RCMOS - Multidisciplinary Scientific Journal of Knowledge.
ISSN: 2675-9128. São Paulo-SP.

Year V, v.1 2025. | submission: 25/07/2025 | accepted: 27/07/2025 | publication: 29/07/2025

Divergence in case law on the civil liability of the state for acts of omission

Jurisprudential divergence on the civil liability of the state for acts of omission

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SUMMARY

This article analyzes the divergent case law regarding the civil liability of the State for acts of omission, regarding the need to demonstrate the subjective element. Using a qualitative approach, the study utilizes a literature review and analysis of judgments handed down by higher courts. Based on concepts related to civil liability in private law, the study seeks to elucidate the civil liability of the State.
and demonstrate the divergence among higher courts regarding liability for acts of omission. The conclusion is that there are different positions regarding the adoption of the subjective or objective theory, depending on the higher court and the type of omission found in the case.

Keywords: Civil liability. Acts of omission. Divergence in case law.

ABSTRACT

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1. INTRODUCTION

The civil liability of the State does not bring innovations to the legal system, since since the classifications, requirements and elements of civil liability, specific to Law Private, were sheltered by public law.

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RCMOS - Multidisciplinary Scientific Journal of Knowledge.
ISSN: 2675-9128. São Paulo-SP.

However, with regard to subjective state liability for omission, the following are noted: adaptations in the elements of classical civil liability, in order to characterize the element subjective in the concept of anonymous guilt.

Based on the concepts related to civil liability in private law, the present study seeks to elucidate the State's responsibility for acts of omission and then demonstrate the divergence existing in the higher courts regarding the (in)existence of the element subjective.

2 CIVIL LIABILITY

2.1 CIVIL LIABILITY IN PRIVATE LAW

Civil liability aims to restore moral and patrimonial balance caused by the author of the damage (restore the *status quo ante),* reestablishing social balance. Thus, legal liability is a social phenomenon, which occurs when there is harm (socially externalized), unlike moral and religious responsibility, which exists only in the field of individual conscience (without repercussions on the legal order).

Obligation and responsibility are different legal institutes, since the second arises after the default of the first. In short, liability is the consequence patrimonial legal basis of non-compliance with the obligatory relationship. Therefore, while the obligation is an original legal duty, liability is a successive legal duty or secondary (duty to compensate for the loss or – in other words – to make good the damage) that arises from the violation of the first.

Civil liability has the interest (generating source) of restoring balance violated by the damage, so that by “compensating” the aim is to restore the situation previous (of “no damage”). Thus, the compensation will be set based on the difference between the current situation and the previous situation, restoring the injured party to the *status quo ante* (to the extent possible). Currently, civil liability is based on the principle of *restitutio in integrum,* which is characterized by the complete restoration of the victim to the situation prior to the injury.

Civil liability therefore constitutes a civil sanction of a criminal nature.
compensatory, which has an essentially compensatory function. Furthermore, for Gagliano &
Pamplona Filho (2004, p. 23), “three functions can be easily visualized in the institute of
civil reparation: compensatory for the damage to the victim; punitive for the offender; and social demotivation of
harmful conduct”.

It is important to emphasize that there are two ways of repairing damage: natural or
compensatory. In this sense, natural or specific reparation is characterized by the delivery of the
own object (or an object of the same kind replacing the injured party), with the aim of
restore the situation altered by the damage. Monetary or compensatory compensation (more
common) occurs due to the impossibility of restoring the previous situation, even if
there is natural repair. In principle, repair must occur *in natura,* with the replacement of
things to the previous state *(status quo ante), and* the pecuniary compensation must be subsidiary.

Still regarding introductory concepts, it is worth emphasizing that civil liability
can be classified, as to the generating fact, into contractual liability and liability
extra-contractual (legal or aquilian). Contractual liability arises from the non-performance of
bilateral or unilateral legal transaction (default), in which, based on a relationship
pre-existing obligation, another obligation arises (not arising from the contract) On the other hand
hand, the Aquilian liability, which does not originate from a previous legal relationship, arises from
failure to observe the law (injury to a right).

From another perspective, regarding the basis, civil liability can be subdivided into
subjective liability, in which it is necessary to demonstrate intent or fault (by action or
omission), and objective liability, which is based on the theory of risk and therefore dispenses with the
proof of intent or fault.

Initially, civil liability was constructed based on the subjective theory. With the
modernity, it was found that this theory was insufficient to protect the victim,
then the theory of risk (objective liability) emerged. According to the theory of risk, the one who
profits from a situation (gains the comforts) must respond to the risk or disadvantages
resulting from it (bear the inconveniences), according to the principle of equity.

In relation to the burden of proof, while in contractual liability the burden of proof is
proof will be the responsibility of the debtor, who will only be exempt from the obligation to compensate if he proves that there was

excluding the duty to compensate (act of God or force majeure), as there is a presumption of guilt for non-performance of the contractual obligation; in the case of liability for damages, the burden *of proof* will fall to the victim, who must prove the agent's guilt (if subjective liability) or demonstrate the causal link or case relating to the theory of risk (if strict liability).

Thus, civil liability can be conceptualized as the application of measures that oblige a person to repair moral or patrimonial damage caused to third parties, due to an act practiced by herself, by a person for whom she is responsible, by something belonging to her or simple legal imposition. In other words: it is the obligation to repair damage, whether resulting from a fault, or a legal circumstance that justifies it (such as presumed fault, for example), or by a merely objective circumstance.

In Brazilian law, civil liability is provided for in the Federal Constitution of 1988 (CF/88), which provides in its art. 5, item V, on the fundamental right "of reply, proportional to the offense, in addition to compensation for material, moral or image damage."

Especially regarding liability for moral damages, it is worth highlighting that personality rights are based on the rights guaranteed by the Constitution, with based on the dignity of the human person (art. 1, III, CF/88) and on the fundamental right of privacy, personal life, honor and image of people, which ensures "the right to compensation for material or moral damage resulting from its violation" (art. 5, X, CF/88).

In turn, the Civil Code of 2002 (CC/2002) provides that:

> Art. 186. Anyone who, through voluntary action or omission, negligence or imprudence, **violate the rights and cause harm to others, even if only moral, commits an act illicit.**
>
> Art. 187. The holder of a right who, when exercising it, exceeds its limits, also commits an unlawful act. clearly the limits imposed by its economic or social purpose, by good faith or by good customs.
>
> [...]
>
> Art. 927. Whoever, through an unlawful act (arts. 186 and 187), causes harm to another, **is obliged to repair it.**

Regarding the unlawful act, Tartuce (2019, p. 470) clarifies that the “unlawful act is the conduct human that violates private subjective rights, being in disagreement with the legal order and causing harm to someone.”

In a detailed analysis, it is clear that art. 186 of the 2002 Civil Code establishes that two elements are necessary: “violating the right and causing harm to others”. That is, even if there is violation of a legal duty and there is fault/intention, if no harm (damage) is found, it will not be due compensation. On the other hand, even if there is legality (lawful act), there may be an obligation to compensate (such as acts performed in a state of necessity, for example).

According to doctrinal understanding, the prerequisites (elements) of liability are civil: conduct of the person responsible (action), damage, causal link (between the action and the damage, it is the cause and effect relationship) and basis of liability (fault and risk).

The action may be commission or omission, voluntary (intent) or involuntary (guilt *stricto sensu),* unlawful (based on fault) or lawful (based on risk). It is important to clarify that action or omission may violate a legal duty (arts. 186 and 927 of the 2002 Civil Code), contractual duty (art. 389 of the CC/2002) or social (arts. 187 and 927 of the CC/2002).

When the action violates a social duty, there is an irregular exercise of a right (that is: the act is practiced with abuse of rights). The abusive act is lawful in its content, but unlawful in its form of execution, as it violates the purpose that society attributed to this right. It is emphasized that the abuse of rights can be assessed through two concepts, subjective (analyzes the intention of the agent) or objective (analyzes the act itself and its consequences), resulting – respectively – subjective or objective (dominant) liability. In this sense, it is worth mentioning the statement 37 of the 1st Civil Law Conference of the National Council of Justice, which states that “civil liability arising from abuse of rights is independent of fault and is based on only in the objective-finalistic criterion”

The damage may be patrimonial (material) and/or extrapatrimonial (moral), which are cumulative, according to the understanding embodied in Summary 37 of the Superior Court of Justice (STJ), which provides that “compensation for material damages and moral damages are cumulative, arising from the same fact”.

Patrimonial damage is the concrete injury that affects an interest related to the assets of the victim. Therefore, it is evaluated in money and measured by the differential criterion (comparison between the assets existing after the loss and what would probably exist if there had not been the injury). Non-pecuniary damage (moral damage), in the strict sense, moral damage constitutes what person feels, causing pain, sadness, bitterness, suffering, anguish and depression. In this vein, “for its reparation, it is not necessary to determine a *price* for the pain or suffering, but rather a means to mitigate, in part, the consequences of immaterial damage, the which brings the concept of *lenitive, derivative* or *substitute”* (TARTUCE, 2019, p. 592).

The causal link is the “intangible or virtual element of civil liability, constituting the cause and effect relationship” (TARTUCE, 2019, p. 537). It should be clarified that the causal link between the damage and the action is not present when there is one of the causes exclusions of liability: force majeure, fortuitous event or exclusive fault of the victim. For in turn, the victim's concurrent fault gives rise to attenuated compensation (proportionally).

Finally, in relation to the basis of responsibility, it is possible to see that this was modified over time. Thus, responsibility – initially based on guilt *(lato sensu)* – came into existence under the foundations of presumed guilt and, finally, the theory of risk. Therefore, the basis of civil liability is no longer sought only in guilt, also existing in the very fact of the thing and in the exercise of dangerous activities (liability arising from risk-benefit, risk created, professional risk, risk of enterprise).

2.2 STATE LIABILITY FOR OMISSION

At the outset, it is important to clarify that the Federal Constitution provides that the State must be liable for damages caused by its agents regardless of fault (objective liability):

> Art. 37, § 6. Legal entities under public law and those under private law providing of public services **will be liable for the damages that their agents, in that capacity, cause to third parties,** ensuring the right of recourse against the person responsible in cases of intent or fault.

RCMOS - Multidisciplinary Scientific Journal of Knowledge.
ISSN: 2675-9128. São Paulo-SP.

This provision is also listed in the Civil Code:

> Art. 43. **Legal entities under domestic public law are civilly liable for acts of its agents that in that capacity cause damage to third parties,** except recourse against those who caused the damage, if there is fault or fraud.

According to the understanding of the majority doctrine (CARVALHO, 2021, p. 359-360), these devices consolidate the theory of administrative risk. In short, this theory holds the public entity objectively responsible, but allows for the exclusion of liability in certain situations.

Since it is objective liability, the presence of three elements is sufficient: conduct, damage and causal link. Since the theory of administrative risk is adopted, liability may be *excluded* due to the exclusive fault of the victim, unforeseeable circumstances and force majeure or *mitigated* by concurrent fault of the victim.

Thus, it is clear that the republican Constitution does not differentiate civil liability of the State for cases of conduct by action or omission, so that – in a literal sense – the The civil liability of the State for state acts of omission is objective.

Despite the constitutional and legal determination regarding the civil liability of State, which does not distinguish between acts of commission or omission for the application of the objective liability, "the prevailing doctrine and jurisprudence recognize that, in cases of omission, the theory of subjective liability applies, where the subjective element is conditioning the duty to compensate" (CARVALHO, 2021, p. 361).

The understanding that state responsibility for omission is subjective finds based on the consolidated jurisprudence of the Superior Court of Justice, which provides:

> CIVIL AND ADMINISTRATIVE PROCEDURE. INTERNAL APPEAL IN THE APPEAL IN SPECIAL APPEAL. CIVIL LIABILITY OF THE STATE. ACT OMISSIVE. SUBJECTIVE LIABILITY. LACK OF LINK CAUSAL AND GUILT OF THE ADMINISTRATION. REVIEW. IMPOSSIBILITY. SUMMARY 7/STJ.

> 1. **The case law of the STJ is firm in the sense that the civil liability of the State for omissions is subjective, making it necessary, therefore, prove negligence in state action, the damage and the causal link between the two.**
>
> 2. In the present case, the Court of origin, based on the factual elements and evidence constant in the process, concluded that there was no proof of either the nexus of causality between the civil wrongdoing and the damages experienced, as well as the poor performance of public service, due to negligent actions by the Public Administration. The review of the issue demands a reexamination of the facts and evidence contained in the records, which is prohibited within the scope of the special appeal, under the terms of Summary 7/STJ. Precedents: AgInt in REsp 1,628,608/PB, Rapporteur Min. Francisco Falcão, Second Chamber, DJe 6/26/2017; AgRg no. REsp 1,345,620/RS, Rel. Min. Assusete Magalhães, Second Panel, DJe 12/2/2015; AgRg in AREsp 718.476/SP, Rel. Min, Herman Benjamin, Second Chamber, DJe 8/9/2015; AgInt in AREsp 1.000.816/SP, Rapporteur Min. Napoleon Nunes Maia Filho, First Class, DJe 03/13/2018.

It is important to assert that the State's subjective liability for acts of omission:

> [...] is not the one presented or defended by the civil theory, that is, it does not depend on the demonstration of intent or fault on the part of the public agent, but rather of **accountability arising from anonymous guilt.** Remember that this theory understands that poor performance of the service or inefficient provision would generate subjective liability on the part of the State. In this case, for the purposes of holding the public entity accountable, **it is not necessary to prove the agent's fault, with proof of poor service provision or inefficient provision of the service or, even, delayed provision of the service** as causing damage. (CARVALHO, 2021, p.361)

Thus, there are four “defining elements of State liability in cases of omission of its agents: the State's omission, the damage, the nexus of causality and the guilt of the public service” (CARVALHO, 2021, p. 361-362). Furthermore, considering the teachings of the illustrious professor Fernanda Marinela (2012, *apud* CARVALHO, 2021, p. 362), it is worth adding “another requirement of responsibility for omission: avoidable damage, when it was possible for the public entity to prevent the loss, but it did not did so.”

Thus, according to the understanding of the Superior Court of Justice and the doctrine majority, there will only be state liability for acts of omission if it is demonstrated, by the injured party, the State's omission, the damage suffered, the causal link

(between state omission and damage) and the existence of public service guilt (as well as the preventability of harm).

It should be clarified that, preliminarily, the Supreme Federal Court had understanding that the State's responsibility for acts of omission was also of a criminal nature subjective, as seen in the following judgments:

> CONSTITUTIONAL. ADMINISTRATIVE. CIVIL. MORAL DAMAGES.
> CIVIL LIABILITY OF LEGAL ENTITIES UNDER LAW
> PUBLIC AND PRIVATE LAW LEGAL ENTITIES PROVIDING SERVICES
> PUBLIC SERVICE. ACT OF OMISSION BY THE PUBLIC AUTHORITIES: DEATH OF A PRISONER BY ANOTHER PRISONER: SUBJECTIVE LIABILITY:
> PUBLISHED GUILT: FAUTE OF SERVICE. CF, art. 37, § 6.
>
> I. - Civil liability of legal entities under public law and individuals private law legal entities providing public services, objective liability, based on administrative risk, occurs in view of the following requirements: a) damage; b) of the administrative action; c) and provided there is a causal link between the damage and the action administrative.
>
> II. - This objective liability, based on administrative risk, allows for research around victim blame, in order to mitigate or even exclude the liability of the legal entity under public law or of the legal entity under public law private provider of public service.
>
> III. - **In the case of an omission by the public authority, civil liability for such act is subjective, which requires intent or fault, in one of its three aspects, negligence, inexperience or imprudence, although it is not necessary individualize it, given that it can be attributed to the public service, in such a way generic, the *faute de service* of the French.**
>
> IV. Action deemed admissible, the State was ordered to compensate the mother of the prisoner who was killed by another inmate, for moral damages. Occurrence of *faute de service.*
>
> V. - RE not known.
>
> (STF, RE 179147, Rel. Min. Carlos Velloso, Second Panel, tried on 12/12/1997, published on 2/27/1998)
>
> CONSTITUTIONAL. ADMINISTRATIVE. CIVIL. CIVIL LIABILITY
> OF PUBLIC PERSONS. ACT OF OMISSION BY THE PUBLIC AUTHORITIES:

ROBBERY COMMITTED BY A FUGITIVE CONVICTOR. RESPONSIBILITY
SUBJECTIVE: PUBLISHED GUILT: ABSENCE OF SERVICE. Federal Constitution, art. 37, § 6.

I. - **In the case of an omission by the public authority, civil liability for such act is subjective, which requires intent or fault, this in one of its three aspects, the negligence, inexperience or imprudence, although it is not necessary individualize it, given that it can be attributed to the public service, in such a way generic, the lack of service.**

II. - The lack of service - *faute du service* of the French - does not dispense with the requirement of causality, that is, of the causal link between the omission attributed to the power public and the damage caused to third parties.

III. - Robbery committed by a gang in which a prisoner who had escaped from prison participated. prison some time before: in this case, there is no talk of a causal link between the escape of convicted and robbery. STF Precedents: RE 172,025/RJ, Minister Ilmar Galvão, "DJ" of 12/19/96; RE 130.764/PR, Rapporteur Minister Moreira Alves, RTJ 143/270.

IV. RE known and provided."

(STF, RE 369820, Rel. Min. Carlos Velloso, Second Panel, decided on 11/04/2003, published on 27/02/2004)

Subsequently, the Supreme Court began to defend a different understanding, in the sense that there is objective civil liability on the part of the State for omission:

REGIMENTAL APPEAL IN THE EXTRAORDINARY APPEAL WITH APPEAL.
CIVIL LIABILITY OF THE STATE. JUSTICE OF THE PEACE. REMUNERATION.
ABSENCE OF REGULATION. MATERIAL DAMAGE. ELEMENTS OF STATE CIVIL LIABILITY NOT DEMONSTRATED AT THE ORIGIN.
RE-EXAMINATION OF FACTS AND EVIDENCE. IMPOSSIBILITY. PRECEDENTS.

1. **The Court's case law has established that legal entities of public law objectively responds for the damages they cause to third parties, based on art. 37, § 6, of the Federal Constitution, both by acts of commission and by acts of omission, provided that the causal link between the damage and the omission of the Public Power.**

2. The reexamination of facts and evidence in the case is inadmissible in an extraordinary appeal. Incidence of Summary nº 279/STF.

RCMOS - Multidisciplinary Scientific Journal of Knowledge.
ISSN: 2675-9128. São Paulo-SP.

> 3. The Plenary of the Court, in the examination of ADI No. 1,051/SC, Rapporteur Minister Maurício Corrêa, understood that the remuneration of Justices of the Peace can only be fixed by law on the exclusive initiative of the Court of Justice of the Member State.
>
> 4. Procedural appeal not granted.
>
> (STF, ARE 897890 AgR, Rel. Min. Dias Toffoli, Second Panel, tried on 22/09/2015, published on 19/10/2015).

In a thorough analysis, it is possible to glimpse that the Supreme Court's understanding distinguishes the State's responsibility according to the type of omission found in the specific case, based on the theory of created risk (risk raised). Thus, if the state's omission is specific, there will be objective liability of the State. In turn, if the State's omission is generic, state responsibility will be subjective.

Matheus Carvalho illustrates this:

> [...] in some circumstances, the State creates risk situations that lead to the occurrence of damage. Through positive behavior, the State assumes the risk of generating damages to individuals. Thus, in these cases, the State is objectively responsible for it, even if direct conduct by a public agent is not demonstrated. The most common situations commonplace arise from the custody of people or things, as is the case with prisoners of a prison, of children inside a public school, of cars seized in Department of Traffic yard, weapons storage. (CARVALHO, 2021, p. 362).

The understanding that state liability for omission is objective, based on the theory of created risk, when there is a specific legal duty of care and protection (specific omission), is verified – respectively – in themes 592 and 366 of general repercussion of the Supreme Federal Court.

In 2016, when judging issue 592, the Supreme Court decided that State responsibility for the death of a prisoner is a result of “failure to comply with its duty specific protection”, provided for in article 5, item XLIX, of the Federal Constitution:

> HEADNOTE: EXTRAORDINARY APPEAL. GENERAL REPERCUSSION. CIVIL LIABILITY OF THE STATE FOR THE DEATH OF A DETAINED INMATES. ARTICLES 5, XLIX, AND 37, § 6, OF THE FEDERAL CONSTITUTION.

1. State civil liability, according to the Federal Constitution of 1988, in its Article 37, § 6, is subsumed under the theory of administrative risk, both for conduct both commission and omission state-owned companies, since the theory of integral risk is rejected.

2. **The State's omission claims a causal link in relation to the damage suffered by the victim in cases where the Public Authority has the legal duty and the effective possibility of acting to prevent the harmful result.**

3. It is the duty of the State and the subjective right of the prisoner that the execution of the sentence takes place in a humanized, guaranteeing the fundamental rights of the inmate, and the right to have their their physical and moral safety (article 5, item XLIX, of the Federal Constitution).

4. The constitutional duty to protect the detainee is only considered violated when possible for the state to act to guarantee their fundamental rights, an unavoidable prerequisite for the configuration of objective state civil liability, in accordance with article 37, § 6, of the Federal Constitution.

5. *Ad impossibilia nemo tenetur,* therefore in cases where it is not possible for the State act to prevent the death of the inmate (which would occur even if the inmate were in freedom), the causal link is broken, removing the responsibility of the Power Public, under penalty of adopting the theory of risk *against legem* and the *opinio doctorum* integral, contrary to the constitutional text.

6. The death of a prisoner can occur for various reasons, such as, for example, homicide, suicide, accident or natural death, and it will not always be possible for the State to avoid it, for but rather take the required precautions.

7. State civil liability remains conjured in cases where the Public Authority proves a cause preventing its protective action towards the detainee, breaking the nexus of causality of its omission with the harmful result.

8. General constitutional repercussions that support the thesis that: **in the event of failure to comply with its specific duty of protection provided for in Article 5, paragraph XLIX, of the Federal Constitution, the State is responsible for the death of the prisoner.**

9. In casu, the court a quo ruled that there was no proof of suicide. detainee, nor any other cause capable of breaking the causal link between his omission and the death occurred, leaving the decision imposing civil liability correct state.

10. Extraordinary appeal DISMISSED.

(STF, RE 841526, Rel. Min. Luiz Fux, Full Court, decided on 03/30/2016, published on 08/01/2016).

In turn, in 2021, when judging topic 366, the Supreme Court decided that state liability for omission, for damages arising from the trade in fireworks, requires the "breach of a specific legal duty to act":

EXTRAORDINARY APPEAL WITH GENERAL IMPACT RECOGNIZED. CONSTITUTIONAL AND ADMINISTRATIVE LAW. CIVIL LIABILITY OF THE STATE FOR OMISSION. ARTICLE 37, § 6, OF THE FEDERAL CONSTITUTION. SUPERVISION OF FIREWORKS TRADE. THEORY OF ADMINISTRATIVE RISK. LIABILITY OBJECTIVE. NEED FOR VIOLATION OF SPECIFIC LEGAL DUTY TO ACT.

1. The Federal Constitution, in art. 37, § 6, enshrines objective civil liability of legal entities under public law and private law entities providing services public services. Application of the theory of administrative risk. Court precedents.

2. To characterize state civil liability, there is a need for compliance with minimum requirements for the application of objective liability, which be: a) existence of damage; b) administrative action or omission; c) occurrence of causal link between the damage and the administrative action or omission; and (d) absence of cause exclusion of state responsibility.

3. In this case, the Court of Justice of the State of São Paulo concluded, based on the doctrine of administrative risk theory and based on local legislation, which does not the Municipality of São Paulo could be held civilly liable for the explosion occurred in a fireworks store. It was understood that there was no state omission in the supervision of the activity, since the business owners developed the activity in a clandestine manner, as there is no state authorization for commercialization of fireworks.

4. The following thesis of General Repercussion was established: **"In order to characterize the civil liability of the State for damages arising from the trade in fireworks artifice, there must be a violation of a specific legal duty to act, what will occur when the operating license is granted without the necessary precautions legal or when the public authorities are aware of any irregularities practiced by individuals".**

5. Extraordinary appeal dismissed.

(STF, RE 136861, Rel. Min. Edson Fachin, Rapporteur for the Judgment Min. Alexandre de Moraes, tried on 03/11/2020, published on 01/22/2021).

FINAL CONSIDERATIONS

In view of the jurisprudential positions elucidated in this work, there is a divergence of understanding between the higher courts.

In this sense, while the Superior Court of Justice adopts the subjective theory to state liability for acts of omission (regardless of whether the omission is generic or specific), the Supreme Federal Court adopts the objective theory for cases of state omission specific, admitting the subjective theory only in the case of generic omission.

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