basis of liability.^{*30}

4.2. Protection of creditor's life and health as purpose of contractual obligation?

Certainly, there are contracts the purpose of which is specifically to protect the creditor against damage to health: for example, medical services contracts, contracts concluded with babysitters or contracts for the carriage of passengers. However, for the reasons set out in the preceding paragraph, protection of the creditor's life and health is, as a rule, not the purpose of the debtor's (principal) contractual obligation.^{*31} Although the debtor's principal obligation may be constituted by the duty to deliver a thing which conforms to the contract, the purpose of this obligation is nevertheless to protect the debtor's so-called interest in equivalence, i.e. the interest in receiving goods or services which are equivalent to the consideration paid, rather than to protect the debtor's absolute legal rights.^{*32}

Could protection of the debtor's life and health be, however, the purpose of a contractual collateral obligation or an independent protection obligation? Or would this, depending on the situation, be simply a delict-

²⁵ I. Kull (Note 7), p. 255.

²⁶ S. Leicht. Die Qualifikation der Haftung von Angehörigen rechts- und wirtschaftsberatender Berufe im grenzüberschreitenden Dienstleistungsverkehr. Tübingen: Mohr-Siebeck 2002, p. 152; H.-J. Meyer. Rule of Foreseeable Damage. Das Haftungsbeschränkungsprinzip für vertragliche Schadensersatzansprüche im Common Law. Regensburg 1986, p. 102.

²⁷ See U. Huber. Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge. *RabelsZ* 1979/43, pp. 500–501; P. Schlechtriem. Einheitliches Kaufrecht – wissenschaftliches Modell oder praxisnahe Regelung? Heidelberg 1978, pp. 52–53.

²⁸ D. Harris, D. Campbell, R. Halson. Remedies in Contract and Tort, second edition. Butterworths 2002, p. 5. At the same time it must be admitted that today, contract law and law of delict are becoming more and more intertwined, their functions have approached in several points and one can no more be distinctly separated from the other. U. Drobnig, C. von Bar (Note 12), pp. 436–437.

²⁹ S. Leicht (Note 26), p. 149. For a more detailed analysis of extensive interpretation of contracts, see I. Kull. Hea usu põhimõte kaasaegses lepinguõiguses (Principle of good faith in modern contract law). Tartu 2002, pp. 133 et seqq. (in Estonian).

³⁰ It has also been emphasised by M. Pellegrino that a claim for compensation for damage arising from breach of a protection obligation can be an option only in the case of the debtor's fault. *Subjektive oder objektive Vertragshaftung?* – *ZEuP* 1997/1, p. 57.

³¹ For contracts of sale, such a position has been taken by M. Käerdi (Note 15), p. 199.

³² *Ibid.*, pp. 18–19, 30–31.

ual duty of care^{*33} which is applicable *erga omnes* and which would give rise to liability only under the provisions of LOA §§ 1043 et seqq.^{*34}

German law is of the position that in addition to the parties' duties of performance, an obligation also contains protection duties, which are not aimed at carrying out the duty assumed in the contract but, rather, at protecting the other party's absolute legal rights (see BGB § 241 (2)). It is, though, arguable, whether such protection obligations are contractual collateral obligations^{*35} derivable from the principle of good faith or independent obligations arising out of law.^{*36} In any case, breach of such a protection obligation in Germany results in contractual or quasi-contractual but not delictual liability.

Should the existence of such collateral or protection obligations, aimed at protecting life and health, also be approved of in Estonian law? Their existence could be derived from LOA § 2 (2), whereunder the nature of an obligation may oblige the parties to the obligation to take the other party's rights and interests into account in a certain manner.^{*37} At the same time, it is questionable, given the structure and conceptual solutions of the Estonian law of obligations, whether or not such protection obligations, breach of which would result in liability under LOA §§ 100 et seqq., i.e. liability without fault, could anyhow exist in relation to the other party's absolute legal rights. The author of this article is of the opinion that this should be negated.

In general, it can be said that the stronger the protection of persons' legal rights under a state's law of delict (i.e. the easier it is to receive compensation for damage under the law of delict), the less the existence of such contractual collateral or protection obligations should be expected.^{*38} The fact that e.g. in German law, many cases typical of what would *per se* constitute delictual liability have been transferred to the sphere of contractual or quasi-contractual liability, is due to deficiencies in the German law of delict. Problems are caused there particularly by BGB § 831.^{*39} In so far as the law of delict fails to provide sufficient protection to the aggrieved party in Germany, there is a wish to bring compensation for damage caused by violation of other persons' absolute legal rights into the scope of contract law by using different legal constructions to vest the right to claim compensation for damage from breach of contract in a person who has not concluded any actual contract with the tortfeasor. This area of application of contractual liability is enlarged through creating extensive collateral and protection obligations, particularly by means of the institutions of *culpa in contrahendo* and contracts with protective effect for third parties.^{*40}

However, in Estonia there is no major need to implement such complex constructions, as according to the author's appraisal, the Estonian law of delict offers sufficient protection to the aggrieved party. Firstly, we have the presumption of tortfeasor's culpability (LOA § 1050 (1)). Secondly, under LOA § 1054, the service user's liability for damage caused by the service provider is substantially stricter than under German BGB § 831, covering, under subsection (2), also any damage caused by the so-called independent operators, provided that the service user has used such operators in the performance of its duties and the damage was caused or the occurrence thereof was made possible through the performance of such duty. Moreover, claims for compensation for damage to health will expire at the same time regardless of whether their basis is contractual or delictual (§ 153 of the General Part of the Civil Code Act (GPCCA)).^{*41}

³³ The concept of the 'duty of care' has been expounded by J. Lahe as follows: 'if a person creates or controls a danger of some kind, that person must take all possible and reasonable measures to keep that danger under control and prevent its materialisation'. J. Lahe. Süü deliktiõiguses (Fault in law of delict). Tartu 2005, p. 56 (in Estonian).

³⁴ This position has been taken by e.g. C. von Bar. *Verkehrspflichten*. Köln: C. Heymanns Verlag 1980, p. 312; P. Schlechtriem. *Vertragliche und ausservertragliche Haftung. – Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*. Vol. II. Köln 1981, pp. 1662–1663; as regards an object of sale damaging the purchaser's absolute legal rights, the same position has been expressed by M. Käerdi (Note 15), pp. 31, 199: to design and produce the product so that it will be safe in respect of other persons' legal rights is a delictual duty of care of the producer. Such a duty of care is incumbent primarily on the producer and, as a rule, not on the reseller of the thing.

³⁵ O. Palandt (Note 1), § 241, paras. 1, 7.

³⁶ C.-W. Canaris. *Schutzgesetze-Verkehrspflichten-Schutzpflichten*. München: FS Larenz 1983, pp. 84–90.

³⁷ This position has been expressed by I. Kull (Note 29), p. 157, in whose opinion such protection obligations can exist in respect of not only the other contracting party but also third parties. See also: I. Kull et al. (Note 7), p. 24 and pp. 39–41. Approval of collateral obligations has been regarded as problematic by T. Tampuu. *Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus* (Law of delict in the Law of Obligations Act. General problems and liability based on the general elements of delict). – *Juridica* 2003/2, p. 72 (in Estonian).

³⁸ C. von Bar (Note 22), p. 415.

³⁹ Under BGB § 831, a service user is not liable for damage inflicted by the service provider if he has exercised due care in the choice of, and in the supervision over, the service provider. In so far as service users can often release themselves from liability under this provision, there is a wish to rely, instead, on BGB § 278, applicable in contract law, whereunder the service user is liable for a fault of the service provider as if it were the service user's fault.

⁴⁰ E. von Caemmerer. *Wandlungen des Deliktrechts. – Gesammelte Schriften*. Bd. I. Tübingen: Mohr-Siebeck 1968, pp. 460–461; C. von Bar. *Verträge mit Schutzwirkung zugunsten Dritter, Drittschadensliquidation and extension of duty of care. – Toward Comparative Law in the 21st Century*. Chuo University Press 1998, p. 3. See also: I. Kull (Note 29), pp. 154 and 156.

⁴¹ *Tsiviilseadustiku üldosa seadus* (General Part of the Civil Code Act). – RT I 2002, 35, 216; 2003, 78, 523 (in Estonian).

Therefore the author is of the position that damage caused to a creditor's health by a defective object of contract must, as a general rule, be compensated for only under the provisions on delictual liability, even if a contract between the parties exists or if the parties are conducting precontractual negotiations.^{*42} In other words, it can be said, as a general rule, that a contractual obligation does not have the purpose of preventing damage to the other party's health (LOA § 127 (2)) and hence, a delictual claim is the only option for compensation for such damage.

At first sight, such a position seems to be erroneous with regard to our case of the residential lease contract: how can one state that a duty to deliver non-defective residential premises does not serve the purpose of protecting the lessee against health damage that could result from it? Nevertheless, only this kind of argumentation will eventually lead to fair results: the lessor will not be liable for damage to the lessee's health on a contractual basis but, rather, only on a delictual basis; a delictual claim would, however, lapse because of the absence of the lessor's culpability (LOA § 1050 (1)). This will also preclude the unreasonable situation in which the standard of lessor's liability would depend on whether the lease contract is effective or, for some reason, void.^{*43}

Also, a contractual claim of the lessee under LOA §§ 115, 276 (1) would not be completely irrelevant, nor would the lessor's contractual liability be non-existent in that respect. Thus the lessee could claim, on the basis of the contract, compensation for the expenses of moving to live elsewhere or for the price difference if the lessee rents a similar but non-defective house for a higher price (see LOA §§ 115 (2), 135 (1)); likewise, a contractual claim for compensation could cover the expenses of the expert analysis which established that the health damage in question indeed arose from a defect in the object of lease (LOA § 128 (3)). Such damage of a purely economic nature would not be claimable by the lessee under the delictual provisions. Therefore, the described solution has the advantage that it allows to flexibly adjust the compensation for damage. While contractual liability depending on culpability will result in 'all or nothing', i.e. the claim for compensation for damage will lapse completely in absence of the debtor's fault, the above-described solution enables to compensate the aggrieved contracting party for at least one part of the damage, i.e. to the extent that this conforms to the contractual distribution of risks. This means that the creditor will be compensated for the so-called interest in equivalence independently of the debtor's culpability (under a contractual claim) but compensation for health damage can be effected only under delictual provisions, i.e. generally only if the debtor is at fault.^{*44}

4.3. Protection of creditor's property as the purpose of contractual obligation?

It is somewhat more complicated to answer the question of whether or not the duty to deliver a non-defective object of contract has the purpose of protecting the creditor's property. In this aspect, problems arise particularly in those cases in which a defective object of contract causes damage to the sold item or the work itself^{*45} as well as those in which damage is caused to the creditor's legal rights which were to be protected by the sold item or the performed work or if such item or work, upon its end-use, comes into contact with, and damages, other things belonging to the creditor.^{*46} Due to the size limit set for this article, I should like to point out, above all, two arguments why damage caused to the creditor's property by a defect in the object of contract should, in Estonian law, *de lege lata*, be compensable primarily through delictual liability.

Let us vary our case of the extension lead so that the purchaser did not buy the extension lead from a shop but directly from the factory, and the fire accident took place three years after the purchase of the extension lead. If we said that the damage caused to the purchaser's house by the defect in the purchased extension lead must be compensated on the basis of the contract, the limitation period of a claim for compensation for damage caused to the purchaser would begin, under LOA § 227, as of the delivery of the thing to the

^{*42} Health damage caused by violations of general duties of care (e.g. a patient skids on a banana skin in a hospital and falls) is included in the protective scope of a contract (i.e. is subject to compensation) to an even lesser extent. This way of thinking is not actually novel for Estonian law since e.g. occupational accidents have been classically regarded here to be encompassed by law of delict, i.e. as a non-contractual liability of the employer.

^{*43} In the first case the lessor would be liable under the contract and in the latter case, under the law of delict. At the same time it would be difficult to justify why the lessor's liability for health damage in the case of an effective contract should be stricter than in the case of a void contract.

^{*44} Health damage is compensable only under the law of delict also in e.g. Spain, Portugal and, as a rule, in Italy. C. von Bar (Note 22), pp. 446–447.

^{*45} In accordance with LOA §§ 225 and 649, such damage is compensated for under the contract.

^{*46} For further details in this respect, see also: P. Schlechtriem (Note 35), pp. 1663–1669; I. Schwenzer. Sachgüterschutz im Spannungsfeld deliktischer Verkehrspflichten und vertraglicher Leistungspflichten. – JZ 1988, pp. 525–531; M. Käerdi (Note 15), pp. 116–128, 183–188.

purchaser. This means that in accordance with GPCCA § 146 (1)⁴⁷, the purchaser's claims would already have expired by the moment of the fire accident and the purchaser would not be able to assert any delictual claims due to the provision in LOA § 1044 (2). However, if the defective extension lead caused damage to the property of a third person, that third person would be in a better position than the purchaser as the third person could make use of the more generous limitation periods of the delictual claim. This result, which is most obviously unfair, can be avoided by the assertion that prevention of damage to property was not the purpose of obligations arising out of the contract of sale (LOA §§ 127 (2), 1044 (2)). By this means, the three-year limitation period of non-contractual liability will be applicable; this limitation period will, differently from that of a contractual claim, begin as of the moment when the entitled person became or should have become aware of the damage and of the person obligated to compensate for the damage (GPCCA § 150 (1)). *De lege ferenda*, however, it should be reconsidered whether the principle of *non-cumul* contained in LOA § 1044 (2) should be abandoned and, thus, free cumulation of contractual and non-contractual claims be allowed.

The second argument for the preclusion of such contractual liability, which is not conditional on the seller's culpability, for damage to the purchaser's property lies in the obvious disproportion between the consideration and the possible risk of damage. An assertion that every shop selling extension lead is also liable for a possible fire accident in a purchaser's house would result in a situation in which all damage will eventually be incumbent on the shop if the shop's right of recourse (LOA § 228) against the producer is precluded due to a contractual limit of liability or the producer's insolvency, and this could, in turn, lead to the bankruptcy of the shop. In terms of economic policy, this would produce a result where small shops could become extinct, leaving the market to only big store chains, who can afford such risks of liability or insure themselves against such damage. A situation of practice in which the majority of sellers are forced to conclude a liability insurance contract to cover possible compensations for damage exists e.g. in France, where a seller involved in economic and professional activity is liable for all damage, even from latent defects, caused to the creditors, including their absolute legal rights, regardless of whether that seller is a producer or merely a reseller. This means that even a small reseller may be liable for an unexpectedly extensive damage, which, in turn, could result in that reseller's bankruptcy.⁴⁸ Whether such solution is also sought in Estonia or whether such situation would be desirable, will eventually be up to the legislator to decide but in the author's opinion, such solution should rather be negated.

5. Protection of absolute legal rights by contracts with protective effect for third parties (LOA § 81)?

Now let us further suppose that in our case of the residential lease contract, health damage was suffered not only by the lessee but also by children living with the lessee. They had no contract with the lessor and hence, in principle, only a delictual claim is available to them. On the other hand, one could assert that the lease in question constitutes a contract with protective effect for a third party (i.e. the lessee's family members) under LOA § 81.⁴⁹ However, as pointed out above, the fact that in Germany, the institution of contracts with protective effect for third parties is very often used even for the compensation for damage from violation of absolute legal rights, in order to make up deficiencies in the German law of delict, especially those arising from BGB § 831.⁵⁰ The same applies to other countries where contracts with protective effect for third parties exist, in particular Austria and France: there, too, the institution in question is aimed at compensating for certain deficiencies in the law of delict.⁵¹ As shown above, such deficiencies practically do not exist in the Estonian law of delict and thus there is no need to protect absolute legal rights through the institution of contracts with protective effect for third parties. All the more so as due to the principle of *non-cumul* provided in LOA § 1044 (2), serious problems would ensue in Estonia from the fact that the third party pro-

⁴⁷ The limitation period for a claim arising from a transaction is three years.

⁴⁸ This would also produce the economically harmful result that each seller or reseller is forced to obtain insurance against such liability risks in order to avoid the risk of bankruptcy, which will eventually mean multiple insurances against one and the same risk. R. Bittner. *Schutz des französischen Käufers vor Mangelfolgeschäden*. Regensburg 1987, pp. 146–150.

⁴⁹ Such a position has been expressed by T. Uusen-Nacke. *Kolmandat isikut kaitsev leping*. *Asjatundja vastutus kolmandate isikute ees* (Contracts with protective effect for third parties. The expert's liability to third parties). – *Juridica* 2003/8, p. 536 (in Estonian).

⁵⁰ E. von Caemmerer *Verträge zugunsten Dritter*. In: *Gesammelte Schriften*. Bd. III. Tübingen: Mohr-Siebeck 1983, pp. 189–190.

⁵¹ C. von Bar (Note 22), pp. 482–483. Von Bar also points out that in cases when the institution of contracts with protective effect for third parties is used in Germany, Austria or France, only law of delict is applied in e.g. the Netherlands or Greece. *Ibid.*, pp. 480–481.

ected by the contract will depend on the limit of liability agreed between the parties in the contract.^{*52} If the debtor's liability has been e.g. quantitatively limited by the contracting parties, such limit of liability would also apply to the third party, which, in turn, would deprive the third party of a delictual claim in the event of damage to property, due to LOA § 1044 (2). This would produce an obviously unfair result, whereby the third party holding a claim under LOA § 81 would be in a worse situation than a person who is not entitled to a contractual claim and who could therefore assert a claim to the full extent under LOA §§ 1043 et seqq.!

Hence, the above reasons lead to the position that in Estonian law, LOA § 81 as a basis for claims in the event of damage to absolute legal rights will be out of the question and the scope of that institution must be limited to damage of a purely economic nature.^{*53} For our case of residential lease, this means that the health damage suffered by the lessee as well as the lessee's children is subject to compensation pursuant to LOA §§ 1043 et seqq., and thus all persons will be treated as equal regardless of whether the injured party has a contract with the debtor or not.

6. As an aside: protection of the other party's absolute legal rights through *culpa in contrahendo*?

Lastly, it would be quite difficult not to touch on the question of the nature of *culpa in contrahendo* as a legal institution, which has recently been a subject of dispute in Estonian legal literature. The dispute has focused primarily on the question of whether liability arising out of precontractual negotiations should be qualified as delictual^{*54} or, rather, the contractual legal remedies provided in LOA §§ 100 et seqq. should be applied to it.^{*55} The author of this article is in favour of the position expressed by J. Lahe that in the event of breach of precontractual duties, LOA §§ 1043 et seqq. should apply, i.e. this would constitute a non-contractual liability. In any event, this is applicable to the duty to protect the other party's absolute legal rights. Such legal rights must be, and as a rule they are, protected only through the law of delict. If a person opens a supermarket and its visitors happen to be hit by a falling shelf, the liability of the supermarket to those persons who intended to purchase something, i.e. were, so to say, in the process of precontractual negotiations, should not be different from its liability to such persons who did not intend to purchase anything or even could not purchase anything because of their restricted active legal capacity. One should rather take the position that the owner of the supermarket has a general duty of care in relation to all persons present, and upon violation of such duty, the owner's delictual liability will ensue.^{*56}

In the author's opinion, considering the structure of the Estonian law of obligations, liability based on *culpa in contrahendo* (LOA § 14) should actually be consequent on primarily just those cases for which it was initially developed by R. Jhering, i.e. as a sanction for precontractual negotiations conducted in bad faith. In no case should duties to protect the other party's absolute legal rights be derived from that obligation through LOA § 2 (2). Such protection obligations are known only in the legal orders of Germany, Austria and Greece, and in all of those countries, the development of such duties has resulted from the deficiencies in the law of delict that have already been mentioned above.^{*57} Inasmuch as in the Estonian law of delict, absolute legal rights are protected to a sufficient degree, a concept of delictual duties of care should rather be developed by the judicial practice: the need for and possibility of that have already been repeatedly stressed in Estonian legal literature.^{*58}

⁵² This is the position in German judicial practice, see E. von Caemmerer (Note 50), p. 194. The same would be applicable in Estonia, in view of the formulation in LOA § 81 (1). Limitation of claims for compensation for damage in residential lease contracts is, however, not possible due to LOA § 275.

⁵³ Suggestions of the same direction have been expressed by I. Kull et al. (Note 7), p. 444: primarily in those cases which deal with damage of a purely economic nature, i.e. damage which is not consequent on violation of delictually protected legal rights.

⁵⁴ Such a position has been expressed by J. Lahe (Note 33), p. 135. That position is prevalent in Europe, see C. von Bar (Note 22), p. 478. Even in common-law countries, where the institution of *culpa in contrahendo* is not known, such violations of obligation are, as a rule, penalised through the law of delict. H.-J. Meyer (Note 26), p. 10; C. von Bar (Note 22), p. 475.

⁵⁵ As expressed by I. Kull (Note 7), pp. 79–86.

⁵⁶ E. von Caemmerer (Note 40), p. 462–463; C. von Bar (Note 34), pp. 314–315; F. Ranieri. *Europäisches Obligationenrecht*. Wien: Springer 1999, p. 137.

⁵⁷ C. von Bar (Note 22), p. 478.

⁵⁸ T. Tampuu (Note 37), pp. 75–77; J. Lahe (Note 33), pp. 54–60; M. Käerdi (Note 15), p. 120.