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Fault, Presumption of Fault, and Wrongfulness in the Yugoslav Obligations Act

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I Introduction

The Socialist Federal Republic of Yugoslavia ceased to exist in 1991, but the Obligations Act (OA),[1] adopted in 1978, lives on in the law of the successor States.[2] In some of them, such as in Serbia[3], the OA is still in force. In others, such as in Slovenia[4] and Croatia[5], new legislation was adopted (in 2002 and 2005, respectively) but it was largely based on the provisions of the OA. Most core concepts of the OA remained intact.

Some questions about the basic structures of non-contractual liability in the OA are still open. In the area of fault liability, they relate, for example, to the concept of fault, the element of unlawfulness (wrongfulness), and the burden of proof regarding fault. In part, the reasons for the open issues or unclear answers can be seen in

1 The Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY) 29/78, 39/85, 45/89 and 57/89. An unofficial English translation of the Act (the version with the amendments adopted in Serbia and Montenegro in 1993, 1994, and 1996) was published, see *I Kovačević* (ed), The Law of Contracts and Torts (1997), and is available on the website of the Serbian Ministry of Justice <https://www.mpravde.gov.rs/en/tekst/1699/civil-matter.php> (1 October 2021).

2 On the Obligations Act generally, see: *S Perović*, Die Kodifikation des Obligationenrechts in Jugoslawien, Archiv für die civilistische Praxis (AcP) 182 (1982) 293; *C Jessel-Holst*, The Yugoslav Law of Obligations and Its Effects in Germany, in: RD Vukadinović (ed), Thirty Years of the Law on Obligations (2009) 164.

3 See Official Gazette of the Federal Republic of Yugoslavia, 31/93, and Official Gazette of Serbia and Montenegro, 1/2003.

4 Obligacijski zakonik, Official Gazette RS 83/01, 28/06, 40/07 and 64/16.

5 *Zakon o obveznim odnosima*, Official Gazette of Croatia 35/05, 41/08, 125/11, 78/15 and 29/18.

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the fact that the wording of the OA is not entirely clear and consistent. Furthermore, the *travaux préparatoires* for the OA, explaining the *ratio legis* of the provisions, were never made available to the public. Also, Yugoslavia broke up before the OA could be truly tested in practice. The legal, economic, and political environment of the successor States is fundamentally different from the environment at the time of the adoption of the OA. We can find some rather different interpretations of the same legislative text in the legal orders of the successor States.

The purpose of this paper is to shed some light on the basic structures of fault liability and to attempt to present some of the mentioned issues. The paper begins with a brief outline of the draft OA (the so-called Sketch). Then, the changes made to the draft during the legislative process are analysed; they are key to understanding the Yugoslav OA. The discussion will then focus on the general reversal of proof regarding fault (the presumption of fault), which was introduced by the OA, and on the interplay between fault, the presumption of fault, and wrongfulness. Subsequently, the assessment of wrongfulness in Slovene law will be analysed. The paper concludes with a short discussion on the interests protected by (Yugoslav and Slovene) tort law.

II The draft of the Obligations Act (the 'Sketch')

The draft, which, in modified form, was later to become the Obligations Act, was published under the title: 'Sketch for a code on obligations and contracts'[6] in 1969 by Mihailo Konstantinović,[7] a professor at the Law Faculty in Belgrade. Konstantinović and his team had started to work on the part relating to non-contractual liability (arts 123–167 of the Sketch) already a few decades earlier; the first known version of the tort law draft dates from 1951.[8]

Except for a very brief introduction, the Sketch contained no explanations of the origin and purpose of the provisions. Also, Konstantinović did not publish many written works from which his views on tort law could be deduced. Some

6 *M Konstantinović*, Obligacije i ugovori, Skica za zakonik o obligacijama i ugovorima (1969).

7 Konstantinović (1892–1983) studied law in Lyon, France, where he obtained a PhD. He was a reputable professor at the Law Faculty in Belgrade and wrote drafts of important parts of private law legislation in Yugoslavia. See eg *D Nikolić*, Istoriat Zakona o obligacionim odnosima i aktuelni trendovi u privatnom pravu Evropske unije, in: D Možina (ed), Razvojne tendence v obligacijskem pravu: ob 40-letnici Zakona o obligacijskih razmerjih (2019) 27, 34f.

8 'Nacrt zakona o naknadi štete', 1951, a text acquired from the Yugoslav State Archive in Belgrade on 2 December 2014. See also *M Orlić*, Esej o krivici, Pravni život 1-2/2009, 180.

insight is nevertheless offered by the notes from his lectures,[9] and the publication of the discussions in which he took part.[10]

Tort law in the Sketch[11] is based on a general clause of the French type: '*If someone, by his own fault, causes damage to another person, he is obliged to compensate it*', art 123 (1) Sketch. The system of fault liability was supplemented by a relatively broad system of strict liability for the holders of 'things' with 'increased risk of damage',[12] including a provision on (strict) product liability.[13]

Fault was defined as any action contrary to the justified expectations of society (art 127 Sketch). This was to be established by comparing the actions of the tortfeasor to the standard of how a reasonable and careful person would act in the given circumstances.[14] Konstantinović, himself having studied in France, saw fault in the broad sense, characteristic of French law.[15] The Sketch did not mention wrongfulness (unlawfulness). This was different from previously applicable law in the region, which, to a large extent, was the Austrian ABGB, and where the wrongfulness of the tortfeasor's actions was a separate requirement of fault liability.[16]

As in most jurisdictions today, the assessment of fault in the Sketch is abstract – it is based on an objective standard of care (*culpa in abstracto*).[17] The

9 *M Konstaninović*, Obligaciono pravo, Beleške sa predavanja, Savez Studenata Pravnog fakulteta (1959).

10 See eg *ST Aranđelović* (ed), Građanska odgovornost: referati i diskusija sa Simpozijuma održanog 11. i 12. februara 1966. godine u Beogradu (1966).

11 The chapter on 'causing damage' was structured as follows: I. Basic principles, II. Fault liability, III. Liability for another person, IV. Liability for dangerous things, V. Liability of employers toward third persons, VI. Compensation of damage, VII. Liability of several persons; VIII. The right of the wronged person to claim compensation after the expiry of the statute of limitations for filing a damages claim.

12 See art 123 (2) Sketch. The determination of which things can be considered 'dangerous' was left up to the courts. There was also a reversal of the burden of proof regarding causation: any damage 'in connection with the functioning' of a dangerous thing was considered a result of the dangerous thing, see art 136 (2) Sketch.

13 Art 141 Sketch.

14 See also *Konstaninović* (fn 9)76.

15 See *M Konstantinović*, discussion, in: ST Aranđelović (ed), Građanska odgovornost: referati i diskusija sa Simpozijuma održanog 11. i 12. februara 1966. godine u Beogradu, Institut društvenih nauka (Belgrad, 1966) 332; *M Karanikić-Mirić*, Postjugoslovenski "život" pravila o vanugovornoj odgovornosti u Srbiji, in: D Možina (ed), Razvojne tendence v obligacijskem pravu (2019) 283; see also *S Perović*, Predgovor, Zakon o obligacionim odnosima (1995) 48; and *C van Dam*, European Tort Law (2nd edn 2013) 233.

16 See eg *S Cigoj*, Odškodninskem pravu Jugoslavije (1972) 94 f. See also *H Koziol*, Österreichisches Haftpflichtrecht I (1997) 139 f.

17 See *G Wagner*, Comparative Tort Law, in: M Reimann/R Zimmermann (eds), The Oxford Handbook of Comparative Law (2nd edn 2019) 1013. On the reasons for the dominance of the objective

question to be answered is how a reasonable person would act under the given circumstances (whether he would meet the abstract standard of care) rather than how the concrete wrongdoer should have acted given his individual characteristics and capabilities (*culpa in concreto*). The latter approach is characteristic of Austrian law, where fault seems to require personal blameworthiness.[18] In the Sketch, individual capabilities are taken into account insofar as mentally ill people and children are not capable of being liable for damage; instead of them, their guardians are liable for the loss.[19]

In some situations, Konstantinović planned to introduce aggravated liability through a reversal of the burden of proof. This was the case for damage caused by the wrongdoer in a state of temporary incapacity (eg due to illness or alcohol); his liability for his state and for the damage was presumed, unless he proved that he was not at fault for being in such a state.[20] The burden of proof was also reversed with regard to the liability of persons entrusted with the supervision of minors (with partial capacity); they are considered liable (together with minors), unless they proved that they could not have prevented the damage and that they were not at fault.[21]

III Tort law in the Obligations Act (1978)

A General

Some important changes were made in the final version of the OA. The most remarkable change was the introduction of the general reversal of the burden of proof regarding fault (the so-called presumption of fault), which will be discussed later. A new general principle of *neminem laedere* was placed among the introductory provisions: everyone is obliged to refrain from any action that might cause damage to another (art 16 OA). Among other changes, a new chapter on 'Special cases of liability' can be mentioned (arts 180–184 OA), consisting of a set of rather

standard, see *G Wagner* in: R Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 189; see also *P Widmer*, Comparative Report, in: P Widmer (ed), Unification of Tort Law: Fault (2005) no 41, 348.

18 See eg *Koziol* (fn 16) 204. However, there is a presumption that an average person, older than 14 years of age and not mentally ill, has average capabilities; see *H Koziol*, Austrian Report, in: P Widmer (ed), Unification of Tort Law: Fault (2005) no 22, 16.

19 Arts 128 (1) and 131 Sketch.

20 Art 128 (3) Sketch.

21 Art 132 (2) Sketch.

different rules.[22] Some provisions from the Sketch, such as arts 142–144 on liability for damage caused by animals, were deleted.

B The concept of and levels of fault in the OA

The concept of fault was modified: art 127 Sketch on fault (action contrary to expectations, standard of a reasonable man) was deleted. Instead, art 150 OA was introduced, stipulating that fault constitutes either intent or negligence, but without defining these terms.

Nevertheless, gross and ordinary negligence can be distinguished as the OA mentions gross negligence in some situations. Firstly, art 191 (1) OA, which seems to follow art 44 (2) of the Swiss *Obligationenrecht*, allows the court to reduce the damages if the payment of full damages would put the person responsible into financial distress, but only if the damage was not caused intentionally or through gross negligence.[23] Secondly, if an employer is liable to a third person for damage caused by an employee, he may take recourse against the employee only if the latter acted intentionally or with gross negligence, art 171 (1) OA. The same rule applies to the wrongdoer (body) in the case of the liability of a legal person for damage caused by a body thereof.[24] It appears that the consequences of gross negligence are the same as those of intent (*culpa lata dolo aequiparatur*).

The OA regulates intent alone only in a few situations. An employee who caused damage to a third person is directly liable to this person (in addition to an employer being liable for damage caused by an employee in connection with work duties) only if he acted intentionally, art 170 (2) OA. Also, a damages claim arising from intentionally caused damage cannot be set off against another claim (art 341 OA). Moreover, in the case of goods damaged by an intentional criminal act, damages in the amount of the sentimental value (*pretium affectionis*) exceeding the market value of the goods may be awarded.[25]

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22 See art 180 OA on establishing the strict liability of the state for damage due to death and injury due to violent and terrorist acts and public demonstrations (a special no-fault liability compensation scheme), art 181 OA on the strict liability of organisers of events due to death or injury caused in extraordinary circumstances such as the movement of masses of people, general disorder, and similar, art 182 OA on liability for emergency rescue (a special case of fault liability), art 183 OA on liability for a breach of an obligation to contract and art 184 OA on liability for public services.

23 Art 110 (1) OA, see also art 153 (3) Sketch (without reference to intention and gross negligence).

24 Art 172 (2) OA.

25 Art 189 (4) OA. In the Slovene OC, an intentional damaging act is sufficient; see art 168 (4) OC.

The fact that the OA distinguishes intent and (gross and ordinary) negligence is not per se incompatible with the notion of notion of fault under art 127 Sketch (an action deviating from expectations). If nothing else, such an understanding of fault can be found in contemporary Serbian law.[26]

Some authors understood fault in the OA as the wrongdoer's state of mind – his psychological attitude towards the consequences of his action – as fault is usually understood in criminal law.[27] A definition of fault as containing a cognitive and a voluntary element is rather common: intention can be either direct (*dolus directus*: the perpetrator is aware of the consequences of his actions and desires them) or 'eventual' (*dolus eventualis*: the perpetrator foresees the consequences as an indirect possibility and consents to them); while negligence can be conscious (the perpetrator is aware of the consequences but expects to avert them) or unconscious (the perpetrator is not aware of the consequences but should have been).[28]

However, fault is also described in a different way, ie as conduct deviating from an abstract standard of behaviour. The prevailing view, at least in Slovenia, seems to be that, although intention is understood subjectively, in the sense of the wrongdoer's attitude toward the act and its consequences, negligence is assessed objectively, ie as actions by the wrongdoer that deviate from the abstract standard of due diligence.[29] Ordinary negligence (*culpa levis*) means the omission of the diligence required of a reasonable and prudent person, while gross negligence (*culpa lata*) refers to the omission of the diligence required of any person.[30] Since Roman times, the notion of *bonus pater familias* has been used as the standard of a reasonable and prudent person. In this sense, the OA provides for the standard of diligence of a reasonable and careful man ('*pažnja dobrog domaćina*', literally, 'diligence of a good housemaster'), which is the general standard of care owed by everyone. In addition, the diligence of a good businessman (*pažnja dobrog privrednika*) is owed by persons conducting their business, while experts are bound to the highest standard of care – that of a good expert (*pažnja dobrog stručnjaka*). The latter implies not only the highest level of attention and care, but also conformity with professional rules and standards. Thus, three different standards of

26 *M Karanikić-Mirić*, Krivica kao osnov deliktne odgovornosti v građanskom pravu (2009) 333; *M Orlić*, Esej o krivici, Pravni život 1-2/2009, 179, 194.

27 See eg *B Strohsack*, Obligacijska razmerja II (1994) 71.

28 See eg *S Cigoj*, Komentar obligacijskih razmerij (1984) art 158, 598f.

29 *D Jadek-Pensa* in: N Plavšak/M Juhart (eds), Obligacijski zakonik s komentarjem (2003) art 135, 797f. See also, eg, Supreme Court of the Republic of Slovenia (hereinafter: Supreme Court RS), II Ips 304/2002, 6 March 2003.

30 Ibid.

diligence can be distinguished in a provision (art 18 OA) that, if taken literally, does not even regulate non-contractual but contractual liability.[31] Nevertheless, the courts sometimes refer to it with regard to the required standard of diligence in tort law cases.[32]

As in the Sketch, individual characteristics and abilities are principally taken into account only within the notion of incapacity: persons with lasting mental illnesses and children under the age of seven cannot be liable for damage; their liability is shifted onto their guardians.[33] Children between the age of seven and fourteen are liable if it is proven that they could understand their actions.[34] Apart from that, any adult is obliged to exercise the minimal average level of care. In other words, he cannot be excused by relying on sub-average characteristics, such as tiredness or poor vision.[35] Whether the standard of care will also be adjusted for persons with a disability and elderly persons, who, just like children and the mentally ill, cannot be blamed for not meeting the general standard of care, if this fact is evident to others,[36] remains to be seen.[37]

If, on the other hand, the wrongdoer has above average characteristics and capabilities, such as expert knowledge and experience, a higher standard of care is applicable (ie that of a good expert). Although, in principle, experts work on the basis of contracts (and, as a rule, receive higher payment for their expertise), they are obliged to exercise the highest standard of care also in tort cases.[38] Sometimes this is referred to as liability for *culpa levissima*.[39]

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31 Art 18 OA refers to the standards of behaviour 'when performing existing duties and asserting rights'. See *B Jakaša*, Nekoliko pitanja temelja vanugovorne odgovornosti u Zakonu o obveznim odnosima, Naša zakonitost, 6/1979, 62, and *Karanikić-Mirić* (fn 26) 274. Furthermore, the provision seems odd also in the context of contract law, as contractual liability in the OA is generally not based on fault, but on a breach of a promise, see art 263 and *D Možina*, Breach of Contract and Remedies in the Yugoslav Obligations Act: 40 Years Later, Zeitschrift für Europäisches Privatrecht (ZEuP) 2020, 134.

32 See eg Supreme Court RS, II Ips 89/2016, 8 March 2018, at no 11.

33 Arts 159 (1) and 160 OA and arts 164–169 OA.

34 Art 160 (2) OA.

35 See the discussion by *Karanikić-Mirić* (fn 26) 195f.

36 See eg *G Wagner*, Deliktsrecht (14th edn 2020) 51, at no 25.

37 A traffic law rule, according to which the participants in road traffic are required to exercise particular care with regard to children, eldery people, and persons with a disability (in their role as pedestrians, not drivers) seems to support the idea and adjusted standard of care. See art 4 (4) Road Traffic Rules Act (Slovenia), Official Gazette RS, 109/10, last amended 92/20.

38 See eg Higher Court in Celje, Cp 120/2020, 29 April 2020. For a comparative view, see eg *Widmer* (fn 17) 349, at no 43.

39 *Cigoj* (fn 28) art 158, 601.

By way of an exception, art 191 (2) OA also mentions a different (lower) standard of care: if a person has caused damage to another person while acting for the benefit of that person (eg helping him), the court may reduce the damages if it considers it to be equitable; furthermore, it may assess his actions by reference to 'diligence as in his own affairs' (*diligentia quam in suis*). Here, the reference is the concrete debtor in his own affairs (*culpa in concreto*), rather than the abstract standard of a reasonable and careful man (*culpa in abstracto*).

It seems that the concept of fault in Yugoslav law was a mixed one. It was not a purely subjective and individualised concept, similar to that from criminal law, implying that liability is a sanction for the blameworthy behaviour of the defendant. Rather, fault (negligence) relates to the violation of an objective and abstract standard. However, the personal characteristics of the wrongdoer are nevertheless taken into account in different ways: by applying the objective standard of behaviour to the circumstances of the defendant and by adjusting the standard to the characteristics of the defendant (a reasonable and careful man or a good expert).

Above it was mentioned that, in principle, personal characteristics are taken into account as the (in)capacity of the wrongdoer to be at fault. However, the incapacity of a person is not taken into account when assessing the contributory negligence of such person (as the victim). In principle, damages are reduced if the victim contributed to the occurrence of the damage or did not take reasonable measures to reduce such.[40] If the victim is a child or mentally ill, the damages are nevertheless reduced.[41] It was argued that it would be unfair if the person liable were responsible for the part of the damage that was not 'caused' by his conduct, but by that of someone else.[42] Technically, what is being assessed here is not the fault of the victim (as an incapable person cannot be at fault), but the objective (un)reasonableness of his conduct that contributed to the damage. The existing case law in Slovenia is mostly based on traffic accidents. If a child was not fastened with a seat belt in the back seat of a car and sustained severe injuries, the court would reduce the damages after assessing which part of the injuries could be ascribed to that fact.[43] The result is harsh towards victims, who should not have to bear the consequences of their guardian's omissions. The possibility of victims to claim the difference (the reduction in damages) from their guardians is, in most cases, merely theoretical. This approach has rightly

40 Art 192 (1) OA.

41 See eg Supreme Court RS, II Ips 289/2008, 11 April 2012, and II Ips 182/2014, 26 November 2015.

42 See eg *B Vizner*, Komentar zakona o obligacionim odnosima (1978) 795.

43 See eg Higher Court in Ljubljana, II Cp 3451/2015, 1 March 2016.

been criticised.[44] In a comparative perspective, the approach where incapacity is taken into account regarding contributory negligence seems to prevail.[45]

C Wrongfulness

Historically, the idea of wrongfulness (unlawfulness) was intertwined with the idea of fault.[46] Roman law did not clearly distinguish between the two: *culpa* within the *Actio legis Acquiliae* was understood as a part of *iniuria*; the damage must have been wrongfully inflicted (*damnum iniuria datum*).[47] Following the French approach, the Sketch did not foresee wrongfulness as an autonomous requirement of liability; rather, it was integrated into the concept of fault.

The OA, too, does not prescribe wrongfulness,[48] but the prevailing view considers wrongfulness nevertheless as an autonomous element of liability.[49] This may well have been a consequence of habit and tradition as wrongfulness was a requirement of liability already under the law applicable before the OA (eg in Slovenia and Croatia under the Austrian ABGB). In his book Yugoslav Tort Law (1972), Cigoj describes wrongfulness as the wrongdoer's action being contrary to the law, which aims to protect the damaged interest, or as conduct contrary to morals (eg the abuse of a right).[50] The infliction of damage in legitimate defence or necessity and in the case of the victim's consent is not wrongful. Interestingly, wrongfulness was also prescribed by the Yugoslav Constitution: the State was liable only if the State's representative caused damage by acting wrongfully.[51]

44 See eg *G Ristin*, Deliktna sposobnost fizične osebe v civilnem pravu, Podjetje in delo 6-7/2003, 1769.

45 See eg *H Oetker* in: Münchener Kommentar zum BGB (8th edn 2019) no 34; *H Honsell/B Isenring/MA Kessler*, Schweizerisches Haftpflichtrecht (5th edn 2013) 119; *U Magnus/M Martín-Casals*, Comparative conclusions, in: WH Boom et al (eds), Unification of Tort Law: Contributory Negligence (2003) 279; *Widmer* (fn 17) 341–343, at nos 20–29.

46 For an overview, see *G Schiemann* in: M Schmoeckel/J Rückert/R Zimmermann (eds), Historisch-kritischer Kommentar zum BGB, vol II (2003) §§ 823–830, 2737f, no 31f.

47 *R Zimmermann*, Law of Obligations (1996) 998f.

48 However, it is mentioned in the context of strict liability in art 175 OA (the wrongful seizure of a dangerous thing from the holder thereof).

49 See eg *Cigoj* (fn 28) art 158, 589f; *Jadek-Pensa* (fn 29) 670; *M Baretić*, Tort Law, in: T Josipović (ed), Introduction to the Law of Croatia (2014) 169f.

50 See eg *Cigoj* (fn 16) 94f and 107.

51 See art 69 of the Constitution (1963) and art 199 of the Constitution of SFR Yugoslavia (1974). Both provisions mention 'unlawful and wrong' action of the State's representative, which was interpreted as wrongfulness in the sense of tort law, which was applicable to State liability cases, see,

Some authors justify the existence of the condition of wrongfulness for liability with the fact that the OA excludes liability in cases of defence, necessity, self-help, and consent.[52] However, the law can (as did the Sketch, arts 129 and 130) exclude liability in such cases also without reference to wrongfulness.

In modern Serbian law, authors are divided with regard to wrongfulness. For Radišić, who sees fault mostly in the psychological attitude of the wrongdoer towards his action and its consequences, wrongfulness is a necessary requirement of liability different from fault; it consists in the breach of a legal rule intended to protect the interests (also) of the victim.[53] The legal rule need not be explicit: the duty to act in a certain way may arise from the principle of *neminem laedere* in art 16 OA.[54] Karanikić-Mirić is of a contrary view that conforms to Konstantinović's Sketch: wrongfulness is not an autonomous requirement of liability but rather it is integrated into the concept of fault (in the sense of action contrary to expectations).[55] Indeed, the more objectivised the assessment of fault, the less the need there seems to be for the action being objectively contrary to the law (wrongfulness).

D The burden of proof regarding fault (the presumption of fault)

In the years before the publication of the Sketch, there was some discussion as to whether a general reversal of the burden of proof (the presumption of fault) should be introduced following the Soviet example. The presumption of fault in art 444 of the Civil Code of the Russian Republic of 1964 was followed by other Soviet republics and a number of countries, such as Czechoslovakia, Hungary, the German Democratic Republic, Bulgaria, Albania, Mongolia, etc.[56]

In Yugoslav literature before the OA, Jakšić held the presumption of fault to be 'a correction to the bourgeois fault principle, necessary in socialist law to

eg, *A Finžgar*, Yugoslavia, in: DD Barry, Governmental Tort Liability in the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland, Romania and Yugoslavia (1970) 297.

52 Eg, *J Radišić*, Obligaciono pravo, opšti deo (2nd edn 1982) 200.

53 Ibid.

54 *J Radišić*, Protipravnost kao zaseban uslov građanske odgovornosti, Anali Pravnog fakulteta u Beogradu, 1-4/2001, 550.

55 *Karanikić-Mirić* (fn 26) 284f.

56 See *M Will/VV Vodinelić*, Generelle Veschuldensvermutung – ein unbekantes Wesen, in: U Magnus/J Spier (eds), European Tort Law – Liber Amicorum Helmut Koziol (2000) 307; *H Küpper*, Deliktsrecht in Osteuropa – Herausforderungen und Antworten, Osteuropa Recht 6/2003, 495, 504; see also *EL Johnson*, No liability without fault – the Soviet view, Current Legal Problems 1967, 165, 168.

achieve the tightening of the personal responsibility of citizens'.[57] His main argument was that the presumption was justified because 'in most cases' it was easier for the wrongdoer to prove what his actions were than for the injured party.[58] Vuković held the classic fault principle to be an 'outdated concept that overencourages individual decision making' and 'hinders the progress of society as a whole, as it does not contribute to improving the quality of production relations.'[59] He considered the presumption of fault to be a 'middle' solution between fault and strict liability, which was supposed to contribute to the strengthening of the individual's personality and social solidarity and was generally more appropriate to the level of production relations and social culture in socialist legal orders.[60] On the other hand, Machiedo pointed out that with the development and expansion of strict liability, the need to introduce the presumption of fault was reduced.[61]

The Sketch did not provide for a general reversed burden of proof regarding fault. It found its way into the draft OA at a late stage of the preparation process, after the Federal Assembly subcommittee for obligations, together with the redaction group, had already completed their work.[62] It was a disputed issue and, ultimately, it was reported that the 'spirit of socialism prevailed';[63] the reversal of the burden of proof was introduced because it was considered 'justified and socially beneficial, as it facilitates the position of the injured party and has a preventive effect.'[64] It may well have been that it was this issue among the many modifications made to the Sketch that prompted Konstantinović to withdraw from any further participation in the legislative project.

Some writers explain the desired preventive effect of the presumption of fault with the protection of 'social property' (in the sense of the 'means of production')

57 *S Jakšić*, Obligaciono pravo-opšti dio (1957) 262.

58 Ibid, 263.

59 *M Vuković*, Odgovornost za štete (2nd edn 1971) 165 and 171.

60 Ibid, 166 and 174.

61 *D Machiedo*, Osnov odgovornosti za prouzrokovanu štetu, in: ST Aranđelović (ed), Građanska odgovornost: referati i diskusija sa Simpozijuma održanog 11. i 12. februara 1966. godine u Beogradu (1966) 31, 46.

62 See *R Slijepčević*, Evolucija nastanka zakona o obligacionim odnosima, Pravni život 10-12/1988, 1429; *I Bukljaš*, Subjektivna načela odgovornosti za nadoknadu štete povodom uvođenja načela pretpostavljene krivice, Naša zakonitost, 7-8/1980, 98.

63 *V Krulj*, Predgovor, in: Zakon o obligacionim odnosima sa registrom pojmova (1978) XII.

64 *I Bukljaš*, Značaj promjene odgovornosti za štetu po načelu pretpostavljene krivnje, Privredno pravni priručnik 1/1979, 31, 33.

in the socialist self-management society.[65] Others, without further explanation, simply refer to the desire to 'help' the injured party, who would otherwise (if unable to prove fault) 'lose' his claim.[66] There was hardly any criticism of the new rule at the time.[67]

Soon after the adoption of the OA, the area of application of the presumption of fault was limited by jurisprudence to ordinary negligence, while gross negligence and intention were excluded.[68]

The discussion in Yugoslav literature focused on the presumption of fault as a means to protect the collective ownership of the means of production (ie 'social property') by means of a deterrent effect. Social property (ownership) had a special status under Yugoslav law.[69] Even in socialist times, however, tort law was primarily meant to protect the interests of individuals, such as life, health, bodily integrity, and property. Furthermore, the 'means of production' were also protected by other means, for example by the liability of employees for work-related losses to the 'basic organisation of associated labour' (ie the employer), provided for by the Act on Associated Labour. Here, however, the assumption of fault played no role in the protection of social property, as employees were liable only for gross negligence and intent against the employer (the formal holder of the means of production), while employers were liable for damage caused to employees for any fault.[70] In any case, the arguments relating to social property are obsolete.

In comparative law, the views on the reversal of the burden of proof in tort law are generally not very positive, as it 'covertly' shifts the liability from fault to strict liability.[71] Surprisingly, there was hardly any discussion in Yugoslav law on whether such a tightening of liability was needed at all, particularly bearing in mind the rather generous concept of strict liability.[72] There was also no discussion

65 See eg *I Bukljaš*, Subjektivna načela o odgovornosti za naknadu štete povodom uvođenja načela pretpostavljene krivnje, Naša zakonitost 7-8/1980, 89, 94; *T Ačanski*, Pretpostavljena krivica kao osnov odgovornosti za štetu, Anali Pravnog fakulteta u Beogradu, 1-4/1983, 59.

66 *Cigoj* (fn 28) art 154, 529.

67 For an exception, see *S Perović*, who expressed concern over the practicability of the rule and the imbalance of the interests of the victim and wrongdoer, in: Predgovor, Zakon o obligacionim odnosima (1978) 58.

68 See the Conclusions of the XIV joint session of the Federal Court, Supreme Military Court, and the Supreme Courts of the Republics from 25-26 March 1980 in Belgrade, published in Privreda in pravo, 5/1980, 64.

69 See arts 10–33 of the Constitution of SFR Yugoslavia (1974).

70 See art 205 (1) Act on Associated Labour, Official Gazette SFRY, 53/1976.

71 *H Stoll*, Haftungsverlagerung durch beweisrechtliche Mittel, AcP 176 (1976) 145, 161; *Widmer* (fn 17) 357, no 67.

72 *M Karanikić-Mirić*, Pretpostavka krivice, Pravni život 11/2009, 941, 950.

about other possible effects of tightening such liability, such as limiting individual freedom of movement and inducing a general defensive stance.

The classical approach to the burden of proof, where each party must prove the facts supporting his claim, corresponds to fundamental fairness considerations; the principles of the protection of property and the preservation of peace speak in favour of the status quo, which the claimant attempts to change with the claim; therefore, the claimant should bear the burden of proof.[73]

The courts in other countries have found ways to ease or even reverse the burden of proof with regard to the elements of fault liability, particularly fault and causation, in specific situations, where, based on experience, there is a particularly high probability of a certain (typical) course of events. In common law, such an approach is called *res ipsa loquitur*,[74] while a similar doctrine in civil law is called *prima facie* evidence (in German law, *Anscheinsbeweis*).[75] From this perspective, the approach of the OA reversing the burden of proof regarding fault in general, regardless of the circumstances, seems odd.

Surely, it cannot be assumed that the person who caused the damage always 'knows best' as regards how the damage occurred and should therefore be obliged to prove that he was not at fault. It is conceivable that, particularly in cases of omissions, the person held responsible might not even know that the damage occurred; it seems strange to expect any potential wrongdoer to collect and keep evidence of exculpation until the expiry of the statute of limitations 'just in case' a damages claim is filed. Furthermore, situations wherein someone is held liable because he, although not at fault, did not succeed in exonerating himself should be avoided rather than accepted.

As was rightly pointed out, the argument that the claimant should be 'helped' with the presumption simply because fault might be difficult to prove 'seriously lacks mental consistency and discipline.'[76] It may also be the case that there are difficulties in proving fault because there was no fault.

Some proponents of the reversed burden of proof seem to think that the fact that someone 'caused' damage is sufficiently indicative of his breach of the general obligation to not cause damage (*neminem laedere*).[77] Mere causation may per-

73 *E Karner*, The Function of the Burden of Proof in Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 68, 70, no 5.

74 See eg *JG Fleming*, The Law of Torts (7th edn 1987) 291f.

75 See eg *K Schmidt* in: R Geigel, Haftpflichtprozess (28th edn 2020) ch 36, no 43.

76 *Karanikić-Mirić*, Pravni život 11/2009, 955; see also *V Ulfbeck/ML Holle*, Tort Law and Burden of Proof – Comparative Aspects. A Special Case for Enterprise Liability? in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 27, no 5.

77 *Aćanski*, Anali Pravnog fakulteta u Beogradu, 1-4/1983, 64.

haps be an indication of fault in clear cases where damage to a person or property was directly caused, but not in cases of omissions; in such cases, the causal link can only be established by means of a hypothesis as to how the person responsible should have acted. The assessment of whether the behaviour was wrongful or not would then, at least to some degree, be shifted to the assessment of causation.

Of course, an assessment of causation is far from being a mere 'factual' category: it is intertwined with other elements of liability such as wrongfulness (eg conduct that does not represent a breach of duty can hardly be considered to be a relevant cause of damage) and contains a number of normative considerations that affect the attribution of damage to a certain wrongdoer.[78] Some of these considerations are sometimes referred to as elements of causation theories and rules, such as foreseeability, the protective scope of the rule, adequacy, the sphere of risk, the kind of legal interest at stake, the degree of the wrongdoer's fault, the type of accident, etc.[79]

E Fault, the presumption of fault, and wrongfulness

In theory, the significance of the presumption of fault for the system of liability is different if fault is understood as it was proposed in the Sketch or as the narrower concept with wrongfulness as a separate requirement of liability, which seems to have prevailed later. Regarding the former, the impact of the presumption of fault is stronger as the claimant must only prove causation and damage to trigger the presumption, while for the latter, the presumption is triggered only if the claimant also proves wrongfulness of conduct.

If, as claimed by the proponents, the presumption of fault was indeed introduced with the aim of tightening liability in general, one would expect that the concept of fault would remain as proposed by the Sketch. However, the provision of the Sketch on fault was deleted and a new provision on fault distinguishing negligence and intent, reminiscent of the approach in criminal law, was introduced (art 150 OA). What was intended with this move – also bearing in mind the presumption of fault – is not entirely clear. There are some doubts as to whether the legislature's intent was uniform at all, or – perhaps more likely – the OA in this respect is simply incoherent as a result of struggles between opposing groups involved in the preparation of the legislative text.

78 See eg *J Kleinschmidt*, Causation, in: J Basedow/KJ Hopt/R Zimmermann (eds), The Max Planck Encyclopedia of European Private Law (2012) 156.

79 Ibid, 159f, and *M Infantino*, Causation Theories and Causation Rules, in: M Bussani/AJ Sebok (eds), Comparative Tort Law (2nd edn 2021) 267ff.

It is certain, however, that the concept of fault proposed by the Sketch was not accepted universally in the literature and jurisprudence. The majority of writers held onto the understanding of fault predating the adoption of the OA, where wrongfulness was a separate element of liability. The result – conscious or not – is that the effect of the presumption of fault was significantly reduced.

By holding onto the requirement of wrongfulness, Yugoslav tort law retained subjective liability as the basic principle of the attribution of damage. The burden of proving a key element of that liability – that the wrongdoer acted wrongly – remains with the claimant.

One can therefore consider the element of wrongfulness also from the point of view of 'neutralising' the effect of the ill-considered presumption of fault. This is a specific function of wrongfulness. Other functions include the determination of the boundary between permissible and impermissible (wrongful) conduct, which may be relevant also for preventive measures, and the limitation of liability in the sense of an additional requirement.

Indeed, the practical effect of the presumption of fault – at least in Slovene law – was rather marginal. The key element of liability – the question of whether the person responsible should be liable because he did something wrong – is assessed under the aspect of wrongfulness.

Certainly, such a system of liability is not entirely coherent. The concepts of fault and wrongfulness are rather similar and, to some degree, overlapping. They both contain a negative value judgement as to the conduct of the perpetrator. Some authors are of the opinion that they can nevertheless be clearly distinguished: the negative value judgement could refer either to the conduct of the perpetrator (wrongfulness) or to his person (fault).[80] It needs to be called to mind, however, that the prevailing view does not consider fault to be a psychological phenomenon but rather a violation of an objective standard of behaviour, at least as far as negligence is concerned. If the notion of fault is objectivised, it tends to be very similar to or even to merge with wrongfulness.[81]

Marija Karanikić-Mirić is right in pointing out the inconsistency of the system, in which, in fact, the inadequacy of the defendant's conduct is assessed twice: under the aspect of fault and under the aspect of wrongfulness.[82] If we take into account the presumption of fault, the situation is even more odd: if the claimant (the injured party) succeeds in proving wrongfulness, damage, and the causal link between them, then the defendant's negligence is presumed. The defendant

80 See *Radišić* (fn 52) 202; *idem*, Protipravnost kao zaseban uslov građanske odgovornosti, Anali Pravnog Fakulteta u Beogradu 1-4/2001, 547 f.

81 *Widmer* (fn 17) 356, no 65.

82 *Karanikić-Mirić* (fn 26) 284 f.

is expected to prove that his behaviour was not inadequate, which is the opposite of the inadequacy of his behaviour that was already shown by the claimant.[83] From a theoretical point of view, the co-existence of fault and wrongfulness in the described sense is far from convincing.[84]

However, taking into consideration the presumption of fault, the concept of fault as was proposed by the Sketch (with 'integrated wrongfulness') – with all its inconsistencies and with the possible effect of broadening liability – seems less attractive. To be sure, jurisprudence can employ other ways to set limits on liability. This seems to be the case in Serbia, where there are no reports of an uncontrolled expansion of liability despite the presumption of fault (in the broad sense). If, at some point in the future, the presumption of fault in Slovenia is removed, there will be room for a different concept of fault. At present, between two non-optimal solutions, the less non-optimal solution is to be preferred.

IV Wrongfulness in Slovene law

A General

As, due to the presumption of proof in art 154 (1) OA and art 131 (1) of the Obligations Code (hereinafter: the Slo-OC), the claimant is relieved of proving fault if other elements are proven, the element of wrongfulness became the focus of the discussion on fault liability. Wrongfulness or 'unlawfulness' (in Slovene: *protipravnost*) means that the person causing damage acted contrary to his duty, ie contrary to law. The courts demand that claimants specify and substantiate how the conduct was wrongful.[85] Wrongfulness refers to human behaviour and not to damage (harm).[86] In cases of strict liability, wrongfulness is not an element of liability, as the latter is not directly connected to human conduct but to the existence of an extreme risk and the realisation of damage.

83 *Widmer* (fn 17) no 65, 356; *Karanikić-Mirić*, Pravni život 11/2009, 950.

84 For a similar opinion regarding Swiss law, see: *Honsell/Isenring/Kessler* (fn 45) 80, no 21.

85 See *M Čujovič*, Utemeljevanje protipravnosti v odškodninskih zahtevkih, Odvetnik 2/2016, 25.

86 Some authors also speak of 'wrongful damage', above all with regard to liability under art 156 (3) OA or art 133 (3) Slo-OC, ie liability for loss arising from an activity in the public interest and exceeding the 'normal' (ie tolerable) limit, see *Cigoj* (fn 28) art 156, 581. However, the confrontation of public and private interest is hardly a classical tort; it seems more similar to partial expropriation in the public interest, justifying special (and limited) compensation but not a general tort liability. See *D Možina*, Nepremoženjska škoda zaradi posega v pravico do zdravega življenjskega okolja: odškodninska odgovornost države za cestni hrup, Podjetje in delo 1/2016, 41.

Although some derive wrongfulness from the general principle of *neminem laedere* (art 16 OA, art 10 Slo-OC), the fact that damage has been caused does not by itself mean that the conduct leading to the occurrence of damage was wrongful.[87] Particularly with regard to omissions, it must first be established whether the actor was under a duty to act in a certain way.[88] Furthermore, if everyone had to 'refrain from conduct that might cause damage to others' in any given situation (art 16 OA), everyday life would be seriously hampered, as hardly any life activity is absolutely without at least some risk of damage.[89] The acceptance of ordinary life risks is connected to the general freedom of movement. In a case involving the injury of a pupil during a school break, the Supreme Court of Republic of Slovenia stated, for example, that a total ban on children's games or supervision so strict as to exclude any risk of injury would be 'contrary to the objectives of the education process'.[90]

B Assessment of wrongfulness

When the law prescribes or prohibits certain conduct, a violation of such a norm is wrongful (unlawful). Of course, the norm must have been intended (also) to protect against such interferences with individuals.

However, where there are no specific norms of behaviour, additional steps are needed for a finding of wrongfulness. The duty to act in a certain way can arise from the general standard of behaviour that can be expected from a person in the position of the wrongdoer. Here, wrongfulness comes very close to or even merges with the concept of the diligence of a reasonable and careful man (fault).[91]

Often, a finding of wrongfulness will require balancing the opposing interests of the parties: on the one hand, the interest of one party to act freely, corresponding to the freedom to develop one's personality or to develop economic, artistic,

87 See Supreme Court RS, II Ips 543/2008, 10 November 2011, no 9 (injury during fitness training as part of military service).

88 See eg Higher Court in Ljubljana, II Cp 1156/2012, 18 December 2012, no 6 (regarding a fall on a snowy path at a spa).

89 *Z Stipković*, O granicama načela *neminem laedere*, Zbornik Pravnog fakulteta u Zagrebu 4-5/1995, 437, 439; *M Baretić*, Protupravnost kao pretpostavka odštetnopravne odgovornosti u hrvatskom pravu, Zbornik PF ZG 4/2020, 595, 602.

90 Supreme Court RS, II Ips 269/1994, 12 October 1995.

91 See eg *N Plavšak* in: N Plavšak/M Juhart/R Vrenčur, Obligacijsko pravo-splošni del (2009) 498; *Jadek-Pensa* (fn 29) 671; *Čujovič* (fn 85) 25. In Croatian law, see Baretic (fn 89) 614, who points out the entanglement of wrongfulness and fault.

sports, or other activities, and on the other hand, the interest of the other party not to be harmed.[92] In balancing interests, a number of factors must be taken into account, such as the kind of protected interest at stake (eg the protection of life or health is more important than the protection of mere property), the level of danger arising from the actor's conduct, and the level of the foreseeability of damage.[93] Furthermore, it must be assessed whether conduct that would have prevented the damage could reasonably have been expected from the actor, taking into account, inter alia, its cost.[94] Although the latter is sometimes not addressed directly by the courts in Slovenia, and they never refer to the 'Learned-Hand formula',[95] it is undoubtedly of importance for the assessment of wrongfulness.

As was mentioned above, the foreseeability of damage is an important element of the assessment of wrongfulness. However, the fact that the damage was foreseeable does not of itself establish the duty of someone else to prevent it. Of course, such duties arise in certain legal relationships, eg between employers and employees or guardians and children, and where someone had created a dangerous situation (and is then under the duty to prevent damage). But there is no general and independent duty to protect others from any damage (liability for pure omissions).[96] Article 182 OA (art 161 Slo-OC) prescribes liability for the omission of urgent help only in the case of an imminent threat to life or health (and not to property or even to pure economic interest), and even then, under the further condition that the help was possible without putting the person helping in danger; furthermore, the court has a wide margin of appreciation in taking into account inter alia the characteristics of human behaviour in emergency situations.

Not only legal but also moral norms are relevant for wrongfulness; eg, liability for unfair competition is triggered by conduct *contra bonos mores*.[97]

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92 See *P Widmer* in: Principles of European Tort Law, Text and Commentary (2005) art 4:102, 76, no 6.

93 *H Koziol*, Conclusions, in: Koziol (ed), Unification of tort law: Wrongfulness (1998) 133. Cf art 4:102 (1) PETL. For Croatian law, see *Baretić*, PF ZG 4/2020, 617 f.

94 Cf art 4:102 (1) PETL.

95 The formula (if the cost of preventive measures is lower than the cost of the harm, multiplied by the probability of its occurrence, then the measures should be taken and harm avoided) was first mentioned by the eminent American Judge Billings Learned Hand in the case *US v Carroll Towing Co*, 159 Federal Reporter, Second Series (F 2d) 169 (2nd Cir 1947). For a modern version, see *G Wagner* in: Münchener Kommentar zum BGB (8th edn 2020) vor § 823, no 56.

96 See eg *C Van Dam*, European Tort Law (2nd edn 2013) 520 f; *Widmer* (fn 92) art 4:103, 86, no 1.

97 See arts 2, 8, 15, and 16 of the Act Prohibiting Unfair Competition and Monopolist Agreements, Official Gazette SFRY, 24/1974, and *Cigoj* (fn 16) 560 f.

The relevant rules of behaviour include autonomous legal norms, such as the rules of professional and sports associations. With regard to the latter, a special aspect of the balancing of interests must be pointed out: in principle, the rules of a sports game represent the limit of wrongful behaviour if there is an injury. However, in sports containing elements of a 'battle', where physical contact is essential (such as football, ice hockey, etc), a mere breach of the rules of the game does not of itself constitute wrongfulness; it requires a serious 'foul' in the sense of particularly dangerous conduct or even the intentional causation of injury.[98] A more protective approach would affect the attractiveness of sports for the athletes as well as for spectators; it is held that the benefits of sports outweigh the risks of typical injuries that are borne by the participants.

C Example: the maintenance of roads and walking surfaces

Case law on liability for the maintenance of roads and walking surfaces may serve as an example of how dynamic the assessment of wrongfulness is in jurisprudence. In principle, the State (State roads) and municipalities (local roads and streets) must ensure the maintenance of roads and other services, including during the winter. This, however, does not justify the expectation of absolute safety in any given circumstances. The duty to perform maintenance must be understood in the context of the significance of roads for traffic, the cost-effectiveness of maintenance, the weather conditions, as well as the duties of users thereof to adjust their behaviour to the circumstances.[99] A higher level of care is required where the risk of damage is greater, especially on highways, but even there, users cannot expect every obstacle to be removed the moment it occurs.[100]

With regard to walking surfaces, too, any shortcomings in the implementation of maintenance as prescribed by municipal rules do not automatically mean that the conduct was wrongful. Jurisprudence has developed the standard of a 'normal walking surface' that a reasonably attentive pedestrian can cross without

98 See: *D Možina*, Odškodninska odgovornost za poškodbe pri športu (Liability for sports-related injuries), in: Bergant-Rakočević (ed), Šport in pravo (2nd edn 2020) 113f.

99 See eg Higher Court in Maribor, I Cp 1152/2009, 27 October 2009 (the duty to perform maintenance is not absolute and cannot be interpreted as a duty to remove all possible obstacles); Higher Court in Ljubljana, II Cp 1827/2010 of 21 July 2010 (users must adapt to winter conditions and walk only on those parts of the route that are safe for walking; an average adult should know that on cold mornings in the winter the ground can be icy).

100 See Higher Court in Ljubljana, II Cp 4143/2010, 9 March 2011 (the injured party ran over an object that fell off an unknown truck. No wrongfulness was found regarding the three prescribed daily inspections carried by the road inspection service).

difficulty; the cracks and uneven surfaces that can be expected in an urban environment are to be tolerated.[101] The standard also applies to staircases.[102] The courts sometimes state that the wrongfulness of the conduct of the owner of the surface or performer of maintenance ends where the user's own responsibility begins (in the sense of general life risks or the conscious assumption of risk): for example, wrongfulness was denied where the users knew the walking surface well or should have expected winter conditions on it.[103] Often, liability is reduced due to contributory negligence.

Of course, liability also exists on private walking surfaces. Within this group, more extensive duties apply to private areas related to commercial activities.[104] In private areas without commercial activities, a higher standard of diligence is required in areas where many people are expected, such as the entrance stairs of a multi-apartment building,[105] and a lower standard in areas where visitors are rare, such as the stairs on the outside of a family house[106] or ceramic tiles inside a family house.[107] Very high standards apply to working surfaces (the liability of the employer).[108]

101 See eg Supreme Court RS, II Ips 85/2013, 6 February 2014 (the claimant fell while jumping from one leg to the other on uneven terrain where paving stones were missing); see also Supreme Court RS, II Ips 19/2009, of 27 January 2011 (the edge of a concrete slab raised by 1.5 to 2 cm compared with other slabs is within acceptable limits).

102 See eg Supreme Court RS, II Ips 94/2019, 25 September 2020 (the claimant fell on public stairs leading to a bridge; all the stairs were the of same height, only the last one deviated by a third in height, which interrupted his rhythmic movement; wrongfulness confirmed).

103 Supreme Court RS, II Ips 177/2018, 22 November 2018.

104 See Higher Court in Ljubljana, I Cp 1644/2018, 20 February 2019 (a slippery surface in front of a fast food restaurant); Supreme Court RS, II Ips 48/2016, 15 February 2018 (the claimant tripped on the edge of a carpet at the entrance to a shopping centre); however, see eg Higher Court in Ljubljana, II Cp 1254/2017, 27 September 2018 (no liability for a fall due to a slippery surface at a cash register in a grocery store; the shop owner cannot be expected to prevent every such event).

105 See eg Supreme Court RS, II Ips 526/2005, 14 November 2007 (a damaged staircase, a higher level of duty of care due to many users, including guests, ie non-parties to the maintenance contract, regarding which the manager of the house was found liable in tort).

106 See eg Higher Court in Ljubljana, II Cp 308/2018, 16 March 2018 (the fall of a visitor on wet stairs on the outside of a private house, wrongfulness denied).

107 See eg Supreme Court RS, II Ips 129/2015, 6 October 2016 (the claimant, visiting a friend who was washing a car outside the house, fell on ceramic tiles when entering the house; wrongfulness denied).

108 See eg Supreme Court RS II Ips 136/2019, 19 June 2020 (an accidental drop of oil on the floor of a bakery is not unforeseeable, the highest standards of care apply).

D Wrongfulness in State liability

The State is liable for the wrongful exercise of authority by its bodies and officials.[109] The courts in Slovenia apply private tort law also to the relationship between the State and the individual, but with some modifications, particularly as regards the element of wrongfulness.[110] The duties of the State are different from those of individuals. Also, the nature of the work of State bodies needs to be taken into account, including the margin of appreciation they might enjoy. For example, the State is liable for the conduct of the courts only in cases of aggravated wrongfulness, such as for an evident breach of duty, eg if a court does not apply a clear and understandable provision of a law or otherwise acts in an unacceptable manner.[111] Furthermore, the State is only exceptionally liable for its legislation (so-called legislative wrongfulness), ie only for the most serious breaches of the Constitution and basic standards of society: the mere finding that a provision of an act is contrary to the Constitution does not as such amount to wrongfulness.[112] The legislature derives its sovereignty directly from the people; unrestricted liability for the acts of the legislature would interfere with the principle of the separation of powers.[113]

In principle, the claimant must state (and prove) how the State's representative acted wrongfully. The Constitutional Court has established two exceptions to this principle: firstly, it introduced a special concept of liability for systemic backlogs at the courts.[114] In this case, the State is liable without the claimant showing concrete wrongfulness: a result (ie an unacceptable delay) is enough.[115] In effect, the Constitutional Court has shifted liability from the fault principle towards strict liability. Furthermore, a (rebuttable) presumption of wrongfulness was established for cases where an individual loses his life while in the custody of the State (eg in prison or during a search of a private house ordered by the court).[116]

The State may also be liable for failing to protect individuals from other individuals or other threats (positive duties). Here, the duties of the State depend on the interest at stake: in principle, the State must maintain an appropriate and

109 See art 26 of the Constitution of the Republic of Slovenia.

110 See eg *D Možina* in: M Avbelj (ed), Komentar Ustave RS (2019) art 26, 261, no 25f.

111 See eg Supreme Court RS, III Ips 123/2009, 29 March 2011, no 20.

112 Supreme Court RS, II Ips 800/2006, 24 June 2009.

113 See eg *Možina* (fn 110) art 26, 261, no 25f.

114 This case law only applies up to the moment when a special no-fault compensation scheme was set up, see: Act on Protection of the Right to a Trial without Undue Delay, Official Gazette RS, 49/2006, 117/2006, 58/2009, 30/2010, and 38/2012.

115 Constitutional Court of Slovenia, Up-695/11, 10 January 2013.

116 Constitutional Court of Slovenia, Up-679/12, 16 October 2014.

effective system for deterring, preventing, detecting, and prosecuting crimes against life or health.[117] The State must actively protect the life or health of an individual, provided that it is aware of the threat against him and that the protection is reasonably possible.[118] However, there is no absolute expectation of safety. The State has a significantly lower level of duty with regard to the protection of property or even the pure economic interests of individuals.[119]

V Wrongfulness and pure economic loss: how general is the general clause?

Like the French Civil Code, the Yugoslav OA does not contain a list of (absolutely) protected interests and does not appear to limit liability for pure economic loss (ie loss not arising from personal injury or damage to tangible property). This is different from the approach of, for example, English[120] or German[121] law, where liability for pure economic loss caused by negligence is limited on a general level. The limitations were based on the fear of an unlimited number and amount of damages claims, which would make everyday life difficult.[122] However, several exceptions were established over time, in German law, for example, in the form

117 Constitutional Court of Slovenia, Up-1082/12, 29 May 2014.

118 Ibid.

119 See eg Circuit Court of Ljubljana, VIII Pg 651/2012, 26 November 2013 (the liability of the State for not having prevented a financial fraud was denied); *Možina* (fn 110) art 26, 262, no 36.

120 In one of the most important torts in common law, *negligence*, the duty of care exists only with regard to physical loss, but not with regard to pure economic loss. See Winfield & Jolowitz on Tort (20th edn 2020) 83, no 5–014. Recovery of pure economic loss is also possible in economic torts, consisting of inducing a breach of contract and interference with a contract, interference with trade or business, economic duress, and conspiracy to injure or to use unlawful means, see *van Dam* (fn 15) 215f.

121 The tort law of BGB is not based on one general clause, but rather on three 'little' general clauses. The most important of them is § 823 (1) BGB, which prescribes liability for a wrongful interference with life, body, health, freedom, property, and 'other rights', but not pure economic interests. The latter are protected under § 823 (2) BGB if there is a breach of a protecting norm, or under § 826 BGB in the event of intentional conduct *contra bonos mores*. For arguments against general liability for pure economic loss, see eg *B Markesinis* in: J Bell/A Janssen, Markesinis's German Law of Torts (5th edn 2019) 89f.

122 See eg *R Zimmermann*, The Law of Obligations (1996) 1037. With regard to Germany, the opposition of *R von Jhering* to general liability (for gross negligence), from Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (JherJb) 4 (1861) 12, is often cited in this regard; see eg *K Zweigert/H Kötz*, An Introduction to Comparative Law (3rd edn 1998) 598.

of an expansion of the protective scope of contractual liability to third persons in some circumstances (*Vertrag mit Schutzwirkung zugunsten Dritter*), and, in English law, as the expansion of negligence liability in relationships of close proximity.[123]

Questions relating to pure economic loss belong to the most thoroughly discussed topics in comparative tort law,[124] but there was no discussion about these kinds of limitations of liability in Yugoslav law. This might be a consequence of the introduction of a French-type general clause, but perhaps also of the political and economic circumstances, above all the domination of State and social property in the economy. If both parties to (an economic) tort are owned by the State, which, in turn, is controlled by one political party, any dispute over liability between them is somehow less acute and can also be solved in other ways rather than in courts.

However, even liability under the OA is not unlimited; the jurisprudence employs other, more indirect ways to 'keep the floodgates shut', such as through the assessment of causation and wrongfulness.[125] With regard to causation, the distinction between 'direct' and 'indirect' damage is of particular importance – the latter being mainly understood as relational (economic) loss. In this regard, indirect damage refers to damage to a victim that is the result of harm to the life, body, or property of another person (the direct victim). Generally, only direct loss – pecuniary as well as non-pecuniary – is recoverable, while indirect loss can be recovered only exceptionally, if the law so provides.[126] Sometimes this distinction is explained with adequate causation: for example, the Supreme Court RS held that the victim – an entrepreneur (a natural person) – can claim recovery for loss of income as a consequence of an injury from a traffic accident, as he can be considered a direct victim.[127] However, if the victim is the sole owner and manager of a limited company, then the loss of income of the company due to the injury of the manager in a traffic accident is not recoverable as it is 'indirect' (the loss of another person) and, as the court noted, is not normally to be expected from a traffic accident (ie not adequately caused).[128]

Moreover, the legislation provides for additional criteria to be met in order to recover pure economic loss in some situations. The first such case is loss due to

123 See House of Lords, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) Appeal Cases (AC) 465, 528f; *Wagner* (fn 17) 1015f.

124 See eg *Wagner* (fn 17) 1006.

125 See *I Gliha/M Baretić/S Nikšić*, Pure Economic Loss in Croatian Law, in: M Bussani (ed), European Tort Law – Eastern and Western Perspectives (2007) 255.

126 See eg Supreme Court RS, II Ips 689/2008, 10 September 2009.

127 Supreme Court RS, III Ips 3/2020, 19 May 2020.

128 Supreme Court RS III Ips 20/2013, 9 December 2014.

unfair competition. Here, the principle *of neminem laedere* under art 16 OA would make market competition impossible. If a company causes damage (loss of profit) to a competitor because it runs its business better, its conduct is not wrongful although it is certainly intentional. The business merely exercises its right to free economic initiative and development; however, it is liable for loss if it acts in an immoral (unfair) way – contrary to good business practices (*contra bonos mores*) and, eg, advertises in a misleading way so as to harm the competitor or interferes with contracts between the competitor and third persons. At the time of the adoption of the OA, this was regulated in the Act on the Prevention of Unfair Competition and Monopolistic Agreements.[129]

A similar approach applies to the abuse of a right. If a person merely exercises his right, he cannot be held liable for the resulting damage. However, if he exercises the right in an immoral way, with an overriding intent to cause harm to another person, he has abused his right and is liable for wrongful conduct.[130]

In both cases, liability is not only based on the minimal requirements for liability arising from the general clause of art 154 (1) OA, but also on the additional element of immorality. Immorality can be described as a particular form of wrongfulness.[131]

In some cases, liability for pure economic loss is limited by legislation, too. Directive 85/374/EC on the liability of the producer excludes loss that is not a result of death, injury to a person, or damage to property, such as lost profit.[132] Already the Yugoslav OA regulated the liability of a producer as a special form of strict liability (art 179 OA) and defined a defect as a 'risk of damage to persons or things' (and not to other economic interests). However, the case law on this provision did not develop and support this view.

For some cases of liability for statements, additional criteria have to be met in order for the loss to be recoverable. The law of damages in the OA contains a special subchapter entitled 'Compensation for pecuniary damage due to insulting and false statements', where, in art 198 OA, additional criteria for liability for statements about the past, knowledge, abilities, and other characteristics of an

129 See arts 2, 8, 15 and 16 'Zakon o suzbijanju nelojalne utakmnice i monopolističkih sporazuma', Official Gazette SFRY, 24/1974; See also *Cigoj* (fn 16) 560f. In Slovenian law, this is regulated in art 63a (3) Prevention of the Restriction of Competition Act, Official Gazette RS, 36/08, last amended 23/17.

130 See eg Supreme Court RS, II Ips 231/2013, 24 October 2014.

131 *Gliha/Baretić/Nikšić* (fn 125) 258.

132 See art 9 of Council Directive 85/374/EEC of 25 July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Official Journal L 210; art 4 Consumer Protection Act, Official Gazette RS, 20/98, last amended 31/18.

individual are determined.[133] Liability is not prescribed for any statement that results in a reduction of the value of the property of the injured party (ie pecuniary loss, see art 155 OA). If the statement is true, there is no liability. However, even if the statement is untrue, the person who made the statement is not liable if he could not reasonably have known that it was untrue and was motivated by a 'serious interest'. It follows from this provision that the interest of the injured party must be weighed against any 'serious interest' of the party who made the statement. Thus, the injured party can claim the recovery of lost profit due to insulting and/or untrue statements only if his interest outweighs the interest of the party who made the statements or the public interest. The line between wrongful and lawful conduct is a result of balancing the conflicting interests of the parties.

Although it does not concern pure economic loss, it should be mentioned that a similar process applies to wrongfulness with regard to non-pecuniary loss due to an insult or interference with privacy and other personality rights. Due to the intangible nature of personality rights, the protected sphere of an individual is much more difficult to define than the protected sphere of bodily integrity or tangible property; the court must weigh conflicting protected interests against each other: on the one hand, the right to free speech, and on the other, the personality rights of an individual.[134] Jurisprudence has developed criteria for defamation: it has to be taken into account whether the injured person is a public person (a known politician, a sportsman, a journalist, etc) or not, as they have to accept harsher criticism. It is also relevant whether the statement is true, and, if it is not, whether the person who made the statement merely erred in his understanding of a situation or had a legitimate interest, or, on the other hand, made the statement with the primary purpose of denigrating the other person.[135] With regard to privacy, too, public persons cannot rely on it in the same way as 'ordinary' people. One of the elements of weighing the right to free speech against the individual's privacy is also whether the intrusion of privacy (and its dissemination) 'contributed to a debate of general interest to society'.[136]

As mentioned earlier, additional criteria have to be met for liability for pecuniary loss due to insults to arise. Also, there is no general liability for negligent statements, information, or opinions. The courts explain that such liability would

133 Cf § 824 BGB.

134 See *Wagner* (fn 17) 1020.

135 See eg Supreme Court RS, II Ips 75/2019, 6 February 2020.

136 See European Court of Human Rights (ECtHR) *Caroline von Hannover v Germany*, 24.6.2004, no 59320/00. See also Supreme Court RS, II Ips 296/2002, 25 September 2003, and II Ips 23/2020, 28 August 2020.

overburden or even disable communication.[137] Following examples from comparative law, the Supreme Court developed case law where experts can nevertheless be liable for negligent statements or information if the recipient, due to a close relationship with the person providing the information, could reasonably rely on the information being correct.[138] Interestingly, the courts have also referred to the DCFR (art VI-2:207) to establish liability in such cases.[139] The expert must have foreseen that the recipient of the information, who belongs to a determinable group of people, would rely on the information in making a particular kind of decision (a so-called 'special relationship').[140] This was, for example, the case where an appraiser, acting under contract with the party, negligently overestimated the value of the property; the valuation was then submitted to a bank, which gave a loan to the party against the property as collateral. When the loan was not repaid, the property could only be sold for a far lower price than evaluated. The court held the appraiser liable to the bank for the difference although they had no contractual relationship.[141]

Some other examples of non-contractual liability for statements or information are regulated by special legislation, such as liability for information provided in relation to a prospectus for a public offering of securities.[142]

Of course, all the questions in connection with pure economic loss cannot be adequately addressed here; the purpose was merely to show that not all interests are equally protected in tort law. In particular, liability for damage to pure economic interests requires additional criteria at least in the situations mentioned. In this sense, it could be said that the general clause of art 154 (1) OA is not as general as it appears to be.

137 Supreme Court RS, II Ips 103/2009, 30 June 2011, no 12.

138 See ibid and Higher Court in Ljubljana, II Cp 373/2017, 6 July 2017, no 7; II Cp 1650/2017, 6 September 2017, no 11.

139 Ibid.

140 Ibid and Supreme Court RS, III Ips 38/2010, 22 January 2013. See also: *D Možina*, Odškodninska odgovornost za nasvet in informacije ter vprašanje zahtevkov tretjih oseb, Podjetje in delo 2/2015, 291f.

141 See Higher Court in Ljubljana, II Cp 1650/2017, 6 September 2017, and II Cp 373/2017, 6 July 2017.

142 See art 81 (3) Act on the Financial Instruments Market, Official Gazette RS, 77/18, 17/19, and 66/19. Cf the criteria for exemptions regarding the aforementioned elements of the liability of experts to third persons.

VI Conclusions

In the area of fault liability, the draft of the OA introduced a French-type general clause with a broad concept of fault. However, some modifications were made to the draft in the legislative procedure, in particular the general reversal of the burden of proof regarding fault (the presumption of fault) was introduced. Although the OA did not mention wrongfulness, the majority opinion in the jurisprudence and academic literature continued to support it.

Admittedly, the concept of wrongfulness (the conduct must be contrary to law or duty) is not entirely coherent given the concept of fault whereby negligence is assessed by comparing the wrongdoer's conduct to an objective standard of behaviour. In part, fault and wrongfulness overlap. However, it seems odd to generally presume the defendant's fault with the effect that the claimant would only need to prove causation and damage. The presumption of fault was considered by its proponents to be more appropriate for a socialist society. However, as the requirement of wrongfulness continued to be applied in practice, the presumption was far less significant than envisaged. A different approach seems to be characteristic of modern Serbian law, where fault is understood in the broad sense and a separate element of wrongfulness is not required. It is certainly peculiar that the same legal text is interpreted so differently: while the 'French' notion of fault seems to be accepted in Serbia, the 'German' concept of wrongfulness prevails in Slovenia and Croatia.

In Slovenia, wrongfulness is the central element of fault liability. In situations where no specific norms of behaviour exist, the finding of wrongfulness requires a balancing of the interests of the parties, whereby a number of criteria are to be taken into account, such as the type of legal interest at stake, the level of danger arising from the activity, the foreseeability of damage, and the reasonableness of the relevant protective measures.

Although no explicit list of protected interests exists in the tort law of Slovenia, it is clear that not all interests enjoy the same level of protection. Firstly, the interest at stake is to be taken into account already in the assessment of wrongfulness (eg the protection of life triggers a more extensive preventive duty than the protection of a mere economic interest). Secondly, some interests, for example, pure economic interests, are protected only under additional conditions, such as the conduct being contrary to morals (eg in cases of unfair competition) or only after a comprehensive balancing of interests (a pure economic loss due to defamation). In some cases, the courts have imported approaches from comparative law (eg the liability of experts for negligent statements towards third parties if there is a 'special relationship'). Putting dogmatic differences aside, the overall picture with regard to the protection of different interests in Slovene tort law shows con-

tours not so unlike those in countries with an explicit hierarchy of protected interests.[143]

143 See eg *Wagner* (fn 17) 1004f.