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Art 4:102 Principles of European Tort Law

An Objective or Subjective Standard of Fault – Does the Difference Really Matter?

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I The concept of fault in the PETL

According to art 4:101 of the Principles of European Tort Law (PETL), liability based on fault requires the 'intentional or negligent violation of the required standard of conduct'. The required standard of conduct is further specified in art 4:102(1) PETL as 'that of the reasonable person in the circumstances' depending on a series of aspects, such as 'the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.' Article 4:102(2) then adds that 'the above standard may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.' Article 4:102(2) PETL is complemented by a special provision for the liability of a person who is in charge of a minor or mentally disabled person, providing that it is not the plaintiff, but the person in charge who has to show that he or she has conformed to the required standard of conduct in supervision (art 6:101 PETL).

In the following, I will not discuss the definition of fault as such, but rather focus on the question of whether it makes a difference if fault is determined objectively or subjectively. Because when it is established that the defendant breached the required standard of care (which means that the defendant did not behave in the way a reasonable person would have done in the circumstances), it must still be determined if the defendant's personal capacities have an influence on the establishment of fault. The examination goes in both directions, be it that the defendant's capacities are above or below the required standard.

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The notion of personal capacities comprises, as van Dam[1] explains, two elements: knowledge of the risk and the skills to avoid it. Both factors can be judged from an objective or a subjective perspective. The objective perspective would address the question by asking what a reasonable person ought to have known of the risk and what skills he or she ought to have had to avoid it. For the subjective perspective, the answer would be determined by an assessment of the personal abilities of the defendant. Although, according to van Dam, the subjective test is deemed to be 'the classical approach in which liability can only exist if the wrongdoer can be personally blamed for his conduct', nowadays 'the general rule is that knowledge and ability are judged in an objective way and that a subjective test is applied in exceptional cases only.'[2]

There are several reasons for the prevalence of the objective theory. On the one hand, it is motivated by the practical notion that it is difficult for a court to obtain the necessary information on the subjective abilities of a person. The much more important reason is, however, the general view that tort law is not based on moral judgements but on a consideration of social responsibility. Tort law must, therefore, not only take the interests of the tortfeasor, but also the protection of the victim into account. Another reason for the application of the objective perspective is the insight that the functioning of social life requires that people meet proper standards of knowledge and skills. This is a matter of reasonable expectation.[3] Although this last argument cannot justify an objective standard of fault in general,[4] it has some merits with respect to contracts and activities such as participation in road traffic, which only can function on the basis of trust in the regular abilities of the other participants.

The typical cases where the dichotomy of the objective or subjective understanding of fault is usually discussed are the liability of children and of mentally incapacitated people. Many jurisdictions provide for special rules in this regard in order to achieve an appropriate balance of interests between the interests of the vulnerable tortfeasor and the likewise innocent victim. This is sometimes also done by introducing deliberations of equity, such as taking into account the financial means of the tortfeasor and the victim, or by providing special liability rules for parents and supervisors.

1 *C van Dam*, European Tort Law (2nd edn 2013) sec 810.

2 *Van Dam* (fn 1) sec 811–1. See also *H Koziol*, Comparative Conclusion, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) nos 8/229-8/235.

3 *Van Dam* (fn 1) sec 811–1.

4 As is pointed out by *H Koziol*, Grundfragen des Schadenersatzrechts (2010) no 6/85.

The issue can be exemplified by a brief analysis of four jurisdictions which tackle the problem in quite different ways.[5] The Austrian Civil Code (ABGB) follows, quite exceptionally, a subjective concept for the evaluation of fault which, however, is mitigated by the legal assumption that 'everyone who is of sound mind is capable of exercising such a degree of diligence and attention which can be exercised [by someone] having ordinary skills.'[6] Experts, including those who voluntarily assume a task that requires special skills, must always comply with an objective and enhanced standard of care. Minors under the age of fourteen and mentally incapacitated persons are not culpable,[7] but may be liable according to equity under § 1310 ABGB if compensation cannot be obtained from a third party who violated supervisory duties (parent, teacher, etc) under § 1309 ABGB. § 276(2) of the German Civil Code (BGB) refers to the failure to exercise reasonable care to constitute fault. In Germany, it is common opinion that fault must be determined objectively, that is, with reference not to the abilities of the individual actor, but to the ability of the reasonable person in the same situation. This means, however, that the standard can vary according to the situation and the profession or group to which the actor belongs.[8] A person who, in a state of unconsciousness or in a state of pathological mental disturbance precluding the free exercise of will, inflicts damage on another person is not responsible for such damage.[9] Special rules apply to minors: the general rule is that minors under the age of seven are not responsible for their actions, and that minors between the age of seven and eighteen must have sufficient insight in order to assume liability. For traffic accidents, the decisive age is increased from seven to ten years.[10] Regardless of these rules, liability can be attributed on an equitable basis if compensation cannot be obtained from a third party with a duty of supervision.[11]

A totally different stance is taken by France and the Netherlands. French law does not distinguish between unlawfulness and fault. According to art 1240 of the French Civil Code, liability arises when damage is caused by the fault of a person. In theory, fault is assessed in a purely objective way in that it already exists when a

5 For a comprehensive presentation and discussion of the matter in European jurisdictions, see *P Widmer* (ed), Unification of Tort Law: Fault (2005); *van Dam* (fn 1) sec 813–1; *B Winiger*/*E Karner*/*K Oliphant* (eds), Essential Cases on Misconduct in the Digest of European Tort Law (2018). For the question of liability of children, see *M Martín-Casals* (ed), Children in Tort Law, Part I (2006) and Part II (2007).

6 § 1297 ABGB.

7 § 176 ABGB (minors).

8 *S Grundmann* in: Münchener Kommentar zum BGB (9th edn 2022) BGB § 276 nos 55 and 56.

9 § 827 BGB.

10 § 828 BGB. See *H Kötz*/*G Wagner*, Deliktsrecht (14th edn 2021) 130 no 55ff.

11 § 829 BGB.

person breached the required standard of care. The standard is that of the reasonable person, regardless of the subjective capabilities of the individual actor,[12] although authors indicate that the relevant case law is not so clear because courts tend to distinguish between professionals and laypersons and sometimes even take the subjective skills of the defendant into consideration for the establishment of fault.[13] Mentally disabled persons and minors are fully liable when they breached the objective standard of care.[14] In addition to the liability of the actor, art 1242 of the French Civil Code provides for special liability rules for parents, teachers and artisans for harm caused by their children, pupils or apprentices while under their supervision.

Contrary to French law, the Dutch Civil Code (*Burgerlijk Wetboek*, BW) does, in principle, distinguish between unlawfulness and fault. In most cases, however, this distinction does not play a role, because in two of the three constellations of unlawfulness provided in art 6:162(2) BW, *in concreto* the violation of a duty imposed by law or the breach of proper social conduct, liability does not require fault as a further category in order to establish liability.[15] Fault is only required under the third category of unlawfulness, the violation of a subjective right, and it is assessed objectively according to the standard of the reasonable person of the specific category (ordinary person or professional) to which the actor belongs.[16] The decisive cases for this issue, the liability of non-accountable persons, are regulated separately in the Civil Code. Damage caused by the unlawful act of a child under the age of 14 must not be borne by the child, but by the person who exercises parental authority or legal guardianship over the child.[17] If the child is between 14 and 16 years of age, this person can escape liability by proving that the supervisor cannot be blamed for failing to prevent the child's unlawful act.[18] Mentally incapacitated persons are, unlike children, not exempted from liability. That damage was caused by an act committed under the influence of mental or physical disability

12 *G Viney*/*P Jourdain*/*S Caval*, Les conditions de la responsabilité (4th edn 2013) nos 443 and 462; *O Moréteau*, Basic Questions of Tort Law from a French Perspective, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 1/151ff ; *J Knetsch*, Tort Law in France (2021) no 75.

13 *Knetsch* (fn 12) no 75.

14 *Moréteau* (fn 12) no 1/152; *Knetsch* (fn 12) nos 80–82. See art 414-3 CC, which provides that a person who has caused damage to another while under the influence of a mental disability is no less obliged to make reparation.

15 See *WH van Boom*, Fault under Dutch Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 167; *Winiger*/*Karner*/*Oliphant* (fn 5) 37.

16 See *van Boom* (fn 15) 167; *Winiger*/*Karner*/*Oliphant* (fn 5) 37.

17 Arts 6:164 and 6:169 (1) BW.

18 Art 6:169 (2) BW.

does not exclude liability of the actor. This liability is supplemented by liability of the person who violated the duty to supervise the not blameworthy actor.[19]

II PETL: Objective or subjective standard?

As a next step of the analysis, it shall be determined whether the PETL propose an objective or subjective standard for the determination of fault. The authors of the PETL seem to be of the opinion that the standard is an objective one. The referral to the 'reasonable person' relies, as Widmer[20] explains in his commentary, on the old Roman concept of the *bonus pater familias* who 'does not pursue his own goals without looking to the right or left, but who takes into consideration the (possibly infringed) interests of other people'. The proposed rule, according to Widmer, thus establishes per se an objective standard for the assessment of fault.

The rule itself, however, leaves considerable room for the 'subjectification' of the objective concept, that is, the assessment of fault according to the subjective abilities of the individual person. An important point for the subjectification of fault is the reference to the 'circumstances' in art 4:102(1) PETL, which allows an adaptation of the required standard according to the concrete situation. First of all, this reference allows an adaptation of the scale model of the reasonable person to the category which the person represents,[21] a classification that, as was shown in the brief comparative overview, seems to be generally accepted even in those jurisdictions which adhere to an objective standard.[22] Accordingly, the person who spontaneously provides assistance to an injured person in the event of an accident does not need to have the knowledge and skills of a doctor or even a professional first-aider; the person who patiently listens to the complaints of their best friend does not have to vouch for the knowledge of a psychiatrist. The rule in art 4:102(1) PETL, however, does not only allow for the differentiation between 'ordinary person' and 'professional', but leaves ample room for further distinctions because it allows for the consideration of a series of further aspects, namely 'the nature and value of the protected interest involved', 'the dangerousness of the activity', 'the expertise to be expected of a person carrying it on', 'the foreseeability of the damage, the relationship of proximity or special reliance between those involved', as well as 'the availability and the costs of precautionary or alternative methods'. What is meant by

19 Art 6:165 BW.

20 *P Widmer* in: European Group on Tort Law, Principles of European Tort Law, Text and Commentary (2005) art 4:102, no 4; *van Dam* (fn 1) sec 811–2.

21 *Widmer* (fn 20) art 4:102, no 5.

22 *Van Dam* (fn 1) sec 812.

these quite general aspects enumerated in art 4:102(1) PETL is far from obvious. As the rule only contains an enumeration of the different aspects and does not give any indication as to the interplay of these aspects, it leaves ample room for discretion by the individual decision-maker.

According to art 4:102(2) PETL, the standard may be further adjusted when 'due to age, mental or physical disability or extraordinary circumstances the person cannot be expected to conform to it.' This rule covers the young as well as those older because the PETL do not define any fixed age limit for tort capacity. The concept is thus, as Widmer points out, of the highest flexibility and provides that 'whether or not a person has sufficient insight and control over his or her behaviour has to be answered from case to case according to the concrete mental development of that person.'[23]

When considering the proposed rules, one gets the impression that, contrary to the assessment by Widmer, the rule in art 4:102 PETL does not provide for an objective standard of fault, but for a rather subjective one. It is true that the standard of the reasonable person serves as a benchmark, but the rules allow for a broad consideration of the subjective abilities of the person concerned for the assessment of fault. All in all, it can be concluded that the rule in art 4:102 PETL is much more general than the rules provided by the civil codes of Austria, Germany, France and the Netherlands, which regulate the issue in much greater detail. By enumerating a series of different deliberations, which in themselves are of a highly abstract nature, the PETL remain quite indefinite on this issue. The consequence is that, if these rules became law, the assessment of fault would, to a large degree, be left to the courts. They would have great latitude in their decisions. In light of the flexibility provided by the rules, it would then be their task to develop a consistent system for the assessment of fault for which the objective standard of the reasonable person would only serve as a reference point. If the national lawmakers are not ready to grant the courts such broad discretion, they will be obliged to concretise the rules.

23 *Widmer* (fn 5) no 15.

III Practical consequences of a subjective or objective concept of fault

A Contractual and non-contractual activities

For an evaluation of the practical consequences of a lawmaker's decision for a subjective or objective standard of fault, it is crucial to examine where this difference will actually play a role. For this purpose, it is necessary to look at the different activities which have to be judged. First of all, one must distinguish between the performance of contractual and extra-contractual activities. With respect to the performance of contractual obligations, fault can only be assessed according to the standard defined by the contract. A person who enters into a contract is obliged to fulfil the obligations as provided by the contract, either explicitly or implicitly, by way of interpretation. The contracting party who lacks the qualifications to perform the contract in the stipulated way is always at fault. In most cases, this standard will be an objective one.[24]

It is interesting to see that many cases presented in the comparative study on misconduct, edited by Winiger, Karner and Oliphant in 2018,[25] concern the contractual duties of professionals. This applies to all those cases dealing with the skills and abilities that doctors and other professionals owe to their clients when performing their profession. It is also apparent that, even for professionals, there is no universal standard because even professionals have different levels of qualification, from the common practitioner to the highly skilled specialist. With respect to contractual obligations, the critical case therefore is not the tortfeasor who lacks the stipulated qualifications (because this will always amount to fault), but the one who has higher skills than those required by the contract, but does not make use of them. The assessment as to whether this amounts to fault must, quite obviously, also be judged on the basis of the contract in question. A doctor, for instance, will always be obliged to use all of his or her professional knowledge and skills when treating a patient. It would be downright cynical to allow a doctor who works as a general practitioner

24 *H Koziol*, Harmonisation and Fundamental Questions of European Tort Law (2017) no 8/11.

25 *Winiger*/*Karner*/*Oliphant* (fn 5). The research of the Ectil data-base EUROTORT on recent cases brought a similar result. Nearly all the published cases that dealt with the question of duty of care were cases discussing contractual duties of professionals, such as doctors, notaries, auditors, lawyers, employers or real estate agents. Only one Spanish case (Tribunal Supremo 17.7.2007, RJ 2007, 4895) addressed the level of care in a domestic accident, an Irish case (High Court 17.2.2004) concerned the pursuit of a traffic offender by the police and two Polish cases (SN 24.9.2009, IV CSK 207/09; 29.10.2008 IV CSK 228/08, OSNC ZD C/2009, item 66) the contributory negligence of children.

but has acquired some special knowledge or skills in a certain area not to apply the special knowledge. In any case, the doctor will at least be required to disclose to the patient any information relevant for him or her to decide on further treatment. Often, the required standard will be set by the contract. A craftsman or a company that manufactures an item, or takes it over for repair, may not be obliged to make use of all of their skills, but be allowed to carry out the work according to the agreed level of quality (which is often a matter of cost).

B Non-contractual activities

When it comes to extra-contractual activities, the assessment of fault depends on the type of activity and on the degree of risk the activity creates for others. The operation of a chemical factory, an electrical power station or a nuclear power plant requires special knowledge and skills and exposes others to a high level of risk. It is evident that the operator of such an activity must meet an objective standard and cannot be excused because of insufficient personal expertise and skills.[26]

The same applies to participation in road traffic. For the functioning of road traffic, it is essential that people who participate in this activity have the objectively required skills. These skills, however, are not the same for the different types of users. They will be rather basic for pedestrians, because pedestrians do not create a high risk for other road users and are exposed to the risks created by others, especially vehicle drivers. A pedestrian must be, for instance, able to walk, to see the traffic lights and to hear a horn. A pedestrian who does not have these skills will be obliged to take extra care (for instance, use only red-light crossings) or take special safety measures in order to warn the general public of the risk (for instance, by wearing high visible clothing). If such safety measures are not sufficient, the person will only be able to participate in public traffic with an escort. The skills required for the rider of a bicycle are already much higher than those of a pedestrian, and they must be very high for the driver of a motor vehicle. A person who is not fit to drive such a vehicle may not escape liability with reference to, or even proof of, mental or corporeal shortcomings. In summary, one can conclude that, with respect to road traffic, the applied standard of care must be an objective one, but it is necessary to distinguish between the different groups of road users, because the required standard of care must reflect the degree of risk the person creates for other road users.

26 *Koziol* (fn 4) nos 6/89 and 6/90.

The application of an objective test for road users does not preclude that the sudden and unforeseeable incapacitation of an otherwise capable road user (for instance, immediate unconsciousness caused by an acute and severe heart attack) can relieve them from liability, provided that the reasonable person in the circumstances could not have acted otherwise. The need for the protection of the victim could, however, justify not allowing an exclusion of liability in such situations.

That the standard of fault in road traffic accidents should be objective does not mean that it must necessarily be extended to the assessment of contributory negligence of pedestrians or cyclists. To participate in road traffic is a necessity of everyday life and must also be open to persons who do not have the usual skills of a healthy adult. This applies to children from a certain minimum age and to persons who suffer from personal deficiencies, such as bad eyesight, impaired hearing or mental problems. Those persons may be held liable according to an objective standard of care when they cause damage to another person. This does not apply when such a person suffers damage through the act of another. For the assessment of contributory negligence of pedestrians, the standard should therefore be a purely subjective one, according to the personal abilities of the concrete person. It is interesting to see that many jurisdictions which apply an objective standard of fault in general tort law have special rules for the assessment of contributory negligence of pedestrians, cyclists and passengers as victims of road traffic accidents.[27]

IV Conclusions: Does the difference between the objective and subjective standard really matter?

To answer the question of whether the difference between the objective and subjective standard really matters, one can say that, from a theoretical viewpoint, the difference between an objective or subjective standard of fault certainly matters, because it is a question of justice whether to hold someone who cannot meet a given standard liable or not. From a practical point of view, a lawmaker's decision for a subjective or objective standard of fault is not so important because there are only

27 Belgium: art 29bis of the Act 21 November 1989 on Compulsory Automobile Insurance (for pedestrians, cyclists and car passengers); France: art 3 Act on the Improvement in the Situation of the Victims of Accidents in Road Traffic and on the Acceleration of the Compensation Proceedings, 'Loi Badinter' (for persons aged under 16 and over 70 and persons with more than 80% disability except in case of intentional conduct); Germany: § 828 BGB (for children under the age of ten); Spain: art 1.2 Road Traffic Liability Act (for children under 14 and non-capable persons).

few constellations where the decision for a subjective standard would actually play a role. For contractual liability, the standard is always determined by the specific contract and, in most cases, this standard will be objective. With respect to extra-contractual activities, the assessment of fault depends on the type of activity and on the degree of risk the activity creates for others. Operators of dangerous activities must always meet an objective (and enhanced) standard. This leads to the conclusion that a subjective standard will only be adequate for activities of daily life. It is only for such activities that the lawmaker's decision for the application of a subjective standard of fault will have practical consequences. Very often the same effect will be achieved by an objective standard, provided that the rule allows a distinction to be made between certain groups of actors. The decisive question is then how far the differentiation between the groups and sub-groups is made.

The decision for an objective standard should, however, not be extended to the assessment of *contributory negligence* of participants in activities of daily life. Here the standard must always be subjective according to the subjective abilities of the concerned person. Activities of daily life, such as the use of roads as a pedestrian, must also be open to persons who, although having the minimum skills to participate in the relevant activity, do not have the abilities of the average person, be it because of young or old age, or mental or corporeal shortcomings. While such persons can be held to an objective standard in order to protect the injured person when they cause harm to another person, there is no justifiable reason for holding them to an objective standard when they are the victim of such harm. It would be rather strange to hold a person with bad eyesight contributorily negligent for not having seen the excavation hole of an unsecured construction site, or a deaf person for not reacting to the warning call of a careless tree cutter with the argument that the average person would have seen the obstacle or would have heard the call. In this regard, the reference to the 'mirror image of fault' is not convincing. In their study on contributory negligence, Magnus and Martín-Casals reached the conclusion that, although it is common opinion in many countries that the standard for contributory negligence is the same as that applied when establishing fault, courts tend to take subjective factors into account when assessing contributory negligence.[28]

The tricky areas for the decision between an objective or a subjective standard of care are the assessment of fault of children and mentally incapacitated persons. Many jurisdictions have special rules for the attribution of liability to these groups in order to balance the interests of the unfit tortfeasor and the innocent victim. The

28 *U Magnus*/*M Martín-Casals*, Comparative Conclusions, in: U Magnus/M Martín-Casals (eds), Unification of Tort Law: Contributory Negligence (2004) 276 (no 68).

brief comparative overview shows that the solutions depend on the fundamental consideration as to who is more worthy of protection, the tortfeasor or the injured party. France and the Netherlands rather protect the injured party while Austrian and German law tend to protect the injurer.

There is no generally valid answer to this problem, but it seems that the strict position of French and Dutch law can serve the matter better than the Austrian and German solution which, as a matter of principle, exculpates the unfit tortfeasor, but then allows liability to be attributed to such unfit tortfeasors on an equitable basis, because this solution only produces legal uncertainty. If the risk of damage can be covered by third party insurance, it is much better to make the unfit tortfeasor liable because this allows the representatives of the unfit person (parents, legal representative of a mentally incapacitated adult) to manage the risk beforehand. The benefit of this solution is twofold: it leaves the liability risk with the tortfeasor who thus, depending on the existing degree of insight, would still have an incentive to avoid the damage, and it ensures that the innocent victim is actually compensated for the loss. Liability of the unfit tortfeasor combined with insurance coverage is not only an advantage for the victim, but also for the tortfeasor and his or her legal representatives who would be spared the cost and considerable emotional stress which such an incident usually causes. That the child's family or the estate of the unfit adult is burdened with the insurance premiums[29] is a comparably small burden because premiums for third party insurance tend to be rather low. Third party liability of minor children is usually automatically covered by household insurance policies without explicit extra cost.

The PETL are somewhat undecided in this matter. By referring to the reasonable person standard in art 4:102(1), they give the impression to adhere to an objective standard of fault. This impression is, however, deceptive, because the broad series of further aspects for its assessment provided by art 4:102(2) PETL allow for a considerable subjectification of fault. The general nature and the unclear interplay of these aspects do not give much orientation to legal practice. It will, therefore, be up to the national lawmaker who wants to incorporate the PETL into national law to concretise these rules. If not, it will be left for the courts to develop a consistent system by way of case law. For the definition of fault itself, this is probably not problematic because courts are quite capable of this task. It can be stated that the definition of fault in art 4:102(1) PETL is likely the best one can possibly give. For a possible update of the PETL, it would, however, be advisable to reconsider the rule

29 *Koziol* (fn 24) no 4/44 therefore proposes the introduction of social liability insurance financed by the public to cover the third party liability of children. Such comprehensive socialisation of damage would, however, have a negative effect on the motivation of children and especially their carers to prevent the occurrence of damage.

on the liability of children and mentally incapacitated persons. The proposed provision is too general and leaves everything open. It would be preferable for all of the affected persons (injurer, parents or legal representatives) to have more legal certainty in this area.