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EMPLOYER'S LIABILITY FOR DAMAGE CAUSED BY AN EMPLOYEE TO A THIRD PARTY AT WORK AND IN WORK-RELATED SITUATIONS IN SELECTED CEE COUNTRIES

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Recommendation from the Supervisor

Milica Ilić, a doctoral candidate at the Ferenc Deák Doctoral School of Law and Political Sciences in Miskolc, Hungary, conducted research in the field of tort law. Although prior to commencing this doctoral programme, she had already established herself as an attorney-at-law in Serbia, she demonstrated a commitment to academic advancement and scholarly inquiry. Her decision to undertake doctoral research in this particular field was motivated not only by curiosity but also by an aspiration to bridge the gap between legal theory and practice. In this sense, by writing the dissertation, she was in a position to synthesise her extensive professional experience with rigorous academic analysis, thereby approaching the subject matter with both practical insight and scientific precision.

A particular distinction of this research endeavour lies in the exceptionally broad comparative analysis undertaken by the candidate, encompassing the legal regulation of the subject matter across as many as nineteen jurisdictions. Such an extensive comparative approach required not only dedication and methodological discipline, but also a deep engagement with diverse legal systems.

An especially demanding aspect of the research consisted of the examination and analysis of legal literature, legislation, and case law written in several less commonly accessible languages, including Estonian, Lithuanian, Latvian and Bulgarian. The successful integration of these sources into the dissertation reflects the candidate's perseverance in producing it.

Each jurisdiction is examined within a separate chapter, systematically structured through corresponding subchapters that follow an identical analytical framework throughout the dissertation. Such methodological consistency significantly contributes to the clarity, coherence, and comparative value of the research.

The first subsection of each chapter, entitled General Considerations, addresses the general issues relevant to the respective legal system. In particular, it identifies and analyses the principal legal sources governing the subject matter, provides the relevant definitions of the concepts of employer and employee, and examines one of the central legal questions in this field — whether an employer's liability is based on the principle of strict liability or fault-based liability. The second subchapter addresses the issue of the liability of a legal person for damage caused by its organ. This part of the analysis further illustrates the well-established interpretation that a legal person, as such, constitutes a legal fiction, whereas its organs are actually natural persons acting on its behalf and expressing its legally relevant will through their conduct.

The subsequent subchapter concerns state liability for damage caused by civil servants. Due to its exceptional breadth and complexity, particularly having regard to the fact that it lies between administrative and civil law, the subject matter has been examined with a focus on state liability for unlawful acts committed by civil servants.
The last subchapter pertains to the employer's liability for damage caused by the employee to a third party using a dangerous thing or performing a dangerous activity. The peculiarities of the topic are that**,** from the very outset, it is firmly situated within a regime of statutory strict liability, where questions of fault, whether on the part of the employer or the employee, are legally irrelevant.

A further distinguishing feature lies in the fact that each jurisdiction has its own *lex specialis*. Accordingly, it was particularly challenging to link these special laws with the subject of the dissertation.
As her supervisor, I can conclude that Milica Ilić has conducted well-structured research, resulting in a PhD thesis that fulfils the requirements of the Ferenc Deák Doctoral School of the Faculty of Law of the University of Miskolc.

Budapest, 19 September 2026

Prof. Dr Attila Dudás
Professor
Supervisor

Summary

The objective of this dissertation is to provide a thorough analysis of the *ratio legis* underlying the adopted legislative solutions, as well as of their interpretation in legal literature on the issue of employer's liability for damage caused by an employee to a third party at work and in work-related situations.

The author selected nineteen countries in Central and Eastern Europe (alternative: Central and South-East Europe). Due to language barriers and a lack of English literature, some of them have not been analysed in separate chapters. Namely, fourteen jurisdictions are divided into separate chapters, with four main subchapters for each of them. Furthermore, at the beginning of this PhD thesis, an overview is provided from a historical perspective of this subject matter that is founded on the Roman legacy. Accordingly, this is a legal institution of vicarious liability that is rooted in Roman law. In addition, modern legal systems are outlined in general terms. The fundamental question underpinning the author's analysis is whether employers are subject to fault-based or strict liability across different legal systems in this work. The research examined whether this sort of liability is prescribed by statute or whether this is the standpoint in legal scholarship.

One subheading is devoted to the issue of the Draft Common Frame of Reference (DCFR). This project attempts to systematise European private law and should serve as a role model for national legislators in European countries. This is particularly relevant given that the DCFR seeks to establish a uniform legal terminology in English across different branches of private law.

The system of presentation is that the main text pertains to the separate chapters for each selected country, with four main subchapters: *General Considerations, Liability of a Legal Person for Damage Caused by Its Organ, State Liability for Damage Caused by Civil Servants, and Employer's Liability for Damage Caused by the Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity.*

INTRODUCTORY REMARKS

"Anyone who works, makes mistakes" is conventional wisdom, but someone must compensate for the damage caused and assume liability. This opens the question of who will do that. This dissertation deals with the employer's liability for damage caused by an employee to a third party at work and in work-related situations. The primary reason for the choice of this topic is the importance of liability for damage, especially when the damage is caused at work or in work-related situations. Secondly, through the comparative method (analysis) which involves a comparison of the various legal regimes of Central and Eastern European (alternative: Central and South-East European) countries, an attempt shall be made to overcome language barriers and make this topic accessible to interested readers in the English language. An additional challenge in the research is that although employer's liability for damage is a tortious liability and part of the law of obligations, in some legal orders, labour law could also contain rules pertaining to this issue (especially in the Polish jurisdiction, where case law has created a new form of tort, the so-called "labour tort"). Therefore, the question emerges as to which act regulates this legal institute. (This will be the normative method used in this work). The answer depends on whether the state (its legal order as mentioned), as a subject matter of the research, has its civil code or not, as well as whether it has a labour code, an employment act, or an obligations act. Usually, the employment act defines terms such as *employer* and *employee*, based on which the definitions of the employment relationship are characterised by a defined hierarchy where the employer gives instructions to employees and organises the working environment. Thus, a reasonable conclusion seems to be that the employer should be liable for their employees because the employer assumes the risks of conducting business. It sounds simple; therefore; however, it poses the question: is it like that every time? This sort of employer's liability is a form of liability for others, or so-called vicarious liability, and is, in doctrinal interpretations of most legal orders, considered strict. However, is the employee's fault legally relevant? Is it a condition for establishing the employer's liability, or would it be justified that the employee should be held liable if they are at fault? Or does the employer's vicarious liability replace the employee's liability? Is it a deviation from the general principle that everyone should bear the consequences of their own actions? These questions will be explored in detail, starting with vicarious liability. In addition, including the state as an employer, alongside private legal persons and entrepreneurs, significantly enhances the

complexity and relevance of this topic. The research also includes the employer's liability for damage caused by an employee to a third party using a dangerous thing or performing a dangerous activity, which always leads to the application of the general rules of strict liability, wherein the employer cannot exempt themselves from liability even if they prove that the employee exercised due diligence and care in their actions. While in other situations, according to the literature, there is substantial scope for different legal interpretations as to whether the employer's liability is strict or fault-based. Therefore, one may assume that two topics shaped this thesis: the employer's liability for damage according to the general rules of fault-based liability and the employer's liability for damage caused by dangerous things or the performance of dangerous activities.

Both are forms of non-contractual liability (*ex delicto*, tort law), which will be explored later. The employer may be a legal or a natural person. What is specific is that a legal person is an artificial entity, a legal fiction, whereas a natural person is an active participant in the employment relationship. The employer may also be the State, whereas, in the case of an entrepreneur, a natural person is the employer. In addition, the injured party is always a third party. In some legal orders, the liability emerging from causing damage to another employee of the same employer is considered contractual. A comparative overview of all these similarities and differences shall be performed for the selected countries, which are divided into two groups: the legislation of Western European countries with a more developed legal tradition in this field, such as Germany, France, Austria and Italy; and the legislation of CEE countries, such as Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Romania, Slovenia, Slovakia, Serbia, Croatia, North Macedonia, Montenegro, and Bosnia and Herzegovina. The sequence in which the countries are examined in this dissertation follows a methodological rationale. The analysis begins with Germany and France, selected as representative models of fault-based and strict liability, respectively. It then turns to the neighbouring jurisdictions of Austria and Italy, followed by Hungary, the Czech Republic and Poland. The analysis subsequently extends to the remaining countries of Central and Eastern Europe and Central and South-East Europe. In addition, although the Baltic States fall outside the geographical scope of the region examined in this study, they have been included as an exception because of their particular relevance to the comparative analysis, given the significant influence of the German model on their respective systems of liability.

Thus, the main hypothesis is that the liability of the employer should be strict, regardless of fault, because the employer must assume the risk for the damage caused. Through the comparative method, it will be explored whether this hypothesis can be confirmed in the

selected countries. In addition, the study will answer the question of what role the employee's fault plays in establishing the employer's liability, especially in cases where the damage is caused by intent, ordinary negligence or gross negligence. Depending on these facts, the question then arises as to whether the injured party has the right to demand compensation directly from the employee. In most jurisdictions, this possibility exists; however, in practice, it is usually the employer who first compensates the injured party and then gains a right of recourse against the employee. Another important question is whether there is any possibility for the employer to release themselves from liability, especially in cases where the damage is caused by a dangerous thing or a dangerous activity, for which liability is always strict and prescribed by statute. Therefore, following this question, the subchapter entitled "General Considerations" examines the theoretical debate concerning the legal nature of the employer's liability, specifically whether it should be characterised as fault-based or strict liability in each legal system. In addition, there are also legal regimes where the labour code regulates this issue, for example, in Polish law, but in the end, it is the Civil Code that takes priority in application. What, then, is the role of the Labour Code in this subject matter? This shall also be examined in the subchapter on General Considerations for each country. Concerning the State's liability for damage caused to third parties, this is a very broad topic; thus, the focus in this thesis will be on the liability of the State for damage caused by its civil servants, and this issue is addressed in a separate subchapter. Usually, the Constitution stipulates, in the form of a principle, the State's liability; administrative law shapes it, but the compensation for damage is carried out following the general rules of the law of obligations.

EMPLOYER'S VICARIOUS LIABILITY IN SELECTED JURISDICTIONS

Historical overview - Roman legacy

As a legal institution, vicarious liability originates in classical Roman law.[1] In that period, the liability of the *paterfamilias* was strict for torts committed by his slaves and the children under his power, based on the principle of noxality.[2] In addition, all legitimate descendants (and the wife *in manu)* were under the power of the *paterfamilias*.[3] This sort of liability emerged during the second period of the Roman Republic, when the development of legal and economic transactions created a need to expand the legal capacity of *alieni iuris* and slaves, while at the same time ensuring greater legal certainty in commercial dealings.[4] Namely, the latter were under the legal authority of the *paterfamilias* and did not possess the legal capacity to enter into legal transactions independently.[5] After the Punic Wars, circumstances changed, and they were allowed to enter into legal transactions on the instructions of the *paterfamilias*.[6] However, this led to legal uncertainty because they did not possess property from which the other party could recover its claim.[7]

When the praetor introduced new actions through an edict (*actiones adiecticiae qualitatis*;[8] these noxal actions were: *actio quod iussu, actio institoria, actio exercitoria, actio de peculio, actio tributoria* and *actio de in rem verso),* additional judicial proceedings were introduced for a third party. Namely, the liability of the *paterfamilias* was extended to the activities of others that caused damage to a third party.[9] However, in post-classical Roman law, the principle of noxality was abandoned following the abandonment of the institution of slavery.[10] In addition, Justinian did not return to the classical standpoint on this issue. Furthermore, the question arose

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[1] Reinhard Zimerman,1992, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Juta & Co, Ltd PO, Kenwyn, p. 1118.
[2] Ibid., p. 1118.
[3] Paul J. du Plessis, 2020, *Borkowski's Textbook on Roman Law*, Oxford University Press, p. 114.
[4] Marija Ignjatović, 2018, "Odgovornost za štetu učinjenu tuđim radnjama u rimskom pravu" ["Liability for damage caused by actions of another in Roman law"], *Zbornik radova Pravnog fakulteta u Nišu*, No. 79, Year LVII, p. 398.
[5] Ibid., p. 400.
[6] Ibid., pp. 400-401.
[7] Šarac, 2011, 45. Cited in Marija Ignjatović, 2018, p. 402.
[8] Bujuklić, 2013, 142. Cited in Marija Ignjatović, 2018, p. 402. Latin word *adiecticiae* originates from the verb *adicio, adicere* (to add), while the word *qualitas* refers to the unique nature of these actions. Mirjana B. Miškić, 2019, "Одговорност господара посла на основу praepositio и iussum" ["Principal's liability based on praepositio and iussum"], *University of Belgrade, Faculty of Law*, p. 16.
[9] Marija Ignjatović, 2018, p. 402.
[10] Reinhard Zimerman, 1992, pp. 1118-1119.

as to whether vicarious liability would continue to exist at all. Namely, scholars were divided on whether the master was liable for his servants. Many thought that he was liable under the general principle of liability only if he was at fault in selecting his servants, in the sense that he did not exercise due care. Nevertheless, some authors argued that he was liable but that the damage was limited to the amount of unpaid wages due to the servant (in the 17th and 18th centuries, the concept of the employer's wage liability evolved, marking an important shift in labour relations). Others stated that this applied only if servants acted outside their employment duties. Otherwise, the master was fully liable for compensation in cases of delicts committed during the course of employment.[11]

This distinction between the damage caused within or outside of employment duties is the reason why modern codes use the term "liability for others" rather than "vicarious liability".[12] Namely, vicarious liability also applies to situations where the damage is caused at places other than the workplace, and fault is not necessarily a condition for establishing the employer's liability. During the nineteenth and twentieth centuries, strict vicarious liability and fault-based liability developed in parallel, but the former prevailed. Strict liability is associated with dangerous activities, whereas the hiring of servants could not be considered dangerous. Vicarious liability served as a tool to make the principal liable for the wrongdoing of their servant[13], whereby one person is liable without own fault for the wrongful act of another. In addition, it should be highlighted that although English law belongs to the common-law legal system and is not the subject matter of this research, the following conclusion will complete the picture of the theoretical interpretation of whether the ground of employer's liability is fault-based or strict. The qualification of this liability as strict is embodied in the English and Romanic legal systems. In Serbia, as in the countries that formerly belonged to Yugoslavia, the situation is the same. In Germany, fault-based liability is prescribed by statute, which provides a weaker protection for the injured party. Thus, the legal institutes of contract law have to be applied in order for the employer's liability to be stricter.[14] Moreover, strict liability has its boundaries; for example, in Serbian law, it requires that the damage be caused at work or in

[11] Ibid., p.119.
[12] Gerhard Wagner, 2011, in *Towards a European Civil Code*, eds., (Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak, C. Edgar du Perron), Kluwer Law International, Alphen aan den Rijn, pp. 903-904.
[13] Ibid., pp. 903-904.
[14] Marija Karanikić Mirić, 2020, 161-182, cited in Marija Karanikić Mirić, 2024, *Obligaciono pravo*, Službeni glasnik, p. 564.

work-related situations.[15] Another example is French law, where the condition for establishing strict liability is that the employee caused the damage in the performance of their functions.[16]

The reparation or restitution is not the only purpose of civil liability.[17] It also has a function to remove the harmful consequences of wrongful conduct and to bring the injured party back to their prior state, in addition to general and special prevention.[18]

In addition, considering the legal doctrine of compensation for damage, a short overview of its historical development should be provided. Namely, the origin of compensation for damage was punitive, and it was defined by the Roman *Lex Aquilia* as a private delict.[19] In the Code of Justinian (*Corpus Juris Civilis*), changes emerged as it differentiated situations in which the damage was caused negligently, and from then on, it was no longer considered a delict. Moreover, Roman law introduced a distinction regarding so-called quasi-delicts, where fault was not required. However, under the Code of Justinian, the principle of fault constituted the basis of fault-based liability and *culpa levis* was sufficient for establishing liability. The tortfeasor had to prove that they were not at fault in order to be relieved from liability, as fault was presumed.[20]

The Contemporary Vicarious Liability Model

Nowadays, fault-based and strict liability represent the two main models of principal's or master's liability for damage caused by their subordinates or servants.[21] The former is accepted in German law and the latter in French law, which are the two most prominent jurisdictions in continental (Romano-Germanic) legal systems.

Modern times imply modern terms; thus, instead of the old-fashioned terms master and servants[22], the term "employer" is more appropriate for organisations such as companies or

[15] Marija Karanikić Mirić, 2024, p. 564.
[16] Ibid., p. 564.
[17] Sava D. Vojnović, 2025, *Legal liability and free will*, University of Belgrade Faculty of Law, Belgrade, p. 86.
[18] Karanikić Mirić, 2024, 500: cited in Sava D. Vojnović, 2025, p. 86.
[19] Bányai Gábor, 2010, "A veszélyes üzemi felelősség és a munkáltatói objektív kárfelelősség kialakulásának egyes állomásai, aktuális kérdései" ["Some Stages in the Development of Strict Liability for Dangerous Activities and Employer's Strict Liability for Damage: Current Issues"], *Magyar Jog*, p. 65.
[20] Ibid., p. 65.
[21] Gerhard Wagner, 2011, p. 907.
[22] Ibid., p. 903.

corporations.[23] However, this term is not exclusive because the term "principal" is also used in some legal sources, such as § 831 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).[24] Namely, based on this article, a person relying on another to perform a certain task is liable for any damage the other unlawfully causes to a third party while performing that task. However, this liability does not apply if the principal (employer) exercised reasonable care in selecting the person, managing the activity, and supervising them, or if the damage would have occurred regardless of the exercise of such care. Hence, two defences are available to them.[25] The reason for this lies in the context of the employer-employee relationship even though it is prescribed in a general way.[26] The principal's or employer's liability is fundamentally based on the concept of fault, accompanied by a reversed burden of proof.[27] In this context, the employer has to provide evidence that they exercised care in the appointment, supervision, or management of their employees, or that the damage would have occurred anyway.[28] Therefore, the rule of the employer's personal fault in the Germanic legal family has a foundation in the post-classical Roman *Gemeines Recht*[29] (which means "common law" developed from customary law) where "the principle of fault was the moral basis of the law of delict".[30]

The other, namely the French model, relies on Art. 1242, Sec. 5 of the French Civil Code *(Code civil: "Les maıˆtres et les commettants, du dommage cause ́par leurs domestiques etpre ́pose ́s dans les fonctions auxquelles ils les ont employe ́s")*.[31] This article imposes the liability on masters for damage caused by their servants to a third party.[32] In the literature, it is considered strict, because the master cannot release themselves from liability by proving that they could not prevent the act leading to that liability.[33] Although it is not prescribed by statute, in case law and literature the general conclusion is that the fault of the employee is a condition for establishing the employer's liability, which must be proved by the injured party.[34] Bearing in

[23] Ibid., p. 905.
[24] German Civil Code, § 831, Liability for Vicarious Agents.
[25] German Civil Code, §831. Cited in Paula Giliker, 2011, "Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective", 2(1) *Journal of European Tort Law*, p. 33; Cees van Dam, 2013, *European Tort Law*, Oxford University Press, p. 502.
[26] Gerald Spindler, Oliver Rieckers, 2019, *Tort Law in Germany,* Kluwer Law International B.V., Alphen aan den Rijn, p. 67.
[27] Paula Giliker, 2011, p. 33.
[28] Ibid., p. 33.
[29] https://www.britannica.com/topic/gemeines-Recht
[30] Konrad Zweigert, Hein Kötz, 1998, *Introduction to comparative law*, Clarendon Press, Oxford, p. 630.
[31] Gerhard Wagner, 2011, p. 909.
[32] Ibid., p. 909.
[33] „Tourneau (supranote 6), para. 7495". Cited in Gerhard Wagner, 2011, p. 909.
[34] Gerhard Wagner, 2011, p. 909.

mind that the injured party often does not know the identity of the tortfeasor, proving a negligent act by the company is sufficient to establish liability.[35]

Although the German model is contrary to the French one, they also share some similarities: both require "a relationship by which one person may be held liable for the harmful acts of others; the act of wrongdoing by the employee or subordinate; and that the liability is confined to a specific set of circumstances, be it "within the course of employment", "*dans les fonctions auxquelles ils les ont employes"* or in *"Ausführung der Verrichtung*."[36]

Looking only at the statutory provisions, the German BGB imposes fault-based liability on the employer, contrary to the French system of strict liability, but case law offers a much nuanced interpretation.[37]

The German and French models of vicarious liability rely on the rules of the civil code, but there are jurisdictions where this legal institution is regulated in the labour law legislation. Such is the case with Poland, for instance, where the Polish Labour Code, in Art. 120. Sec. 1 (Labour Code of 1974 - *Kodeks Pracy*) prescribes the direct liability of the employer for damage caused by their employee to a third party during the working process.[38] Under Austrian law, vicarious liability is found in the following articles of the Austrian General Civil Code - ABGB[39] (*Allgemeines Bürgerliches Gesetzbuch*): 1313a (liability for *Erfüllungsgehilfen*), 1315 (liability for *Besorgungsgehilfen*), and 1319a (*Leutehaftung*).[40] In addition, legal persons are also liable for their organs and their liability is strict.[41]

Under Romanian law, this issue is broadly defined. Principals are liable for the actions of their auxiliaries, and this term includes the employer's liability as well. Art. 1373, sec. 1 of the Romanian Civil Code mandates that principals must compensate for any damage caused by

[35] „Cass. civ. 2e, 27.4.1977, Bull. civ. II, no. 108" cited in Gerhard Wagner, 2011, p. 909.
[36] Paula Giliker, 2011, p. 33.
[37] Ibid., p. 38.
[38] Ewa Bagin´ska, Magdalena Tulibacka, 2022, *Tort Law in Poland*, eds. (Roger Blanpain, Frank Hendrickx, Britt Weyts), Kluwer Law International B.V., Alphen aan den Rijn, p. 92.
[39] General Civil Code for all German hereditary lands of the Austrian Monarchy StF: JGS No. 946/1811, with all amendments up to today: last update: BGBl. I Nr. 33/2024 (NR: GP XXVII RV 2462 AB 2481 S. 257. BR: AB 11461 S. 965.).
[40] Ferdinand Kerschner & Erika Wagner, 2015, in Christoph Grabenwarter, Martin Schauer (eds.*) Introduction to the Law of Austria*, Kluwer Law International BV, The Netherlands, p. 112.
[41] Ibid., p. 112.

their auxiliaries when such wrongful actions are tied to their duties or the goals of their assigned tasks.[42]

Regarding the successor states of the former Czechoslovakia, in the Czech Republic, the Civil Code does not contain a specific provision on an employer's vicarious liability.[43] Art. 2914 regulates this issue generally as liability for an assistant who causes damage to a third party in a general way.[44]

Under Slovakian Law, Art. 420, Sec. 2 of the Civil Code is considered a general provision that regulates the issue of attributing liability to a principal for damage caused by their assistant to a third party.[45] It prescribes that damage could occur while a natural or legal person is performing activities on behalf of the person who engaged them for those activities. In addition, the assistant will not be liable according to this provision, as the Civil Code specifies that labour law rules may envisage different liability regime.[46] Establishing an employer's liability under civil law requires the fulfilment of two conditions: first, the employer's assistant must cause the damage during the performance of work duties stemming from a contract, or other acts and decisions; second, the subject performing these activities must be an employee or a representative acting on behalf of the employer.[47] If any of these conditions is missing, the employee will be directly liable in theory. Sec. 1 stipulates the liability of everyone who causes damage, while Sec. 3 provides that they will be released from liability if they prove that they did not cause the damage.[48] However, regarding the formulation of Art. 420, Sec. 2 of the Slovakian Civil Code , the employer is liable as a principal ("*že zodpovedným je zamestnávateľ v právnom postavení principála v zmysle občianskeho práva*") while the employee cannot be

[42] Laura Toma-Da ̆uceanu, Ioan Ilies ̧, Neamt in Roger Blanpain, Frank Hendrickx, Britt Weyts (eds.), 2022, *Tort law in Romania,* Kluwer Law International B.V., Alphen aan den Rijn, p. 68.
[43] Lenka Dobešová and Jan Hurdík, 2020, *Tort Law in the Czech Republic*, Kluwer Law International B.V., Alphen aan den Rijn, p. 67.
[44] Law No. 89/2012 Coll. as amended up to Act No. 163/2020 Coll, Civil Code of the Czech Republic, Art. 2914.
[45] Trojčáková Veronika, 2019, "Zodpovednosť za škodu voči tretím osobám spôsobenú pomocníkom a poistenie zodpovednosti za škodu" ["Liability for Damage Caused to Third Parties by an Auxiliary Person and Liability Insurance"], *Súkromné právo* 6/2019. p. 244.
[46] "Škoda je spôsobená právnickou osobou alebo fyzickou osobou, keď bola spôsobená pri ich činnosti tými, ktorých na túto činnosť použili. Tieto osoby samy za škodu takto spôsobenú podľa tohto zákona nezodpovedajú; ich zodpovednosť podľa pracovnoprávnych predpisov nie je tým dotknutá". ["Damage is caused by a legal person or a natural person where it was caused in the course of their activities by persons whom they engaged to carry out such activities. Such persons themselves shall not be liable for the damage caused in this manner under this Act; their liability under employment law provisions shall not be affected thereby"]. Act No 40/1964 Coll., Civil Code, Federal Assembly of the Czech and Slovak Federative Republic, effective from 01.07.2016, § 420, Sec. 2.
[47] Trojčáková Veronika, 2019, p. 245.
[48] Slovakian Civil Code, § 420, Sec. 1 and 3.

directly liable according to case law.[49] Furthermore, in Slovakian literature, there is also an interpretation, following the model of Czech law and enactment of a new Civil Code, that the question of establishing the direct liability of the employee remains open. Namely, the idea is to establish the direct liability of the employee for damage caused if they act beyond their work duties or if the acts are not related to work.[50]

In Hungarian law, § 6:540 of the Hungarian Civil Code prescribes both the liability of the employer and the legal person for damage caused by an employee or a member of a legal person to a third party in the course of the employment or membership relationship.[51] §6:542 stipulates the joint and several liability of the agent and the principal to the injured party.[52] However, §6:542 of the Hungarian Civil Code pertains to contractual liability and regulates the liability of the obligee of another contract for damage caused by the obligor to a third party. Namely, the obligor is in a contractual relationship with the obligee in order to perform the contract.[53]

Under the Italian Civil Code, this issue is somewhat challenging to examine because liability for auxiliaries is addressed by two separate articles: Art. 1228, pertaining to contractual liability, and Art. 2049, pertaining to extra-contractual liability. Recent scholarly analysis has highlighted the contrasting foundations underlying these forms of liability.[54] Art. 1228 establishes a debtor's liability for the actions of an agent based on fault, characterising this as a direct liability. In contrast, Art. 2049 imposes strict liability on employers for the actions of their employees, making this an indirect form of liability. Notably, Art. 1228 does not necessitate the existence of a master-servant relationship, which is a requirement under Art. 2049. Consequently, a debtor can be held liable under Art. 1228 for contractual breaches resulting from an independent contractor's actions, a scenario that falls outside the purview of Art. 2049.[55]

Regarding the successor states of the former Yugoslavia, what they have in common is that the Obligations Act of 1978 lives in their legal systems today, directly or indirectly; in Serbia, it is

[49] Barancová Helena, 2022, "Zodpovednosť zamestnanca v pracovnom práve Slovenskej republiky a príprava nového Občianskeho zákonníka" ["Employee's Liability within the Scope of Labour Law of the Slovak Republic and Drafting Efforts of the New Civil Code"], *Právny obzor* 4/2022, pp. 271 – 284, p. 280.
[50] R NS ČR 25 Cdo 1855/12 cited in Barancová Helena, 2022, p. 280.
[51] Act V of 2013 on the Civil Code, promulgated on 26 February 2013, Art. 6:540, Sec. 1 and 2.
[52] Hungarian Civil Code, Art. 6:542.
[53] Hungarian Civil Code, Art. 6:543.
[54] „G Ceccherini, Responsabilità per fatto degli ausiliari. Clausole di esonero dalla responsabilità, in: P Schlesinger / FD Busnelli (eds), Commentario al codice civile (2nd edn 2016)" cited in Cristina Amato and Giovanni Comandé, 2019, Miquel Martin-Casals (ed.) *The Borderlines of Tort Law: Interactions with Contract Law*, Intersentia, p. 302.
[55] Cristina Amato and Giovanni Comandé, 2019, p. 302.

still in force (with amendments) while in Croatia a new act was adopted in 2005, in Slovenia in 2002,[56] in North Macedonia in 2001,[57] and in Montenegro in 2008,[58] while in the Republika Srpska and the Federation of Bosnia and Herzegovina, the Obligations Act of 1978 is still in force, with minor modifications just as in Serbia.[59] Given these facts, a separate analysis of the legislation of Bosnia and Herzegovina is not necessary for the purposes of this dissertation because the same statute prescribes this subject matter identically in both countries. Namely, all of them rely on this act as a common historical background. However, it should be emphasised that these countries still do not have their own civil codes, although in all of them except Croatia and Bosnia and Herzegovina, expert committees were established to prepare drafts.[60] These drafts are expected to replace the Obligations Act and integrate its provisions into a unified codified system in the future. In Serbia, the Obligations Act in Arts. 170 and 171 prescribes the employer's vicarious liability for damage caused by the employee to a third party at work or in work-related situations, unless the employer proves that the employee acted as they should have, under the given circumstances.[61] The prevailing opinion in the literature is that the employer's vicarious liability is strict and their fault is not legally relevant, while the employee's fault is a condition for establishing the employer's liability.[62] The main reason for this statutory solution is to limit the employer's liability.[63] Usually, the employer is economically stronger than the employee, but that in itself is no reason for the employer's liability. It is a mitigating circumstance for the injured party, securing better compensation for

[56] Damjan Množina, 2021, "Fault, Presumption of Fault, and Wrongfulness in the Yugoslav Obligations Act", *De Gruyter*, p. 221.
[57] Закон за облигационите односи [Obligations Act] (Official Gazette of NM, Nos. 18/2001, 4/2002, 5/2003, 84/2008, 85/2008, 81/2009, 161/2009, 148/2011, 123/2013, 10/2015, 150/2015, 58/2016, 89/2020, 156/2020, 215/2021, 42/2023 and 154/2023.
[58] Zakon o obligacionim odnosima [Obligations Act], Official Gazette Nos. 47/08, 4/11 and 22/17.
[59] Zakon o obligacionim odnosima FBiH [Obligations Act of FBiH], Official Gazette of SFRJ", Nos. 29/1978, 39/1985, 45/1989 - decision of the Constitutional Court and 57/1989, Official Gazette of RBiH, Nos. 2/1992, 13/1993 and 13/1994 and Official Gazette of FBiH, Nos 29/2003 and 42/2011. and Zakon o obligacionim odnosima [Obligations Act of RS], Official Gazette of SFRJ, Nos. 29/1978, 39/1985, 45/1989 - decision of constitutional court USJ and 57/1989 and Official Gazette of RS, Nos. 17/1993, 3/1996, 37/2001 - other statute, 39/2003 and 74/2004. The Obligations Act applies on the entities, but a small number of articles were changed after integration into the legal system of BiH. In Meškić, Z, Čolaković, M. (2014): "Odgovornost države za štetu uzrokovanu pogrešnom presudom – praksa Vrhovnog suda Federacije Bosne i Hercegovine u svjetlu Suda Evropske unije", *Sveske za javno pravo* 16, p. 97.
[60] Perović Slobodan, 2012, *Novi razvoj u oblasti građanskog prava u zemljama Jugoistočne Evrope*, Forum za građansko pravo za jugoistočnu Evropu, Knjiga II, Skoplje, p. 38.
[61] Zakon o obligacionim odnosima [Obligations Act], Službeni list SFRJ [Official Gazette of the Socialist Federative Republic of Yugoslavia], Nos. 29/78, 39/85, 45/89 – the decision of the Constitutional Court of Yugoslavia and 57/89, Službeni list SRJ [Official Gazette of the Federative Republic of Yugoslavia], No. 31/93, Službeni list SCG [Official Gazette of the State Union of Serbia and Montenegro], No. 1/2003 – Constitutional Charter and Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 18/2020).
[62] Marija Karanikić Mirić, 2023, *Tort law in Serbia,* Kluwer Law International B.V., Alphen aan den Rijn, p.79.
[63] Miloš Vukotić, 2017, "Social Policy in Serbian Tort Law: The case of vicarious liability for Employees," *Pomniki prawa na przestrzeni wieków*, Księgarnia Akademicka, Kraków, p. 257.

the damage.[64] However, if the employee acted with intent, the injured party may claim damages directly from the employee.[65]

Under the law of Slovenia, the employer's liability is stipulated in Art. 147 of the Slovenian Obligations Act.[66] It prescribes in Sec. 1 that if an employee causes damage to a third party at work or related to work, the legal or natural person for whom the employee was working at the time the damage was caused will be held liable, unless it can be demonstrated that the employee acted as required under the circumstances.[67]

In the Croatian legal system, the employer shall be held liable for damage caused by an employee to a third party at work or related to work according to Art. 1061 of the Croatian Obligations Act, unless they prove grounds for excluding the employee's liability.[68] This rule has been interpreted as imposing fault-based liability on the employer, whereby their fault is compared to that of the employee's fault who is the actual perpetrator of the damage.[69] The injured party is entitled to seek compensation directly from the employee if they caused the damage with intent.[70] Furthermore, an employer who has compensated an injured party for damage gains a right of recourse against the employee, provided the damage was caused intentionally or with gross negligence.[71]

Bosnia and Herzegovina is a complex state consisting of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska, and the District of Brčko. Such a state system emerged with the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina, which was signed on December 14, 1995, in Paris. This agreement was confirmed by the Act on the Ratification of the General Framework Agreement for Peace in Bosnia and Herzegovina.[72]

In this legal system, after Bosnia and Herzegovina gained independence, both entities amended the former federal Obligations Act of 1978 and now possess their own Obligations Act, within

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[64] Ibid., p. 256.
[65] Obligations Act, Art. 170, Sec. 2.
[66] Obligacijski zakonik [Obligations Act], Official Gazette of the RS, Nos. 83/01, 32/04, 28/06, 40/07, 97/07– official consolidated text, 64/16 and 20/18, Art. 147.
[67] Obligations Act, Art. 147, Sec. 1.
[68] Zakon o obveznim odnosima [Obligations Act], Official Gazette of RC Nos. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22 and 155/23.
[69] Josipović, T. (ed.), 2014, *Introduction to the Law of Croatia, Kluwer Law International*, Alphen aan den Rijn, The Netherlands, p. 173.
[70] Obligations Act, Art. 1061, Sec. 2.
[71] Obligations Act, Art. 1061, Sec. 3.
[72] Zakon o potvrđivanju opšteg okvirnog sporazuma za mir u Bosni i Hercegovini, *"Sl. list SRJ - Međunarodni ugovori", br. 12/2002,* Art. 1.

their own competence.[73] Concerning the employer's vicarious liability, it is prescribed in Arts. 170-172 of the Obligations Act of the Federation of Bosnia and Herzegovina. Namely, Art. 170, Sec. 1 uses the term "enterprise" („business entity"") for the employer and stipulates that they will be liable for damage caused by the employee at work or in work-related situations, unless they can prove that the employee's conduct was as required.[74] Sec. 2 stipulates that the injured party can claim damages directly from the employee if the employee caused it with intent.[75] Next Art. 171, Sec. 1 stipulates that Art. 170 will be applied to other legal persons and entrepreneurs for the damage caused by their employees.[76] If the employee caused the damage with intent or gross negligence, the person who indemnified the damage has a recourse claim against the tortfeasor within six months.[77] In contrast the liability of a legal person for damage caused to a third party by its organ is stipulated under Art. 172.[78] The Obligations Act of the Republika Srpska contains verbatim the same rules.[79]

The Draft Common Frame of Reference (DCFR)

The 2009 Draft Common Frame of Reference (DCFR) reflects a contemporary trend towards the harmonisation of the law of obligations in Europe. Led by Professor Christian von Bar, scholars drafted this scholarly work as a unified set of principles aimed at serving as a universal Civil Code.[80] This is an academic paper prepared by two working groups at the request of the European Commission.[81] Those working groups were, as previously mentioned, the so-called *von Bar's group* (named after him) or the Study Group on a European Civil Code (SGECC), and the Research Group on the Existing EC Private Law, *commonly known as the Acquis Group*

[73] Zakon o obligacionim odnosima FBiH [Obligations Act of FBiH], Official Gazette of SFRJ", Nos. 29/1978, 39/1985, 45/1989 - decision of the Constitutional Court and 57/1989, Official Gazette of RBiH, Nos. 2/1992, 13/1993 and 13/1994 and Official Gazette of FBiH, Nos 29/2003 and 42/2011. and Zakon o obligacionim odnosima [Obligations Act of RS], Official Gazette of SFRJ, Nos. 29/1978, 39/1985, 45/1989 - decision of the Constitutional court USJ and 57/1989 and Official Gazette of RS, Nos. 17/1993, 3/1996, 37/2001 - other statute, 39/2003 and 74/2004. "The versions of the Obligations Act applicable to the entities were amended in a small number of articles after their integration into the legal system of BiH, but Art. 172 of the Obligations Act remained the same in both versions". In Meškić, Čolaković, 2014, 96.
[74] Obligations Act of FBiH, Art. 170, Sec. 1.
[75] Obligations Act of FBiH, Art. 170, Sec. 2.
[76] Obligations Act of FBiH, Art. 171. Sec. 1.
[77] Obligations Act of FBiH, Art. 171. Sec 2 and 3.
[78] Obligations Act of FBiH, Art. 172, Sec 1.
[79] Obligations Act of RS, Art. 170-172.
[80] John Bell, Book Review, 2011, JETL 1/2011, p. 121,
[81] Dušanka Đurđev, 2010, "Nacrt Zajedničkog referentnog okvira za evropsko privatno pravo" ["Draft Common Frame of Reference for a European Private Law"], *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2, p. 78.

.[82] The purpose of preparing this paper was to facilitate the implementation of the Commission's Action Plan on a More Coherent European Contract Law of 15 March 2003, published in the form of a Communication from the Commission to the European Parliament and the Council.[83] This Action Plan announced a Common Frame of Reference (CFR), as a repository of the "best solutions for definitions, terminology, and substantive rules in European private law."[84] The CFR was a long-term project aimed at systematising contract law.[85] In addition, it was soft law, particularly defined by the European Commission as a handbook or toolbox of European contract law.[86] This legal qualification was intentionally set to ensure that the CFR would not be equated with a European Civil Code.[87] Namely, Christian von Bar, the chairman of the Study Group on a European Civil Code, clarifies that the concept of a European Civil Code should not be identified with national codifications, such as the French *Code Napoléon* or the German Civil Code; it should be understood as a common foundation for European private law.[88] Therefore the term "European Civil Code" should be avoided; and Common Frame of Reference is a better notion.[89] However, taking into account that the objective of the CFR is to analyse and systematise the *acquis*, rather than to create new law, legal theory has raised the question of whether the CFR is, in fact, a draft of a future European Civil Code.[90] The answer lies in the Draft Common Frame of Reference (DCFR), which was the outcome of the work on the CFR.[91] Namely, the Draft Common Frame of Reference for a European Contract Law was published in 2009 and, in addition to the rules of contractual relationships, also contains rules on non-contractual legal relationships.[92] Furthermore, the structure of the draft is grounded in patterns contained in various European Civil Codes, such as the German Civil Code.[93] The DCFR is intended to provide a comprehensive and consistent framework for the law of obligations, supported by a standardised legal vocabulary. One of the main questions concerns

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[82] Silvija Petrić, 2009, "Nacrt Zajedničkog referentnog okvira za europsko privatno pravo" ["Draft Common Frame of Reference for European Private Law"], *Prav. fak. Sveuč. Rij.* (1991) Vol. 30/1, p. 490.
[83] Dušanka Đurđev, 2010, p. 78.
[84] Frank Emmert, 2012, "The Draft Common Frame of Reference [DCFR] - The Most Interesting Development in Contract Law Since the Code Civil and the BGB", *Cuadernos de la Maestría en Derecho*, p. 7.
[85] Dušanka Đurđev, 2010, p. 75.
[86] Srećko Jelinić and Dubravka Akšamović, 2010, "Ugovorno pravo Europske unije na prekretnici", *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 60, p. 237.
[87] Von Bar, C., supra 90, 23. Cited in Srećko Jelinić and Dubravka Akšamović, 2010, pp. 237-238.
[88] Christian von Bar, 2008, "A Common Frame of Reference for European Private Law—Academic Efforts and Political Realities", *Tulane European & Civil Law Forum*, Vol. 23, pp. 39-40.
[89] Ibid., p. 40.
[90] Srećko Jelinić and Dubravka Akšamović, 2010, p. 241.
[91] Dušanka Đurđev, 2010, p. 77.
[92] Reiner Schulze, Thomas Wilhelmsson, 2008, "From the Draft Common Frame of Reference towards European Contract Law Rules", *European Review of Contract Law*, Vol. 4, No. 2, De Gruyter Recht, pp. 154, 156.

[93] Ibid., p. 156.

the role of the DCFR: whether it should be a "toolbox" for a European Code or be implemented as an optional legal instrument.[94] Therefore, it can be concluded that, in theory, the DCFR is the draft and model code of a future Civil Code of the European Union, "although the Commission and the academic study groups nowadays avoid the politically sensitive language of a "European Civil Code".[95] In addition, Monika Jozon, among other legal scholars argues that the DCFR is only the first step in a long codification process.[96] Regarding its structure, it is divided into ten books.[97] It "contains principles, definitions and model rules".[98] Furthermore, the purpose of the definitions is to develop a standard legal terminology in Europe.[99] Regarding the research topic of this thesis, it is discussed in (Book 6) Art. 3:201, titled "Accountability for damage caused by employees and representatives".[100] Namely, the term "accountability" is used in this Act, while in this text, the term "liability" is used.[101] These provisions reads as follows: "(1) A person who employs or similarly engages another is accountable for the causation o relevant damage suffered by a third person when the person employed or engaged: (a) caused the damage in the course of the employment or engagement; and (b) caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage. (2) Paragraph (1) applies correspondingly to a legal person in relation to a representative causing damage in the course of acting as such a representative. For the purposes of this paragraph, a representative is a person who is authorised to effect juridical acts on behalf of the legal person by its constitution."[102] This establishes a regime of strict liability for damage caused by employees or auxiliaries (the first paragraph) and of legal persons for their representatives (the second paragraph). According to the majority of Member States' legal doctrine, this is an independent employer liability separate from personal fault. Furthermore, it does not matter whether the damage was caused intentionally or negligently. According to legal theory, the liability for an employer's failure to supervise could be excluded; however, in

[94] Dušanka Đurđev, 2010, p. 78.
[95] Frank Emmert, 2012, p. 7.
[96] Monika Jozon, 2011, in Luisa Antoniolli and Franceska Fiorentini (eds.) *A factual Assessment of the Draft Common Frame of Reference*, Sellier. European Law Publishers, p. 243.
[97] Frank Emmert, 2012, pp. 7-8.
[98] Christian von Bar, Eric Clive and Hans Schulte-Nölke et al., 2008, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, [Interim Edition, to be completed], p. 3.
[99] Ibid., p. 4.
[100] Christian von Bar et al., 2009, *Principles, Definitions and Model Rules of European Private Law*, Draft Common Frame of Reference (DCFR), Sellier. European Law Publishers GmbH, Munich. p. 632.
[101] Milica Ilić, 2025, "Employer's Liability for Damage Caused by the Employee to a Third Party under German, French, and Romanian law", *Zbornik radova Pravnog fakulteta u Bihaću*, p. 258.
[102] Ibid., p. 632.

judicial practice, this is almost impossible. In addition, this rule could not be applied to legal persons due to "technical" grounds because they act through their board members.[103]

The Baltic States

Although the Baltic countries that once belonged to the USSR[104] — Estonia, Latvia, and Lithuania are located in Northern Europe, it is necessary to provide a general overview of the employer's liability for damage caused by an employee to a third party in these legal systems. There are some statutory solutions, which are similar to those in some countries analysed in this thesis (for example, Germany, in relation to the fault-based liability of the employer). Namely, in Lithuania, the fault of the employer is of legal relevance in the event of determining the causal link between the employer's control over the employee and the employee's act that caused the damage, and this is one of the reasons why the employer is liable for the employee.[105] However, the literature does not support this standpoint because, in that event, the employer's liability could not be vicarious, but rather personal.[106] Hence, the following discussion aims to bridge the geographical gap between the Northern and Central and Eastern European countries.

Estonia

Under Estonian law, the legal ground for attributing liability for damage caused by an employee to the employer is laid down in § 1054 of the Law of Obligations Act of 2002.[107] This provision is entitled "Liability for another person", and the first paragraph prescribes that a person who regularly engages another person in their business activity will be liable for damage caused by the latter, as if they had caused the damage themselves, provided that it is connected with their

[103] Ibid., p. 632.
[104] In the Baltic Revolution of 1991, they regained independence. Slakoper Zvonimir and Tot Ivan, 2022, *The Law of Obligations in Central and Southeast Europe, Recodification and Recent Developments*, Routledge, Taylor & Francis Group, London and New York, p. 2.
[105] „50: Autodesk Incorporated ir Microsoft Korporacija v. UAB „Technoverslas". Cited in Martynas Antanaitis, 2016, *Ar lietuvoje galima tiesioginė darbuotojo deliktinė atsakomybė?,* Vytauto didžiojo universitetas, Kaunas, [*Is direct tort liability of an employee possible in Lithuania*?, Vytautas Magnus University], p. 15.
[106] Martynas Antanaitis, 2016, p. 15.
[107] Kärt Meri, 2024, *Tööandja deliktiõiguslik vastutus töötaja põhjustatud kahju eest, Tartu ülikool õigusteaduskond, Eraõiguse osakond* [*Employer's Tort Liability for Damage Caused by an Employee*, Faculty of Law, University of Tartu, Department of Private Law], p. 3.

activities (economic or professional).[108] The provision implies that one person engages another continuously in the course of such activity.[109] The second paragraph stipulates that a person who engages another person to fulfil an obligation will be held liable for any damage caused by that person as if they had done it themselves, provided that the damage was caused or made possible by the performance of that obligation.[110]

The application of this provision in case law can be very broad.[111] For example, a person can engage the assistance of another person who is an independent contractor to fulfil an obligation.[112] This involved a scenario where snow-clearing services were ordered from a primary provider. However, a subcontractor was assigned by that provider to conduct the service. The subcontractor's employee caused damage to the person who ordered the service. The Supreme Court delivered a decision in 2009 stating the party from whom the snow-clearing service was ordered, is liable for damage caused by the subcontractor's employee in line with § 1054, Sec. 2 of the Law of Obligations Act of 2002.[113]

Lastly, the third paragraph concerns the principal's liability for damage caused by a person acting on their instructions (*mandate, mandatum*). They shall be liable as if they had caused the damage themselves. In addition, it is required that the damage occurred in the course of performing the mandate and that the principal exercised control over the conduct of the tortfeasor.[114] This last provision applies in cases of one-time execution of a mandate or

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[108] § 1054. "Vastutus teise isiku eest" (1) "Kui isik kasutab teist isikut pidevalt oma majandus- või kutsetegevuses, vastutab ta selle isiku poolt õigusvastaselt tekitatud kahju eest nagu enda tekitatud kahju eest, kui kahju tekitamine oli seotud selle majandus- või kutsetegevusega". Võlaõigusseadus ["Liability for the Acts of Another Person" (1) "A person who continuously engages another person in the course of their economic or professional activities is liable for damage unlawfully caused by that person as if the damage had been caused by the first person, provided that the damage was caused in connection with those economic or professional activities". Estonian Obligations Act - VõlaõigusseadusVÕS] – RT I 2001, 81, 487; with amendments, last RT I, 11.11.2025, 1 (in Estonian). Available at https://www.riigiteataja.ee/akt/111112025016 (Accessed on 12.02.2026).

[109] Annika Kask, 2024, "Ülesande andja vastutus toimingu tegija delikti eest, Tartu ülikool õigusteaduskond, Eraõiguse osakond, Tallinn" [The Principal's Liability for the Tort of a Person Performing a Task, Faculty of Law, University of Tartu, Department of Private Law, Tallinn]. p. 4.

[110] § 1054. (2) "Kui isik kasutab teist isikut oma kohustuse täitmisel, vastutab ta selle isiku poolt õigusvastaselt tekitatud kahju eest nagu enda tekitatud kahju eest, kui kahju tekitati või kahju tekitamine sai võimalikuks seoses selle kohustuse täitmisega." ["If a person engages another person in the performance of their obligation, they are liable for damage unlawfully caused by that other person as if they had caused the damage themselves, provided that the damage was caused, or its occurrence was made possible, in connection with the performance of that obligation."], the Obligations Act of 2002.

[111] Janno Lahe, 2013, "The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective", *Review of Central and East European Law*, 38 (2013) 141-170. p. 166.

[112] According to Morétea, drawing between them (dependent and independent work), the dividing line is hard. Morétea, 117. Cited in Janno Lahe, 2013, p. 166.

[113] Janno Lahe, 2013, p. 166.

[114] § 1054. (3) "Kui isik teeb teise isiku ülesandel teatud toimingu, vastutab ülesande andja ülesande täitmise käigus õigusvastaselt tekitatud kahju eest nagu enda poolt tekitatud kahju eest, kui kahju tekitati või kahju tekitamine sai võimalikuks seoses ülesande täitmisega ja ülesande andjal oli vastavalt tema ja kahju tekitanu

agreement.[115] Thus, an independent contractor can also be liable under § 1054 Sec. 3 of the Estonian Obligations Act, as previously Sec. 2 of the same section.[116] The difference is that the supervision of the principal over the agent is a condition for the last provision to apply.[117]

The person who relies on another in this regard for the performance of their duties is any natural or legal person, as well as a public authority.[118] In the literature, for example, Annika Kask uses the terms *ülesande andja* for the English translation of the principal, and *toimingu tegija*, which means mandatory (or agent) for the person acting on their instructions based on the commentary on § 1054. Sec. 3 of the Obligations Act (these terms are used in the Commentary).[119] Jano Lahe uses the term "service user" for a person who engages another in all three paragraphs of § 1054 of the Obligations Act and "service provider" for the engaged person.[120] Kärt Meri writes about an employer's liability that is provided in § 1054 Sec. 1 of the Obligations Act of 2002. The term employer is found in the case law examined in her study[121] Furthermore, she supports the standpoint of the previously mentioned legal scholar Jano Lahe, that a special legal relationship exists between the employer and the employee. It means that the employee committed a tort during the performance of their work duties, which are related to their legal relationship with the employer. Furthermore, this relationship is one of the two reasons that justify why the employer is liable for the other. The second reason, which Kärt Meri also supports, is the standpoint of another civil law professor, Tambet Tampuu. He has approached the economic aspect as the reason for the justification of the employer's vicarious liability.[122]

In the case law, all three sections of § 1054 (1, 2, 3) of the Obligations Act of 2002 apply to this subject matter, although the literature and the Supreme Court (*Riigikohus*) acknowledge

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vahelisele suhtele kontroll kahju tekitanu käitumise üle." ["If a person performs a specific act on behalf of another person, the principal is liable for damage unlawfully caused in the course of performing that task as if the damage had been caused by the principal, provided that the damage was caused, or its occurrence was made possible, in connection with the performance of the task, and that, having regard to the relationship between the principal and the person who caused the damage, the principal had control over that person's conduct"].the Obligations Act of 2002.

[115] Annika Kask, 2024, p. 4.

[116] Janno Lahe, 2013, p. 166.

[117] Ibid., p. 166.

[118] Kärt Meri, 2024, p. 15.

[119] Käerdi, M., Tampuu, Kommenteeritud väljaanne. Tallinn: Juura 2020. Cited in Annika Kask, 2024, p. 4.

[120] Jano Lahe, 2006, "Meaning of Fault with regard to Liability for Damage Caused by the Unlawful Action of Another Person", *Juridica International* XI/2006, p. 142.

[121] Kärt Meri, 2024, pp. 10, 15-16.

[122] Ibid: 2024, p. 10.

that § 1054 Sec. 1 should be the legal ground for the issue of the employer's liability for damage caused by the employee to a third party.[123]

In addition, § 1054. Sec. 1 and 2 constitute special provisions compared to § 132 of the General Civil Code (*Tsiviilseadustiku üldosa seadus, TsÜS*).[124] Furthermore, VÕS §1054 is a supplement to § 1043 of the Obligations Act[125] which is a general norm on compensation for damage.[126] The courts have interpreted the conditions for establishing the principal's liability differently. According to the Supreme Court, those are the perpetrator's unlawful act committed through their fault while the principal exercised control over the perpetrator.[127] According to the Harju County Court, based on § 1054. Sec. 3, the conditions are damage sustained by the injured person, the principal's unlawful act, a causal link between the damage sustained by the injured person and the principal's act, and that the principal must be at fault. However, according to the commentary on the Obligations Act and the prevailing case law, the prerequisites are not the principal's unlawful act and their fault, but rather that of the perpetrator. In this event, the injured party may opt against whom to bring an action (whether the principal or the perpetrator).[128] On the other hand, § 1054. Sec. 3 is modelled on § 831 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*).[129]

It should be highlighted that the Estonian legislation is codified, but in a modular way, through several separate statutes that were enacted during different periods, but operating as one codification together and forming the system of civil law, instead of an individual unified civil code.[130] These special acts are the Property Law Act (1993)[131], the General Part of Civil Code

[123] Ibid., 2024, p. 15.
[124] Annika Kask, 2024, p. 4.
[125] Ibid. p. 5.
[126] § 1043. "Teisele isikule (kannatanu) õigusvastaselt kahju tekitanud isik (kahju tekitaja) peab kahju hüvitama, kui ta on kahju tekitamises süüdi või vastutab kahju tekitamise eest vastavalt seadusele." ["A person who unlawfully causes damage to another person (the injured party) shall compensate for the damage if they are at fault in causing the damage or are liable for the damage pursuant to law".] Obligations Act.
[127] RKTKo 2-20-1836, p 13. Cited in Annika Kask, 2024, p. 5.
[128] Annika Kask, 2024, p. 5.
[129] Käerdi, M., Tampuu, Kommenteeritud. Tallinn: Juura 2020. Cited in Annika Kask, 2024, p. 4.
[130] Irene Kull, 2013, in Julio César Rivera: *The Scope and Structure of Civil Codes, Ius Gentium: Comparative Perspectives on Law and Justice*, Vol. 32, Springer, p. 133.
[131] Property Law Act [*Asjaõigusseadus*], entered into force in RT I 1993, 39, 590, with amendments.

Act (1994)[132], the Family Law Act (1995)[133], the Succession Law Act (1997)[134] and the Obligations Act (2002), which is the main subject matter of this topic.

Thus, as mentioned, § 132 of the General Part of the Civil Code Act also prescribes vicarious liability, as does § 1054 of the Obligations Act however, it should be noted that these articles do not overlap because the former pertains to non-contractual liability while the latter pertains to contractual liability.[135]

Although § 1054 does not foresee the fault of the agent as a precondition for the principal's liability, a standpoint is taken in the literature by Jano Lahe that the service provider should be at fault at least through negligence).[136] The principal's fault is not relevant.[137]

Latvia

In Latvian law, Art. 1782 of the Latvian Civil Code[138] requires masters to choose their employees and servants with due care and to assess their capacity to perform their work duties. If the master fails to perform this obligation properly, they can be held liable for their choice of assistants and other employees.[139] Originally, this provision was not intended to hold legal persons liable for the acts of their employees. However, it now applies to employers as well as legal persons. This rule includes legal persons because they also must select their employees with due care, considering that they assume the risks related to their employees in order to achieve a financial goal.[140] The employer is not automatically liable when an employee has committed a faulty action. It is required to determine that the employer selected the employee

[132] General Part of Civil Code Act [Tsiviilseadustiku üldosa seadus], entered into force in 1994, revised version RT 2002, 35, 216, 2002, with amendments.
[133] Family Law Act [Perekonnaseadus], entered into force in 1995; the Act RT I 2009, 60, 395 entered into force in 2010, with amendments.
[134] Succession Act [Pärimisseadus], entered into force in 1997, a new law Act RT I 2008, 7, 52 entered into force in 2009, with amendments.
[135] Jano Lahe, 2006, p. 144.
[136] Ibid., p. 144.
[137] Käerdi, M., Tampuu, T. Võlaõigusseadus IV, § 1054/3.1. 2020. Cited in Kärt Meri, 2024, p. 15.
[138] "Ja kåds nepiegrieΩ vajadzîgo uzmanîbu izvéloties kalpotâjus un citus darbiniekus un nepârliecinâs papriekß par viñu spéjâm un noderîbu izpildît viñiem uzliekamos pienâkumus, tad viñß atbild par zaudéjumiem, ko viñi ar to nodarîjußi treßai personai." ["If a person fails to exercise due care in selecting servants and other employees, and does not first ascertain their ability and suitability to perform the duties assigned to them, that person shall be liable for the damage caused to a third party."] Latvian Civil Code, Art. 1782. Valdības Vēstnesis, 41, 20.02.1937. with amendments.
[139] Ja¯nis Ka¯rklin¸s, ˇVadim Mantrov and Lauris Rasnacˇs, 2022, *Tort Law in Latvia*, Kluwer Law International B.V., Alphen aan den Rijn, p. 65.
[140] Ibid., pp. 65-66.

at least through negligence.[141] It should be underlined that this provision applies towards the third party who has suffered damage caused by the employee.[142]

In addition, Art. 1638 of the Latvian Civil Code applies in a situation when a subordinate commits a delict based on the orders of a supervisor. In that case, the subordinate will not be liable, unless the act constitutes a crime.[143]

Concerning the notions of employee and employer, an employee is defined as a natural person who performs paid work based on an employment agreement under the employer's orders.[144] The employer, on the other hand, can be either a natural or a legal person, or a partnership with legal capacity that hires at least one employee based on an employment agreement.[145]

Regarding the liability of a legal person for damage caused by its organs, the legal person is liable with its own property for damages.[146] The conduct and fault of the organs of a legal person are attributed to the legal person according to the literature. Therefore, Art. 1782 of the Latvian Civil Code is not applied in its entirety. The reason for this standpoint is that the liability of the employee is distinct from that of the legal person. The employer is liable for the negligence in choosing an employee, "whereas the employee is liable for the wrongful act itself".[147]

Lithuania

The Civil Code of the Republic of Lithuania guarantees the injured party's right to compensation for damage.[148] In cases where the damage is caused by an employee during the

[141] Jānis Kārkliņš, Vadim Mantrov, Lauris Raņačs, 2022, p. 66.
[142] Ibid. p. 66.
[143] "Par tiesību aizskārumu, ko izdarījis apakšnieks péc priekšnieka pavéles, pirmais nav vainojams, ja darbība nav pati par sevi noziedzîga." ["For a violation of rights committed by a subordinate pursuant to the order of a superior, the subordinate shall not be deemed at fault if the act is not in itself criminal."], Latvian Civil Code, Art. 1638.
[144] "Darbinieks ir fiziskā persona, kas uz darba līguma pamata par nolīgto darba samaksu veic noteiktu darbu darba devēja vadībā" ["The employee is a natural person who, on the basis of an employment contract, performs specified work for an agreed remuneration under the direction of the employer"], Latvian Employment Act, Art. 3. [Darba likums, Latvijas Vēstnesis, 105, 06.07.2001.; Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs, 15, 09.08.2001.]
[145] Latvian Employment Act, Art. 4.
[146] Ja ̄nis Ka ̄rklin ̧s, ˇVadim Mantrov and Lauris Rasnacˇs, 2022, p. 71.
[147] Ibid., p. 71.
[148] Mindaugas Belickas, 2009, "Ar įstatyminis reikalavimas darbdaviui atlyginti žalą, atsiradusią döl darbuotojo kaltös, nepažeidžia nukentöjusiojo ir darbuotojo teisių?", ["Does the statutory requirement for an employer to compensate for damage caused by an employee's fault violate the rights of the injured party and the employee?"], Vytauto didžiojo universitetas, Kaunas, p. 6.

performance of work duties, the claim should be addressed to the employer.[149] In Lithuanian law, the peculiarities of an employer's vicarious liability are that, in addition to the general conditions of liability under civil law, two additional requirements must also be fulfilled.[150]

The general conditions are well known: the existence of an unlawful act, its causal link to the damage, and the existence of fault. The additional conditions pertain to the existence of an employment agreement between the contracting parties, which states that the employee acts under the instructions and control of the employer.[151] The second prerequisite requires that the damage be caused in the course of performing work duties.[152]

Namely, Art. 6.264 of the Lithuanian Civil Code of 2000 stipulates the liability of the employer for damage caused by their employees through fault.[153] Sec. 1 provides for the employer's compensation for damage caused by the fault of their employees in the performance of their work duties.[154] According to Sec. 2 of the same article, a definition is provided for the notion of an employee as a person who exercises their functions based on an employment or civil contract. In addition, they act under the supervision or in line with the orders of either a legal or a natural person.[155]

Sec. 3 foresees that the employee will be liable towards the employer if they cause damage with intent or negligence in cases where the statute prescribes their joint and several liability.[156]

The employer is liable for ensuring that employees perform their work with due diligence and in accordance with the statute, in a way that does not cause damage to others. The statute

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[149] Ibid., p. 6.
[150] Martynas Antanaitis, 2016, p. 13.
[151] Ibid., p. 13.
[152] Autodesk, LR Aukščiausiasis Teismas, Civilinių bylų skyrius (2013, Nr. 3K-3-385). Cited in Martynas Antanaitis, 2016, p. 13.
[153] Lietuvos Respublikos Civilinis Kodeksas, Official Gazzette of RL 2000, No. 74-2262; OG. 2000, No. 77-0; OG. 2000, No. 80-0; OG. 2000, No. 82-0, i. k. 1001010ISTAIII-1864., Civil Code of the Republic of Lithuania.
[154] "Samdantis darbuotojus asmuo privalo atlyginti žalą, atsiradusią dėl jo darbuotojų, einančių savo darbines (tarnybines) pareigas, kaltės" ["A person who employs workers is required to compensate for damage caused through the fault of their employees while those employees are performing their employment (official) duties."], Civil Code, 6.264 Sec. 1.
[155] "Pagal šį straipsnį darbuotojais laikomi asmenys, atliekantys darbą darbo sutarties arba civilinės sutarties pagrindu, jeigu jie veikia atitinkamo juridinio ar fizinio asmens nurodymu ir jo kontroliuojami." ["For the purposes of this Article, 'employees' shall mean persons performing work under an employment contract or a civil contract, provided that they act on the instructions of, and are subject to the control of, the relevant legal or natural person."]
Civil Code, 6.264 Sec. 2.
[156] "Jeigu įstatymų numatytais atvejais samdantis darbuotojus asmuo ir darbuotojas už žalą atsako kartu, tai darbuotojas atsako jį nusamdžiusiam asmeniui tik tuo atveju, kai yra darbuotojo tyčia ar neatsargumas." ["Where, in cases provided for by law, the person employing employees and the employee are jointly and severally liable for damage, the employee shall be liable to the person who employed them him or her only where the employee acted intentionally or with gross negligence."], Civil Code, 6.264 Sec. 3.

prescribes the employee's fault when damage is caused as a condition for the employer's vicarious liability to apply. In such a case, the employer's fault is equated with the employee's fault.[157]

It is easier for the injured party to identify the employer than the direct tortfeasor.[158] The employer is often a legal person; thus, the liability rests on the company in cases where the direct tortfeasor may escape the liability.[159] For example, in the case law, the defendant was a nightclub as an employer where its employee worked as a security guard. In that case, the court found that the employer was liable because they had acted negligently by failing to properly supervise the employee. In addition, in the hiring process for the position of security guard, they failed to ascertain whether the employee fulfilled the special statutory requirements for the position.[160] Like in Germany, under Lithuanian law, the employer will not be liable if they selected the employee properly, gave them the tools for work, and supervised them.[161] After paying damages, the employer has a right of recourse against the employee.[162] It should be emphasised that the statute does not foresee the direct liability of the employee. Such a solution raises the question of what will happen if the employer is insolvent.[163] This issue affects both parties, the employee and the injured party.[164]

[157] Martynas Antanaitis, 2016, p. 13.
[158] Mindaugas Belickas, 2009, p. 10.
[159] Ibid., p. 10.
[160] See in details Judgment of the Supreme Court in Lithuania, No. 3K-3-114/2011 of 15 March, 2011.
[161] Martynas Antanaitis, 2016, p. 13.
[162] Mindaugas Belickas, 2009, p. 6.
[163] Ibid., p. 6.
[164] Ibid., p. 7.

SELECTED EUROPEAN COUNTRIES THAT CONSTITUTE TRADITIONAL EUROPEAN LEGISLATIVE MODELS:

1 Employer's Liability for Damage Caused by an Employee to a Third Party under German Law

1.1 General Considerations

The German Civil Code (*Bürgerliches Gesetzbuch, BGB*) does not envisage explicitly the employer's liability for damage inflicted by an employee to a third party.[165] § 831, Sec. 1 of the BGB establishes a general principle whereby one person who designates another to perform a task is obligated to indemnify for any damage unlawfully inflicted by the latter upon a third party during the conduct of that task, unless the master (principal) has exercised due diligence in the selection and oversight of the other (servant).[166]

Under this rule, the employer is referred to as a principal (*Geschäftsherr*) who engages another person; in the literature, the term "master" can also be used for the employer. In any case, it is clear that this rule regulates the relationship between the employer and the employee. Thus, § 831 refers to the employer as the principal (*Geschäftsherr*) while "the employee (*Verrichtungsgehilfe*) is a subordinate or servant (usually an employee) who is dependent on the instructions of the principal".[167] Namely, the Civil Code defined an employee in April 2017, in § 611a. Before that period, and still today, there has been a definition of a self-employed person, but in § 84, Sec. 1, sentence 2 of the Commercial Code (*Handelsgesetzbuch–HGB*), according to which a self-employed person is considered to be anyone who has the freedom to organise their own working hours and job and it was introduced to distinguish them from the notion of the employee.[168] By contrast, personal subordination is the main characteristic of the employee, related to the employer/employee relationship, where the employee works for the employer, according to an employment contract as the legal basis.[169] In addition, a contract is an essential element due to its voluntary nature, since the employee is not forced to work for

[165] Gerald Spindler, Oliver Rieckers, 2019, *Tort Law in Germany,* Kluwer Law International B.V., Alphen aan den Rijn, 2019., p. 67.
[166] Ibid., p. 67.
[167] Cees van Dam, 2013, p. 503.
[168] B. Waas, 203–216, 2005. Cited in Manfred Weiss, Marlene Schmidt, and Daniel Hlava, 2019, *Labour Law and Industrial Relations in Germany*, Kluwer Law International B.V., p. 45.
[169] Brox et al., 20. Cited in Manfred Weiss et al., 2019, p. 45.

anyone and the employment relationship is not established in the public sphere; for example, the employee is not a civil servant.[170] In order to determine the degree of direction and control of the employer over the employee, a test is applied.[171] The court interprets this control test in a way that a person is considered a servant if they perform a function within the employer's sphere of influence. Furthermore, there is an employee's social and economic dependency[172] in addition to the orders given by the employer.[173] The employee is put in a position by the employer to perform work duties, based on which the employer could gain profit from it. Thus, it is justified that the employer's liability is vicarious. In addition, the injured party is in a better position because they can claim damages from the financially stronger party, instead of the weaker one (employee), and the employer is usually economically stronger than their employee.[174]

However, the employer could be liable even for independent contractors and traders if they rely on the employer's instructions.[175] In addition, fellow workers are liable under tort law.[176]

The main indicators of employee status include whether the employee is always required to be prepared to take on new assignments and cannot decline tasks presented by the employer; whether the employee is integrated within the workplace; and, as previously mentioned, an indicator that the employee is required to adhere to specific instructions, which at the same time give the employee the freedom to take the initiative.[177]

The employer's liability is based on fault (or *culpa*) and originates from the Pandectist School of Law[178], which supported the view that the superior must be at fault for the improper selection of an employee to establish their liability.[179] Namely, the contribution of the personal fault of the superior to the occurrence of the damage is the key element in determining whether they

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[170] Manfred Weiss, Marlene Schmidt et al., 2019, p. 45.
[171] Markesinis, Bell and Janssen, 2019. Cited in Oliver Rieckers, Simon Gerdemann, and Andreas Seidel 2023, *Tort Law in Germany*, Kluwer Law International BV, The Netherlands, p. 69.
[172] "BGH,Vers R1998, 862 et seq.; BGHZ 45, 311, 313; BGHZ 103, 298, 303; and BGH, NJW2009, 1740, 1741". Cited in Oliver Rieckers, Simon Gerdemann Andreas Seidel, 2023, p. 69.
[173] Köln,Transp 1995, Steffen, in: RGRK, BGB, § 831 1989; and Bernau, in: Staudinger, 2022. Cited in Oliver Rieckers Simon Gerdemann Andreas Seidel 2023, p. 69.
[174] Basil S Markesinis, John Bell, André Janssen, 2019, *Markesinis's German Law of Torts A Comparative Treatise*, Hart, p. 117.
[175] Wagner, 2009, 8. Cited in Cees van Dam, 2013, p. 503.
[176] Raimund Waltermann in Ken Oliphant and Gerhard Wagner (eds.) 2012, *Employers' Liability and Workers' Compensation, Tort and Insurance Law*, Walter de Gruyter GmbH, Berlin/Boston, p. 284.
[177] Karsini Vanessa Soerjaman, 2013, *Employers' liability for damage caused by his employee, A comparative study: Germany and the Netherlands,* International European Labour Law, University of Tilburg, 2013, pp. 9-10.
[178] Konrad Zweigert, Hein Kötz, 1998, *Introduction to comparative law*, Clarendon Press, Oxford, 1998, p. 630.
[179] Bell, John, André Janssen, and Basil S Markesinis, 2019, *With a Foreword by Professor Sir*, ed. Markesinis's German Law of Torts: A Comparative Treatise. Oxford: Hart Publishing, p. 118.

will be liable in the Germanic legal family.[180] That is the standpoint of the *Gemeines Recht*, and legal scholars according to whom the principle of 'no liability without fault' applies to vicarious liability as well. This principle was a moral basis in tort law. According to Jhering: "It is not the occurrence of harm which obliges one to make compensation, but fault. This is as simple as the chemical fact that what burns is not the light but the oxygen in the air."[181]

This approach was accepted by the BGB, although, in the literature, there was also an interpretation that the employer's liability is strict, which did not require their fault but that of the employee. Most European legal systems also accept this latter view, while in Germany, it did not prevail because of the general legal principle that the employer is liable for the unlawful acts of their employees only if personal fault can be attributed to the employer for the wrong choice of the employee and faulty supervision.[182] The explanation stems from a historical perspective that the 19th-century Pandectists were of the opinion that the aforementioned doctrine of *culpa in eligendo* was the only one known in Roman law and that it should be incorporated into § 831 of the BGB. But the development of this doctrine that an employer is liable only if they are personally at fault from the casuistic Roman doctrine proved to be less persuasive. Particularly, according to the Imperial Liability Act of 1871, strict liability was imposed on railway companies and completely suppressed fault. Therefore, the Civil Code allows some space regarding the special matters (cases) for specific statutes to regulate such issues, because the BGB does not regulate special matters in general terms.[183]

Thus, *culpa in eligendo* remains as one of the conditions of the employer's liability, which means selecting the inappropriate employee for a specific work task, in addition to *culpa in instruendo,* meaning failing to give that employee clear instructions, and *culpa in vigilando,* in situations where the employee's performance is not properly supervised.[184]

There are other (general) conditions as well, such as the existence of a relationship whereby one person is liable for the acts of another, wrongful conduct committed by the employee or subordinate, and that liability be limited to a particular set of circumstances arising during the

[180] Konrad Zweigert, Hein Kötz, 1998., p. 630.
[181] "(Das Schuldmoment im römischen Privat-recht (1867) 40)." Cited in Konrad Zweigert, Hein Kötz, 1998, p. 630.
[182] Bell, at all, 2019, p. 630.
[183] Ibid.
[184] Paula Giliker, 2011, "Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective", 2(1) *Journal of European Tort Law*, p. 33.

employment relationship.[185] This means that the damage must be caused during the performance of assigned duties by the employee.[186]

Furthermore, this is the most contested issue of vicarious liability. With some simplification, there are two possibilities: the employee acts within the "course of employment" and the other, that they act outside it. This is a question of fact.[187] It is not sufficient that the harmful act happened simply during the course of employment if it was not closely related to the employee's assigned duties. Instead, the wrongful conduct must be meaningfully linked to the type of actions that are part of carrying out the employee's job duties.[188]

The employer can be exempted from liability in two ways. First, they cannot be held liable if demonstrated that the employer exercised reasonable care in the selection process of the employee, provided the necessary tools, and supervised the employee. Secondly, the employer is not liable if the damage would have occurred even if such reasonable care had been demonstrated. It can be concluded that the focus is on the liability based on negligence with a reversed burden of proof. According to the case law, courts generally require the employer to observe a high standard of care, which effectively makes the application of this Article similar to strict liability.[189] Furthermore, the employer bears no liability for any damage the employee caused while travelling to and from work.[190] Thus, even a superficial reading of the first sentence of § 831 Sec.1 BGB reveals that the employer is the liable person for their employee. However, the second sentence gives them the possibility to rebut that rule by proving either the lack of fault or a lack of causation.[191] The Civil Code does not define fault (*Verschulden*). It makes clear that fault contains two categories: *Vorsatz* (intent), which further involves (*dolus directus* and *dolus eventualis*) and *Fahrlässigkeit* (negligence).[192] Regarding the notion of causation, it is not defined by statute (as is the case with the aforementioned fault).[193] In the literature, there is an assumption that one condition derives from another. In addition, it is a legal concept which is not strictly formulated, as it is, for example, in the natural sciences.[194]

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[185] Ibid.
[186] Cees van Dam, 2013., p. 503.
[187] Bell et al., 2019., p. 122.
[188] Joachim Zekoll and Gerhard Wagner (eds.), 2019, *Introduction to German Law*, Kluwer Law International B.V. p. 281.
[189] Cees van Dam, 2013., p. 503.
[190] Kwame Opoku, 1972, p. 239.
[191] Walter van Gerven et al, 2000, p. 480.
[192] Ulrich Magnus and Gerhard Seher in P. Widmer, 2005, *Unification of Tort Law: Fault*, Kluwer Law International, p. 104.
[193] Ulrich Magnus and Gerhard Seher, 2005, p. 63.
[194] E. Deutsch, J. Esser/E. Schmidt; H. Kötz;H. Lange. Cited in Ulrich Magnus and Gerhard Seher, 2005, p. 63.

Liability arises if a causal relationship is established between the tortious act and the infringement of the injured person's right (*haftungsbegründende Kausalität*). In addition, the infringed rights have to be causally linked to each other (*haftungsausfüllende Kausalität*).[195] A further precondition for establishing the employer's liability under § 831 BGB is that the employee must be a person appointed by the employer to perform a function.[196] According to German courts, a servant (*Verrichtungsgehilfe*) is a person under the supervision and control of their superior, typically a salaried employee. For instance, if a doctor assigns a task to a nurse to use radiological equipment, she is considered to be a servant under his control; however, if the hospital provides both the nurse and the equipment, and the doctor has no control over how to the devices are used by the nurse, the doctor is not liable. The category of independent contractors is not considered as servants unless they depend on those who employed them. Legally challenging issues can arise when one employer lends employees to another, depending on whether the first employer retains supervision rights over the borrowed servants.[197]

Another condition defined in § 823 Sec. 1 and 2 BGB is the existence of an unlawful (*rechtswidrig*) act committed by the employee[198]. (This Article also represents the gist of the tort law regime in Germany).[199] A sufficient cause of the damage generally involves the employee's conduct; thus, if they acted with due care, it is not the employer's liability, and further examination of defences is unnecessary (there is no requirement of proof of the employee's fault (*Verschulden*), for the employer's liability to be established).[200] However, if the employee acted intentionally or negligently, § 840 BGB applies, which prescribes that they will be jointly and severally liable (the employer and the employee together).[201]

However, having compensated the injured party for the damage caused, the employer has a recourse claim against the employee, if the employee acted intentionally or with gross negligence. Conversely, if the employee has paid damages and did not act intentionally, they have the right to seek reimbursement from the employer.[202]

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[195] Versicherungsrecht, H. Lange; Palandt/Heinrichs. Cited in Ulrich Magnus and Gerhard Seher, 2005, p. 63.
[196] Konrad Zweigert, Hein Kötz, 1998, p. 630.
[197] Ibid, p. 632.
[198] § 823 of BGB, Sec. 1 and 2.
[199] Soares, E., 2012, "Tort Law Systems in Selected Countries: Brazil, China, England & Wales, France, Germany, India, Italy, Japan, Russia". Washington, D.C., Law Library of Congress, p. 23.
[200] Cees van Dam, 2013, p. 503.
[201] §840 BGB,
[202] "Kötz-Wagner, 2010, N 319; BAG 27 September 1994, ZIP 1994, 1712" cited in Cees van Dam, 2013, p. 504.

For example, if the injured party sustained bodily injury, they can claim compensation for pain suffered and must prove in civil proceedings a violation of one of the rights listed in the provision as "life, person, health, liberty, and property."[203] Those rights prescribed in § 823 Sec. 1 BGB are "protected rights" which do not involve pure economic losses.[204]

They involve "other rights" as well, a term referring to absolute rights, which must be respected by all and are enforceable against any third party. Conversely, contractual rights are not protected under § 823 Şec. 1 BGB, as they pertain only to the parties in privity of the contract and are therefore considered relative rights, enforceable solely through contractual claims.[205] "Protective rights" are mentioned in § 823 Sec. 2. Their goal is to protect individual interests, and, at the same time, they are wider and narrower than those in § 823 Sec. 1 because more interests are protected, but some conducts, such as fraud, false information, and unfair competition (those are economic interests) which should be sanctioned, are not included.[206] They are included in different sources of law such as statutes, decrees, ordinances, or can be derived from customary law.[207]

The claim is to be addressed against the principal due to their failure to choose a qualified employee or to supervise them properly. In this context, the liability is not vicarious *stricto sensu*; rather, it stems from the principal's presumed fault.[208] However, this presumption of fault is rebuttable. There are certain cases, particularly those concerning product liability, where this presumption is so pronounced that the distinction between fault-based and strict liability becomes significantly blurred.[209] In theory, it can be found that the basis of this liability can be contractual, quasi-contractual or delictual. Based on the rules of the tort law regime, the employer can be exempted from liability if they prove that they conducted due diligence in selecting and overseeing the manager or a person liable for conducting the work assignment. In addition, the employer is required to demonstrate that appropriate planning and equipment were implemented within the organisation. Subsequently, it falls to the manager or supervisor to establish that they exercised due care in the selection, training, and oversight of their

[203] Harald Koch, 2019, in Joachim Zekoll and Gerhard Wagner (eds.) *Introduction to German Law*, Kluwer Law International B.V, Alphen aan den Rijn, The Netherlands, p. 274.
[204] Leonhard Hubner and Luca Kaller, 2022, in Ekaterina Aristova and Uglješa Grušić eds. *Civil remedies and human rights in flux, Key Legal Developments in Selected Jurisdictions*, Hart Publishing, p. 190.
[205] Harald Koch, 2019, p. 275.
[206] Leonhard Hubner and Luca Kaller, 2022, pp. 190-191; Kwame Opoku, 1972, p. 234.
[207] Kwame Opoku, 1972, p. 234.
[208] Harald Koch, 2019, p. 280.
[209] Kwame Opoku, 1972, p. 231, p. 239.

subordinates. In essence, the supervisor assumes the role and liabilities of the owner, thereby being required to satisfy the stipulations outlined in § 831.

Considering that the German law of torts includes three general clauses, five specifically regulated torts, rules for vicarious liability, and cases of statutory strict liability, this issue is placed under the rules for vicarious liability.[210]

Another precondition for the employer's vicarious liability is that the employee acted in the course of their employment at the moment when the damage was caused. It means that the employer will not be liable if the employee commits theft because they acted intentionally, in which case the employer is not obliged to pay damages,[211] because it is in no way related to the designated function. However, things might be different if the criminal offence and the assigned duties overlap, for example, if a baggage handler steals the luggage of a passenger.[212] The Federal Supreme Court holds an employer liable for a theft committed by those employees if the theft was predictable because there is a combination of the employer's lack of supervision and the tasks assigned to the employee by the employer.[213]

It should be emphasised that in German civil law related to the employer's vicarious liability, under § 831 BGB, there is a theoretical debate between two theories that influence practice. Those are the Result Theory (*Erfolgstheori*e) and the Conduct Theory (*Handlungstheorie*).[214] According to the former, as the name of the theory itself suggests, the result is a consequence of unlawfulness (*Rechtswidrigkeit*). For example, the result is a violation of a protected right under § 823 Sec.1 BGB. To trigger liability, the plaintiff must prove *Tatbestand*, which means the facts leading to the employer's liability. Related to § 831 BGB, that is a presumption of fault (*Verschulden*) of the employer. To release themselves from liability, the employer should rebut that presumption.[215] However, according to the conduct theory, an act is considered unlawful (*rechtswidrig)* only if it can be demonstrated that a norm of conduct has been violated.[216] Thus, for the existence of unlawfulness, the violation of a *Rechtsgut* incorporated in § 823 Sec.1 was not sufficient, like in the result theory.[217] In addition, there are various other theories that support the unlimited liability of the employer. For example, the theory of risk

[210] Ibid., p. 231.
[211] Ibid., p. 239.
[212] Gerald Spindler, Oliver Rieckers, 2019, p. 70.
[213] Ibid., p. 70.
[214] Walter van Gerven et al., 2000, p. 483.
[215] Ibid., p. 483.
[216] Ibid., pp. 483-484.
[217] Ibid., p. 483.

(because the employer bears a risk of causing damage) or the principle of *respondeat superior.*[218] According to them, the employer can exempt themselves from liability if they prove exculpatory grounds such as a simple casus (lesser accident), acts of a third party or the injured party, and force majeure. They have the right of recourse against the employee who caused the damage with intent.[219] However, the contemporary lifestyle has imposed strict liability in addition and left the principle of *culpae in eligendo vel in vigilando* as remnants of the past.[220]

Furthermore, regarding § 823 Sec. 1, it needs to be emphasised that the employee can be directly liable according to this article. In the case law, it can be found that, for example, a claim was addressed against the employee in the event of the employer's insolvency.[221] The facts were that the plaintiff was a leasing company that, based on the leasing agreement, provided a vehicle for use to the defendant's employer. The employer made the vehicle available to the employee, who was a sales representative, and they were allowed to use it for private purposes as well, with the manager's approval. However, the damage was caused by them during a business trip when the defendant, due to slippery road conditions, caused an accident by hitting a guardrail. The plaintiff sustained damage to the vehicle in the amount of 7,893.50 German Marks (DM), which could not be recovered from the employer, as the employer had become insolvent in the meantime. The first-instance court dismissed the plaintiff's lawsuit against the employee, as it considered that they were not liable because the damage was caused by their slight negligence.[222] (There is no distinction in the BGB between gross negligence and slight negligence or between *culpa lata* and *culpa levis*).[223] However, the second-instance court upheld the lawsuit and obliged the defendant to compensate for the damage, holding that the damage to the vehicle was caused by their carelessness while driving, within the meaning of § 823 Sec. 1 of the BGB.[224] This standpoint was also upheld by the Supreme Court, which stated that the defendant had sufficient life experience to be held liable

[218] Laleta Sandra, 2003, p. 48.
[219] Ibid., p. 48.
[220] Ibid., p. 49.
[221] Judgement of the Federal Court of Justice, No. 349/88 of 29.11.1988, in German - 10. Zivilsenat des Oberlandesgerichts Stuttgart vom 29. November 1988 (BGH, Urteil v. 19. September 1989 - VI ZR 349/88 - OLG Stuttgart, LG Heilbronn), pp. WIV-2.
[222] Ibid., p. 3.
[223] Wacke Andreas, 1992, "The Employee's Limited Liability in German Law and Its Development Compared with Roman Law." *Journal of South African Law*, p. 369.
[224] Judgement of the Federal Court of Justice, No. 349/88 of 29.11.1988, pp. 2-3.

for a driving error that they could have avoided if they had exercised due care.[225] In addition, it should be highlighted that in this case, driving a car for work purposes was assessed as a dangerous activity[226], which will be analysed in detail separately. However, in theory, driving a car for work purposes is not assessed as a dangerous activity if it is driven along a dry road under conditions with good visibility.[227]

Moreover, in theory, the employee is directly liable for damage caused by all types of negligence.[228] This interpretation is also based on the general rule of tort liability under § 823 BGB, and according to the theory, it applies to so-called "damage-prone labour" ("*schadensgeneigte or gefahrengeneigte Arbeit"*), which means potentially dangerous work that leads to causing the damage, and the example with a traffic accident is given above. Because, due to human fallibility, such errors during the performance of work duties can occur "as typical results of such work".[229] Thus, there is also a statutory solution in § 840 Sec. 2[230] of the Civil Code, which prescribes that if the employee is liable for damage caused, they will pay damages alone, although another person is obliged to compensate for the damage according to §§ 831 and 832. However, in practice, it is common that the employer is sued by a third party based on § 278 BGB (*ex contractu*, "from a contract") in addition to § 831 BGB (*ex delicto*, "from a wrong" or "from a transgression").[231] But if the third party decides to sue the employee directly, the employee will then have the right to seek exemption from liability by the employer. This opportunity for the employee can reverse the aforementioned § 840 Sec. 2 BGB, but in the literature, it grants a recourse right to the employer against the employee.[232] Furthermore, the employee can be directly liable if they cause damage with intent (for example, to their colleague); the legal basis for intent alone can be § 826 BGB[233] in addition to the

[225] See the Judgement 19. November 1985 - VI ZR 176/84 - NJW-RR 1986, 383, 384. Cited in Judgement of the Federal Court of Justice, No. 349/88 of 29.11.1988, pp. 4-5.
[226] Judgement of the Federal Court of Justice, No. 349/88 of 29.11.1988, p. 6.
[227] Wacke, Andreas, 1992, p. 370.
[228] Ibid., p. 371.
[229] Ibid., p. 370.
[230] "Ist neben der Person, die nach den Abschnitten 831 und 832 zur Entschädigung für einen von einer anderen Person verursachten Schaden verpflichtet ist, auch die andere Person für den Schaden verantwortlich, so ist in ihrem internen Verhältnis nur die andere Person verpflichtet; im in Abschnitt 829 genannten Fall ist nur die Person mit einer Aufsichtspflicht verpflichtet." ["If, alongside the person who is obliged under Sections 831 and 832 to compensate for damage caused by another person, the other person is also liable for the damage, then, in their internal relationship, only the other person shall be obliged to bear the liability; in the case specified in Sec. 829, only the person under a duty of supervision shall be liable."]. Civil Code, § 840, Sec. 2.
[231] Wacke Andreas, 1992, p. 371.
[232] Ibid., p. 371.
[233] Giesen (2001), p. 125-127. Cited in Karsini Vanessa Soerjaman, 2013, Employers' liability for damage caused by his employee, A comparative study: Germany and the Netherlands, University of Tilburg, pp. 42-43; § 826 BGB reads as follows: "Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen Menschen vorsätzlich Schaden zufügt, ist diesem gegenüber zur Zahlung von Schadensersatz verpflichtet." ["A person who

aforementioned § 823 BGB, which refers to both negligence and intention.[234] There are also situations when both the employer and the employee are jointly and severally liable.[235] The injured party may opt as to who to claim damages from. If the claim is addressed against the employee, they have a right of recourse against the employer, but that right is limited to the extent of liability. The same applies to the employer if the claim is addressed against them, and their right of recourse is limited to the extent of the employee's liability.[236] The principle of internal damage settlement (*innerbetrieblicher Schadensausgleich*) applies to mutual claims between the employer and the employee.[237]

1.2 Liability of a Legal Person for Damage Caused by its Organ

This type of liability is not within the scope of the vicarious liability under § 831 BGB.[238] Namely, if the employer is a legal person, § 31 applies.[239] It envisages the legal person's liability for the acts of its organs and representatives (persons who are given the authority to act without being an organ). Since they are unable to act independently, legal persons rely on their organs to act on their behalf in compliance with their articles of incorporation; thus, the liability of legal persons for the actions of their organs is a necessary and reasonable consequence in this event.[240] This rule formally establishes liability for the legal person's own actions, rather than for the conduct of others; however, the outcome remains the same. The case law has further expanded the scope of this provision to include persons in managerial roles, for example, branch directors and heads of departments.[241]

However, § 31 is not a direct legal source for a claim for compensation for damage.[242]

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intentionally causes damage to another in a manner contrary to public policy and accepted standards of morality shall be liable to pay damages to the injured party."]

[234] Karsini Vanessa Soerjaman, 2013, p. 42.

[235] von Ira Schelp, 2003, "Die Haftungsbelastung des Arbeitnehmers bei Schädigung Dritter, eine rechtsvergleichende Untersuchung, mit dem Regelungsentwurf für ein europäisches Modellgesetz" ["Employee Liability for Damage to Third Parties: A Comparative Legal Analysis with the Draft of a European Model Law"], Juristische Fakultät der Humboldt-Universität zu Berlin, p. 18.

[236] "Statt aller: Busemann, Die Haftung des Arbeitnehmers gegenüber dem Arbeitgeber und Dritten, Rn. 82." Cited in von Ira Schelp, 2003, p. 18.

[237] Kötz/Wagner, Deliktsrecht, 304. 299. Cited in von Ira Schelp, 2003, p. 18.

[238] Gerald Spindler, Oliver Rieckers, 2019, p. 74.

[239] Cees van Dam, 2013, p. 503.

[240] Gerald Spindler, Oliver Rieckers, 2019, p. 74.

[241] Cees van Dam, 2013, p. 504.

[242] For more details, see The Decisions of the Federal Court of Justice in Civil Matters (BGHZ) 99, 298, 302. Cited in Gerald Spindler, Oliver Rieckers, 2019, pp. 74-75.

It stipulates that actions attributable to a legal person must be carried out by its organ or a duly appointed authorised representative. While the law defines who the organs of a legal person are, the concept of a "duly appointed representative" requires further explanation. They include representatives whose roles are outlined in the organs' governing documents, such as the articles of association. However, the Federal Supreme Court has adopted a broader interpretation. It considers that this rule includes persons who, based on internal rules, act with personal liability and perform key functions on behalf of the legal person and represent it.[243] However, there was a case that pertained to the personal liability of an executive officer (*Geschäftsführer*) who sold a vehicle that was not owned by the limited liability company (*GmbH*). According to the Federal Court of Justice (*BGH*) interpretation of § 31 of the Civil Code, this paragraph does not exclude the personal liability of the executive officer. Namely, an executive officer is personally liable for causing damage through an unlawful act. In this case, the legal person was not the owner of the vehicle, which belonged to the plaintiff, and did not have the authority to dispose of it. Despite that fact, the executive officer made the decision to sell the vehicle. This case was remanded to the Court of Appeal, and the Federal Court of Justice highlighted that the executive officer may be personally liable for a business decision falling within the scope of his organisational duties as an executive officer.[244]

In addition, there are some tasks that cannot be performed by the organs of a legal person; thus, according to the standpoint of the case law, legal persons are held liable if they fail to appoint a special representative to carry out those tasks.[245] They do not need a legal authorisation to represent the legal person.[246]

This interpretation relies on § 31, which prescribes the liability for the appointed representative, in order to avoid the application of §831, Sec. 1, which could otherwise be used to avoid strict liability. This is done by waiving the possibility of exculpation from liability based on § 831, Sec. 1.[247]

Based on § 31 (similarly to § 831), the precondition for the liability is that the organ or another duly appointed representative must act in the performance of the assigned functions. It means

[243] Oliver Rieckers, 2019, p. 75.
[244] Bundesgerichtshof Urt. v. 12.03.1996, Az.: VI ZR 90/95 [Judgment of the Federal Court of Justice VI ZR 90/95 of 12 March 1996]. nwalt24.de/urteile/bgh/1996-03-12/vi-zr-90_95?utm
[245] Ibid.
[246] BGHZ 49, 19, 21. Cited in Oliver Rieckers, 2019, p. 75.
[247] RGZ 157, 228, 235; BGHZ 24, 200, 213; BGH, NJW1980, 2810, 2811; Part II, Ch. 1, §§ 1, 2. Cited in Oliver Rieckers, 2019, p. 75.

that a material link must exist between the conduct and the function performed by the organ or the representative.[248]

1.3 State Liability for Damage Caused by Civil Servants

Under German law, although there is a two-track system for public bodies' liability, or authority liability (*Staatshaftung* – state liability), which is regulated in a complicated way, it is regarded as a matter of tort law, not public law.[249] At the beginning, a distinction has to be made between the civil servant's personal liability and the liability of the public authority or the state for their servants, and "between lawful and unlawful acts of state servants or public authorities".[250] The state can be held liable for both lawful and unlawful acts under different conditions (liability for lawful actions is however an exception).[251]

Regarding unlawful acts, the liability may stem from a variety of sources. Based on to § 839 BGB, it is founded on the personal liability of the civil servants (*Beamtenhaftung*). It applies in both situations, when civil servants act in the public (*acta iure imperii*) or private (*acta iure gestionis*) domain of state activities.[252] For the latter case (domain of state private activities), the general provisions of §§ 31, 278, and 831 BGB are also applied, concerning liability for employees' acts.[253]

Lastly, when the State is liable for the unlawful acts of its servants in the public field, of state activities Art. 34 the German Constitution/Basic Law (*Grundgesetz*) regulates this situation and substitutes the servant's personal liability with state liability.[254]

Namely, the German Constitution in Art. 34 stipulates as follows: "If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him or her. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual civil servant shall

[248] BGHZ 49, 19, 23; BGHZ 98, 148, 151. Cited in Oliver Rieckers, 2019, p. 75.
[249] Cees van Dam, 2013, p. 532; Ulrich Magnus in Ken Oliphant (ed), 2017, *The Liability of Public Authorities in Comparative Perspective,* Intersentia, p. 177.
[250] Ulrich Magnus, 2017, p. 177-178.
[251] Ibid., p. 178.
[252] Ibid., p. 178.
[253] Ibid., p. 178.
[254] Ibid., p. 178.

be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity".[255]

Intent and gross negligence were general limits of the employee's liability according to the legal scholar Denecke, and his standpoint explained and justified the application of this general norm (Art. 34 of the Constitution) also to the employees of the private sector, although verbatim its rules apply to the public sector.[256]

This provision contains different models of liability for wrongful acts by the state (liability for wrongful state acts falls into four categories): 1) the personal liability of a public official acting on behalf of the state, 2) the state's direct liability for wrongful acts by its civil servants (*Staatshaftung*), 3) derived liability, where the official's liability is shifted to the state (*Amtshaftung*), and 4) shared liability between the state and the public official.[257]

As mentioned at the beginning, this issue falls under tort law, specifically § 839 BGB. This law came into effect on January 1, 1900, before the Basic Law, and sets out the conditions under which a public official may be held liable for breaching official duties.[258]

Actually, the liability of public authorities is based on a combination of § 839 BGB and Art. 34 of the Basic Law (*Grundgesetz*). Under § 839, a public official (civil servant) can be held personally liable for damage caused by breaching official duties. However, Art. 34 transfers that liability to the state as long as the civil servant used their sovereign authority. Essentially, this means the state is generally liable to the injured party.[259]

Namely, in line with § 839 Sec. 1 BGB, a civil servant who intentionally or negligently breaches an official duty incumbent upon him/her against a third party is obliged to compensate the third party for the damage caused. However, if he or she acted only negligently, liability

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[255] Art. 34 [titled: "Liability for violation of official duty"], Basic Law for the Federal Republic of Germany [*Grundgesetz*; GG] "in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 22 March 2025 (Federal Law Gazette 2025 I, No. 94)." englisch_gg/englisch_gg.html, accessed 24.04.2025.

[256] Dieter Gaul, 1964, "Die Haftung des Arbeitnehmers bei schadengeneigter Arbeit in Literatur und Rechtsprechung" ["Employee Liability for Damage in Hazardous Work: Legal Scholarship and Case Law"] *Arbeit und Recht*, Vol. 12, No. 9, p. 261.

[257] H Maurer and C Waldhoff, Allgemeines Verwaltungsrecht (19th edn, CH Beck 2017) § 26 para 1, cited in Ferdinand Wollenschläger and Johannes Stapf, *Tort liability of public authorities in European laws,* Giacinto Della Cananea and Roberto Caranta (Eds), Oxford University Press, 2020, p. 50.

[258] Ferdinand Wollenschläger and Johannes Stapf, 2020, p. 50.

[259] Cees van Dam, 2013, p. 540.

arises only if the injured party cannot obtain compensation from other sources, such as social security or private insurance.[260]

Furthermore, § 839 Sec. 2 stipulates that a civil servant is not liable for damage caused by a breach of duty committed while delivering a judgment in court, unless the breach is subject to criminal penalties.[261]

In addition, Sec. 3 adds that the right to compensation does not arise if the injured party intentionally or negligently failed to prevent the damage by using an available legal remedy.[262]

This means that the injured party is required to file an administrative appeal or a complaint with another public agency before bringing an action for damages against the public authorities.[263]

Damage compensation is excluded if the injured party does not appeal the administrative decision itself.[264]

While § 839 BGB limits liability in some respects, it also extends beyond general tort law, for instance, by allowing compensation for pure economic loss, falling outside the scope of § 826 BGB. However, the injured party can only claim material compensation; compensation for non-material damage is generally not available.[265]

In addition to proving that there was a breach of an official duty and the public official's fault, the injured party must also demonstrate that "the duty was owed to him as an individual and that the damage falls within the protective ambit of the violated duty".[266] For example, the courts have rejected individual claims based on legislative injustice, as such duties are typically meant to serve the public order as a whole rather than specific individuals.[267]

However, § 839 BGB was old-fashioned because there were limitations regarding the possibility of the injured party claiming damages as aforementioned. Thus, the lawmaker found the solution in a new law (*lex specialis*) - the Act on Governmental Liability

[260] § 839 Sec. 1 of BGB.
[261] § 839 Sec. 2 of BGB.
[262] §839 Sec. 3 of BGB.
[263] Ferdinand Wollenschläger and Johannes Stapf, 2020, p. 53.
[264] "Morlok (n 22) para 116", cited in Ferdinand Wollenschläger and Johannes Stapf, 2020, p. 53.
[265] Gerald Spindler, Oliver Rieckers, 2019, p. 61.
[266] "BGH, NJW2013, 604, 605; and BGH, VersR2010, 532 et seq.; see also Markesinis, Bell and Jan-ssen, Markesinis's German Law of Torts179 et seq. (5th ed., 2019); and Kümper, DVBl 2013, 1022,1024", cited in Gerald Spindler, Oliver Rieckers, 2019, p. 62.
[267] Gerald Spindler, Oliver Rieckers, 2019, p. 62.

(*Staatshaftungsgesetz*) of 1981.[268] But the opinion of the Federal Constitutional Court was that the federal legislator lacks the competence to regulate this liability of the state, declaring the law unconstitutional.[269] Although jurisdiction in this field of law has explicitly shifted from the states to the federal legislator, no new legislation has yet been enacted.[270]

After 1990, when Germany was reunited, the State Liability Code or Act (*Gesetz zur Regelung der Staatshaftung in der Deutschen Demokratischen Republik* - East German Public Authority Liability Act of 12 May 1969, GBl I 34), as well as amendments by the Act of 14 December 1988 (*Gesetzblatt 1988 I 329*) which existed in the former East Germany (in the former German Democratic Republic, GDR), were incorporated "into the law of the new eastern *Länder*".[271] It stipulates that, regardless of the civil servant's fault, the State is directly liable for damage caused by its unlawful acts.[272] Today, the law of Brandenburg, Saxony-Anhalt, and Thuringia contains in traces the rules of this code. However, its overall significance is limited. In Saxony-Anhalt, the provisions have been confined to claims regarding property rights infringements, permitting only "appropriate compensation."[273] Moreover, in Brandenburg and Thuringia, both procedural and substantive modifications have been implemented, resulting in the courts beginning to interpret the otherwise broad provisions in a narrow sense.[274]

In addition, from a historical perspective, the state was not held liable for damage caused by its civil servants to third parties until the nineteenth century.[275] At that time, prevailing was the mandate contract theory (*Mandatsvertragstheorie*) according to which only the civil servant (*Beamter*) was liable for a wrongdoing, but not the state which hired him, while female civil servants were not hired at that time.[276] However, in 1794, when the Common Prussian Land Law, ALR (*Allgemeines Preussisches Landrecht*), was enacted, according to which the State had a duty to compensate the injured party whose rights were sacrificed for the benefit of the

[268] Ibid., p. 62.
[269] "Cf. BVerfGE 61, 149." Cited in Gerald Spindler, Oliver Rieckers, 2019, p. 62.
[270] Gerald Spindler, Oliver Rieckers, 2019, p. 62.
[271] "Anlage II (chapter III, topic B: Bürgerliches Recht, section III) of the unification treaty; see Gesetz zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertragsgesetz—und der Vereinbarung vom 18. September 1990 of 23 September 1990, BGBl II 885, 1168." Cited in Ferdinand Wollenschläger and Johannes Stapf 2020, p. 52; Ulrich Magnus, 2017, p. 178.
[272] Ulrich Magnus, 2017, p. 178.
[273] "See § 1 para 1 of the Gesetz zur Regelung von Entschädigungsansprüchen im Lande Sachsen-Anhalt in der Fassung der Bekanntmachung vom 1. Januar 1997, GVBl II 17; cf Ossenbühl and Cornils (n 14) 572. The provisions can, therefore, be regarded as more restrictive than the conditions of an 'enteignungsgleicher Eingriff ', cf von Danwitz (n 16) para 137." Cited in Ferdinand Wollenschläger and Johannes Stapf, 2020, p. 52.
[274] Ferdinand Wollenschläger and Johannes Stapf, 2020, p. 52.
[275] Ulrich Magnus, 2017, p. 179.
[276] "§§ 88, 89, II. Teil, 10. Titel ALR". Cited in Ulrich Magnus, 2017, p. 179.

public interest.[277] Thus, from this period originates the standpoint in the literature that the state can be held liable under rules of strict liability because the injured person is considered a "special victim" (*Sonderopfer*) and is entitled to compensation if they suffer a disproportionate burden as a result of a public law measure implemented in the public interest, violating the principle of equality.[278] This "rule only applies to infringements of life, health, bodily integrity, and personal freedom".[279]

In addition, in situations of unlawfully impaired property rights of citizens by the State, the case law developed a right to compensation (*Haftung aus enteignungsgleichem Eingriff* – "liability for an expropriation-like intervention").[280] *Haftung aus Aufopferung or aufopferungsgleichem Eingriff* – "liability for sacrifice or sacrifice-like intervention" applies regarding the unlawfully impaired immaterial rights of citizens by the state.[281] The case law has also developed "a special, so-called *Folgenbeseitigungsanspruch* (claim for removal of consequences) where otherwise consequences of an unlawful State act would still remain".[282] "Finally, the courts established a so-called *sozialrechtlicher Herstellungsanspruch* (claim for restoration of social rights) where wrong advice given by state authorities impaired the claimant's position concerning social security rights."[283]

Regarding state liability for damage caused by lawful acts, those are expropriation based on Art. 14 of the Basic Law (Constitution) when citizens have the right to compensation and "in certain cases where the claimant was obliged to bear a special burden or sacrifice in the public interest that others did not have to bear (*Aufopferung and aufopferungsgleicher Eingriff* – sacrifice and sacrifice-like intervention)".[284]

[277] Ibid., p. 179.
[278] "Münchener Kommentar-Papier, 2009, § 839 N 57". Cited in Cees van Dam, 2013, p. 540.
[279] Cees van Dam, 2013, p. 540.
[280] Ulrich Magnus, 2017, p. 178.
[281] Ibid., p. 178.
[282] Ibid., p. 178.
[283] Ibid., p. 178.
[284] Ibid., p. 179.

1.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

In German law, this topic is regulated in many special laws, which envisage strict liability in case of "operation of railways, road traffic, air traffic, the operation of energy-producing works as far as accidents are caused by the effects of electricity, gases, steam and other liquids used or produced in the process (e.g., in power generators or electricity cables), the operation of mines, the operation of nuclear power plants and the possession of radioactive substances, genetic engineering, the protection of water resources against pollution, the protection of real estate against intromission, the operation of certain factories as far as the pollution of the environment in general is concerned, products put in circulation (so-called *Produkthaftung*), medical preparations, the possession of luxury animals, the protection of real estate from damage caused by certain wild animals (so-called *Wildschadensersatz*) and wildlife hunting."[285] All of the above-listed things and activities potentially represent danger and risk of causing damage. For this reason, strict liability is imposed.[286] Its purpose is to compensate (*gerechter Ausgleich für das Erlaubtsein eines gefährlichen Tuns*).[287] In addition, there is a social benefit of the dangerous activity, and despite a high degree of care by a person conducting these activities, some damage cannot be completely avoided. In legal scholarship, causation (*Gefahrveranlassung*) and control (*Gefahrbeherrschung*) of dangerous things and dangerous activities justify such liability.[288] Another German concept, "*Gefährdungshaftung*" ("liability for endangerment", or "liability based on dangerousness")[289] also gives the justification for strict liability. According to Gerhard Wagner: "the concept of *Gefährdungshaftung* [...] makes the element of attribution explicit in its name: the defendant is liable because he created or controlled a source of danger that poses an increased risk of harm to others".[290] Moreover, Wagner justifies strict liability as a "correlate for the approval of technical risks".[291] According to the standpoint of Helmut Koziol, "that those who derive the benefit should bear the harm".[292] The author emphasises that the same applies to Austrian law, which is the reason why the standpoint of Helmut Koziol as an Austrian law professor (retired

[285] Jörg Fedtke and Ulrich Magnus, 2002, in B.A. Koch and H. Koziol (Eds.), p. 152.
[286] Ibid., pp. 154-155.
[287] W. Fikentscher, 1992, 1319. Cited in Jörg Fedtke and Ulrich Magnus, 2002, p. 156.
[288] K. Larenz/C.-W. Canaris, 604. Cited in Jörg Fedtke and Ulrich Magnus, 2002, p. 156.
[289] Johannes W Flume, 2021, "Strict Liability in Austrian and German Law", *JETL* 2021; 12(3): 205–220, p. 207.
[290] H Koziol, 2012, 6/139 cited in Johannes W Flume, 2021, p. 207.
[291] G Wagner, 2021, 8/8 cited in Johannes W Flume, 2021, pp. 207-208.
[292] Koziol (fn 9) 6/139 cited in Johannes W Flume, 2021, p. 208.

professor at the University of Vienna) is in this German chapter. Thus, the doctrinal foundations of strict liability (*Gefährdungshaftung*) are the same in both countries, Germany and Austria,[293] and the principle of "dangerousness" (*Gefährlichkeit*).[294] This principle was the political reason why the legislator prescribed strict liability by statute. In Austria, the courts developed new case law based on the principle of 'dangerousness'. While in literature, drafting a blanket clause in the German and Austrian Code served as an idea that was not implemented.[295] After these theoretical interpretations, the following part is dedicated to the law in force.

Regarding the operation of railways, from the beginning of this chapter, according to § 1 of the Liability Act (*Haftpflichtgesetz-HPflG*), the operator of a railway or cableway will be liable for damage sustained by an injured party during its operation of a railway or a cableway.[296] The subsequent § 2 of the Liability Act stipulates the liability of the owner of a power line, or pipeline system, or a system for the delivery of energy, such as electricity, gases, vapours, or liquids, for damage caused to a third party.[297]

Regarding damage caused by employees in road traffic accidents, § 7 Sec. 1 of the Road Traffic Act (*Straßenverkehrsgesetz-StVG*) prescribes the general liability of the owner of a motor vehicle for damage sustained by an injured party during its operation. However, Sec. 3 clarifies this rule, stating that even when the vehicle has been entrusted to an employee, the employer remains liable.[298] Similarly, regarding air traffic, the Aviation Act (*Luftverkehrsgesetz – LuftVG*) in §33 prescribes the general liability of the operator of an aircraft for damage sustained by the injured party during its operation. The operator remains liable if they employ a user to operate the aircraft.[299] In addition, § 33 Sec. 1 envisages the application of §§ 44 to 54 regarding the contractual liability to a passenger and the liability of an operator of a military aircraft. If an aircraft used for training persons to become pilots, the person who trains them is liable towards these persons under general statutory rules.[300]

[293] Johannes W Flume, 2021, p. 207.
[294] W Rother, in: Festschrift für Karl Michaelis (1972), BC Steininger, (2007), cited in Johannes W Flume, 2021, p. 208.
[295] Johannes W Flume, 2021, p. 208.
[296] Liability Act of 1978 [Federal Law Gazette I p. 145], last amended 2017 [Federal Law Gazette I p. 2421].
[297] Liability Act, § 2.
[298] Road Traffic Act of 2003 [Federal Law Gazette I, pp. 310, 919], last amended by Art. 1 of the Act of 12 July 2021 [Federal Law Gazette I, p. 3108], Art. 7 Sec. 1 and 3.
[299] Aviation Act of 2007 [Federal Law Gazette I, p. 698], last amended in 2023 Federal Law Gazette 2023 I No. 409, § 33, Sec 1 and 2.
[300] Aviation Act, § 33, Sec 1.

Another example of strict liability is related to the operation of mines. The Federal Mining Act §§ 114, 115, and 116 (*Bundesberggesetz-BbergG*) regulate the liability of the entrepreneur operating the mining operation or the mining permit holder.[301]

Furthermore, the Act on the Peaceful Use of Nuclear Energy and Protection Against Its Dangers (Atomic Law) in § 25 prescribes the strict liability of the operator of a nuclear installation. In addition, there is a statutory solution for a carrier who has assumed liability for the operator by concluding a contract for the operation to be liable instead of them.[302]

The Act on the Regulation of Genetic Engineering (Genetic Engineering Act - *GenTG*) § 32 regulates the liability for damage of the operator of a genetic engineering facility.[303] In addition, there are a lot of special laws in the German legal order prescribing strict liability, but the mentioned are sufficient examples for the purpose of this research.

Finally, the most important question is whether the liable persons can release themselves from liability. The answer lies in traditional defences such as (*höhere Gewalt*) vis major, unavoidable events, the fault of the injured party or a third party, or consent.[304] But it should be highlighted that not all defences are available in strict liability scenarios, and they depend on a case to case basis.[305]

2 Employer's Liability for Damage Caused by an Employee to a Third Party under French Law

2.1 General Considerations

In French civil law, until 2016, Art. 1384, Sec. 5 prescribed the employer's liability for damage caused by the employee to a third party, which relied on the Sec. 1 of the same Art. 1384. It envisaged a general regime of delictual liability for the acts of other persons, or keeping things

[301] Federal Mining Act of 1980 [Federal Law Gazette I p. 1310], last amended 2021 [Federal Law Gazette I, p. 1760], §§§ 114, 115 and 116.
[302] Atomic Act of 1985 [Federal Law Gazette I p. 1565], last amended in 2025 (Federal Law Gazette 2025 I No. 301).
[303] Gesetz zur Regelung der Gentechnik [German Genetic Engineering Act, *Gentechnikgesetz – GenTG]*, Federal Law Gazette 1990 Part I No. 28, with ammendments.
[304] Johannes W Flume, 2021, pp. 213-214.
[305] Ibid., p. 214.

that caused the damage[306], unlike the aforementioned German legal regime, which does not provide for a general liability of another.[307] This rule has been recodified into Art. 1242 Sec. 5 concerning employers or masters (referred to as *maîtres or commettants)* who are liable for the damage caused by their employees or servants (referred to as *domestiques or préposés)* to a third party, "in the functions for which they have been employed" (*dans les fonctions auxquelles ils les ont employés*).[308] If they acted outside of their roles, the employer can release themselves from liability.[309] The negligent injured party's contribution to the occurrence of the damage is the reason for the employer to release themselves from liability, which is, in theory, strict.[310] As a kind of vicarious liability, it provides additional security for the injured party because the other party is economically stronger than the direct tortfeasor.[311]

The rule uses archaic terms "masters" and "servants". Given the evolution of legal and social norms, these terms became obsolete, as the relationship between homeowners and their domestic staff is now classified under the terminology of employer/employee.[312] In addition, the term "principal" is also a translation of the French term *maître*, but the term "employer" employer is more convenient for everyday use because the principal's liability traces back to the time when servants (*domestiques*) lived with their masters. As mentioned previously, this has changed in the meantime.[313]

In fact, the French terms *commettant*[314] and *préposé* are frequently translated incorrectly into English as "employer" and "employee" because Art. 1242 Sec. 5 is not limited solely to the traditional employer-employee relationship.[315] In the French language, "employment relationship" is a translation of *lien de preposition*, but related to Art. 1242 Sec. 5, this syntagma

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[306] Walter van Gerven, Jeremy Lever, and Pierre Larouche, 2000, *Common law of Europe casebooks, Tort law*, Hart Publishing, Oxford and Portland, Oregon, p. 468. It should be noted that a reform of tort law is currently in progress in France. It started with "Catala Viney draft of 2005, after that "Terré draft of 2010", and "preliminary draft law of 2016" when the provision of this subject matter was changed. Furthermore, there was "draft law of 2017" and the final "law proposal of 2020". The idea is to increase the number of articles that refer to tort law. Dimitra Tsiaklagkanou, 2023, p. 243.
[307] Ibid., p. 467.
[308] Art. 1242 alinéa 5 of the new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016. Original version, *Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés*.
[309] Walter van Gerven et al., 2000, p. 500.
[310] Cees van Dam, 2013, p. 506.
[311] Corinne Renault-Brahinsky, *Droit des obligations*, Gualino éditeur, p. 293.
[312] Jonas Knetsch, 2021, *Tort Law in France*, Kluwer Law International BV, The Netherlands, p. 75.
[313] Cees van Dam, 2013, p. 507.
[314] The word 'commettant' has its narrow meaning in contract law, specifically in the contract of commission *(le contract de commission*). François Terrè; Philippe Simler, Yves Lequette, 2002, *Droit civil, Les obligations*, Dalloz, p. 784. Namely, in this contractual representation, the represented party is called 'commettant' while the representing party is 'commissionnaire'. Ph. Didier, 110, cited in François Terrè et al., 2002, p. 179.
[315] Jonas Knetsch, 2021, p. 75.

is beyond its literal meaning.[316] Namely, it encompasses various situations where one person is tasked with completing an assignment on behalf of another, because vicarious liability applies to cases involving neighbours or family members where one may be held liable for the actions of another[317] or a friendly and gratuitous favour to another person.[318] But in order to apply Art. 1242 Sec. 5, the real relationship between employer and employee is required, not a pure appearance of the employer-employee relationship, although an employment agreement is not necessary.[319] This broad interpretation by the court seems not to be correct since, in that event, the basis for liability must be Art. 1240 (old Art. 1382, which was in force until 2016) if someone willingly establishes an appearance of a subordinate relationship.[320]

However, it is evident that the formulation of Art. 1242 Sec. 5 is written generally and gives space to the court for a wide interpretation because "it cannot be disregarded in cases where liability may stem from a contractual obligation in application of the non-cumul rule, since courts also cite the article when dealing with contractual matters:[321] French law recognises a general principle of contractual liability for the acts of auxiliaries"[322], comprising the rule in Art. 1242 Sec. 5.[323]

Another question is whether the employee acts in the "functions for which they have been employed"? In English, the "in the course of employment" phrase is used. In the analysis of its meaning, the task is to find an appropriate test or standard to follow when determining whether an employee inflicted the damage *dans les fonctions* as mentioned above. This has elicited discussion in both jurisdictions (European and common law) because the judges had difficulties establishing with certainty whether an employee is operating within the scope of employment if they take into account only the linguistic meaning of the term. For example, should an employer be considered liable in cases where an employee engages in criminal activity during working hours or in situations where an employee disregards explicit warnings and commits a criminal act? The solution is found in a case-by-case approach recognised by the French court,

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[316] Walter van Gerven et al., 2000, p. 469.
[317] Jonas Knetsch, 2021, p. 75.
[318] Cees van Dam, 2013, p. 506.
[319] Ibid., p. 506.
[320] "Crim. 15 February 1972, D. 1972. 368, JCP 1972. II. 17159, on which see Van Gerven (2000), 490". Cited in Cees van Dam, 2013, p. 507.
[321] "Viney/Jourdain, Les conditions de la responsabilité3 nos 791-2 and 813", cited in Olivier Moréteau in Helmut Koziol (ed), „Basic Questions of Tort Law from a Comparative Perspective, *Jan Sramek Verlag KG Wien*, 2015, p. 77.
[322] This term is also used for the term employee. In Olivier Moréteau, 2015, p. 77.
[323] "Viney/Jourdain, Les conditions de la responsabilité 3 nos 791-2 and 822", cited in Olivier Moréteau, 2015, p. 77.

which seems to be the fairest, similar to the one adopted in the common law system, and such an attitude is applied to the analysis of Art. 1242 Sec. 5 of the Civil Code.[324]

In terms of matters regarding conditions for establishing the employer's liability, the personal fault of the employee is a precondition, in addition to the existence of damage and causation.[325] Thus, these are the conditions stipulated by Arts. 1240 and 1241 (previously Arts. 1382 and 1383).[326] First, the employee should be the employer's *préposé* or *subordonné* who performs work duties for them and is subject to their oversight, guidance, and control.[327]

In that event, the defendant is obliged to prove that the damage was caused by the employee's fault (in French, *préposé's faute*)[328] while any personal misconduct on the part of the employer is not of legal significance.[329] However, the employer can be held liable based on their own fault under Art. 1240, which will be discussed below.[330] From a historical perspective, the irrebuttable presumption of fault of the employer for damage caused by their employee was prescribed in a particular provision of the old Civil Code of 1804 (the Napoleonic Code).[331] The contemporary standpoint of the employer's strict liability, which does not require proof of their fault, originated in the late nineteenth century and was established through case law.[332]

Regarding the employee's fault, despite not being specifically prescribed in Art. 1242 Sec. 5 of the Civil Code, the requirement of fault was unequivocally upheld by the Court of Cassation in 1866 and has been frequently reaffirmed.[333] Therefore, the standard of fault under Art. 1240 of the Civil Code must be used to evaluate the *preposé's* behaviour.[334] However, the majority of legal scholars assert that the relation between the employee's fault and the functions for which they are employed is only relevant for the defences available to the employer.[335]

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[324] Eva Steiner, 2018, *French Law: A Comparative Approach* (2nd edn), Oxford University Press, p. 278.
[325] Cees van Dam, 2013, p. 507.
[326] Walter van Gerven et al., 2000, p. 468.
[327] Suzanne Galand-Carval in J. Spier (ed.), 2003, *Unification of Tort Law: Liability for Damage Caused by Others,* Kluwer Law International, p. 93.
[328] Jonas Knetsch, 2021, p. 78.
[329] Jonas Knetsch, 2021, p. 75.
[330] Ibid., p. 76.
[331] The Code Napoleon (William Benning, 1804), cited in Tsiaklagkanou Dimitra, 2023, "French Tort Law Reform: A Rapprochement to Other Legal Systems?", *Journal of International Business and Law*, pp. 244-245.
[332] Ibid., p. 245.
[333] "Req, 19 February 1866. See more recently Civ 2, 8 April 2004, no. 03-11653". Cited in Jonas Knetsch, 2021, p. 78.
[334] Jonas Knetsch, 2021, p. 78.
[335] Ibid., p. 78.

Furthermore, they strive for the judicial practice to adopt the standpoint that an employee's fault is no longer required as a condition for establishing the employer's liability.[336]

French courts, with rare exceptions, tend to assume a connection between fault and the functions of the employee. It means that the employer must demonstrate that the employee's actions were wholly unrelated to the tasks they were assigned or that there was an abuse of authority.[337]

Case law has established the prerequisites under which the employer can be released from liability: the employee must have acted outside the scope of their assigned duties (*abus de fonctions)*, without authorisation, and for reasons unrelated to the tasks entrusted to them.[338]

Furthermore, the damage must be caused by the employee outside working hours, away from the workplace, and without utilising any equipment or means supplied by the employer.[339]

In theory, in addition to the aforementioned case law, the liability of the employer is strict (the principle of strict liability applies to employers), even though Art. 1242 Sec. 5 of the Civil Code does not explicitly stipulate it. As mentioned, historically, early nineteenth-century century jurisprudence framed this liability in terms of an irrebuttable presumption of fault either in the selection (*culpa in eligendo*) or in the supervision (*culpa in vigilando*) of employees (*préposés)*.[340]

There are decisions in case law (such as Cass. civ., 8 mai 1908, DP 1909.1.130; 7 avr. 1924, DH 1924.373)[341] in which a person, if they did not choose the employee, was not held liable for that employee who acted under their instructions. However, this concept of free choice was later abandoned.[342]

In addition, according to case law, the existence of a relationship of authority and subordination whereby one person gives orders and is therefore liable for another is not so straightforward, because the person giving the orders may merely be an intermediary.[343]

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[336] Viney and Jourdain et al. Cited in Walter van Gerven et al., 2000, p. 468.
[337] Jonas Knetsh, 2021, p. 78.
[338] "Ass. plén. 19 May 1988, D. 1988. 513, comm. Larroumet, Gaz. Pal. 1988, 640, on which see Van Gerven (2000), 501–502 from which the translation is derived", cited in Cees van Dam, 2013, p. 507.
[339] Jonas Knetsch, 2021, p. 79.
[340] Ibid., p. 75.
[341] Cited in François Terrè et al., 2002, p. 784.
[342] Ibid., p. 784.
[343] Ibid., pp.784-785.

However, contemporary legal literature and case law have clarified that vicarious liability relies on strict liability with the aforementioned defences, and force majeure as an additional ground for exemption from liability.[344]

The justification for this strict liability regime is the concept of guarantee. Namely, both the literature and case law emphasise that an innocent third party should not bear the consequences of an employee's financial inability to compensate for damage caused by negligence, particularly when the employer, who benefits from the employee's labour, is in a better position to indemnify such losses. The act of engaging another person's work inherently generates risk, and this should warrant a correspondingly heightened standard of liability, even exceeding that which attaches to one's own direct actions.[345]

Thus, as mentioned previously, the employer can be at fault and liable under Art. 1240 of the Civil Code. Namely, this Article can be applied in addition to Art. 1242 Sec. 5, because the employer could be liable on the grounds of fault; for example, they are at fault because they did not give proper instructions to the employee or failed to supervise them. Furthermore, there are cases which are related to contractual and not to delictual liability.[346]

Another peculiarity is that in cases where the employees negligently cause damage, they are released from liability based on the so-called general "civil immunity" introduced by the French Court of Cassation in the *Costedoat* case.[347] Namely, according to this judgement of the Assembly of the Court of Cassation in France of 25 February 2000, the injured party could not claim damages directly from the employee who negligently caused damage to them and stayed within the limits of their duties.[348] According to the case law, this solution stems from the assurance that the employer is insured against the damage caused by their employees and the insurance company will pay compensation for the damage.[349]

However, in theory, the injured parties may opt from whom to claim damages.[350] When the employer is the defendant, Art. 1242 Sec. 5 applies. The employee can also be a defendant, based on Art. 1240. However, they will not have the right of recourse against the employer,

[344] Jonas Knetsch, 2021, pp. 75-76.
[345] Ibid., p. 76.
[346] Ibid., p. 76.
[347] Ibid., p. 76.
[348] Cass. Plen. Ass. 25 February 2000, No. 97–17.378. and 97.20.152. Cited in Goran Georgijević, 2025, "Civil liability of principal for the acts of agent–a comparison between France and Mauritius", *Anali Pravnog fakulteta u Beogradu*, p. 76.
[349] Goran Georgijević, 2025, p. 76.
[350] Bénac et al. Cited in Walter van Gerven et al., 2000, p. 470.

which is unfair according to many legal scholars because the employee cannot pay the total damages.[351] Furthermore, the claim can be addressed against both, when their liability is joint and several (*in solidum*).[352] However, case law has a standpoint that the employee can be directly sued only for personal fault.[353] The theory of risk (*théorie du risque*) relies on the employee's fault because their fault is important in establishing the employer's liability. Earlier, this theory did not offer reasoning why the personal fault of the employee is the basis for the employer's recourse right against them. Later, according to this theory, the purpose of the risk was to determine who was liable. Basically, there are two subtypes of risk theory, which explain why the employer is liable. The theory of risk-profit, which gives the rationale that the employer is liable because they bear the risk due to their economic benefit from the employee's work for them. Secondly, the theory of risk-authority attributes liability to the employer's authority over the conduct of the employee. Thus, the idea was to make the company liable due to the risk it bears for the actions of the employee on its behalf.[354]

There is a background of liability insurance that requires insurers to pay damages that supports this theory.[355]

2.2 Liability of a Legal Person for Damage Caused by its Organ

The concept of liability of legal persons (*personnes morales*) for their organs emerged in the case law that is as the liability for the acts of their executives.[356] These organs are defined as persons who manifest the legal person's will and act on its behalf (*qui veut et agit en son nom*); thereby, their acts are identified with the legal person.[357]

Namely, a legal person is liable for acts conducted by its organs possessing the authority to make decisions, as well as for acts undertaken in the name of the legal person and on its behalf. Notably, liability may arise even in cases where the organ acts beyond the scope of its

[351] Viney and Jourdain, Schmidt/Larroumet. Cited in Walter van Gerven et al., 2000, p. 470.
[352] Bénac-Schmidt/Larroumet et al. Cited in Walter van Gerven et al., 2000, p. 470.
[353] Ibid, p. 471.
[354] Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, 2011, *Droit Civil, Les obligations*, Defrenois, p. 76.
[355] Paula Giliker, 2018, "Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective", *The Chinese Journal of Comparative Law,* Vol. 6 No. 2 pp. 265-293, p. 283.
[356] Jonas Knetsch, 2021, p. 88.
[357] Terré-Simler-Lequette, 2009, 725; Le Tourneau (2012), 1372: 'La faute commise par un organe de la personne morale, c'est-à-dire par une personne qui veut et agit en son nom, est une faute de la personne morale.' Cited in Cees van Dam, 2013, p. 508.

authority.[358] Furthermore, legal persons are liable for the acts of their appointed representatives. Namely, appointed employees with granted authority (*salarié titulaire d'une délégation de pouvoirs*) are real representatives, and it would not be correct to designate general employees as representatives.[359]

In a significant judgement from 1997, the Cour de cassation adjudicated that an organ or representative cannot be held personally liable if they acted within the scope of their granted authority. In 1993, the same was held for the employee.[360] Generally, the court does not require from the plaintiff to identify the specific person liable for the damage caused.[361]

Furthermore, in addition to the non-contractual liability (*responsabilité délictuelle*), based on Art. 1242, Sec. 5, a legal person can be contractually liable (*responsabilité contractuelle*). That is in situations where a contractual relationship exists between the injured party and the legal person.[362] For example, board members, executive officers, and bankruptcy trustees can cause damage as corporate organs through breaching a contract or law within their authority to represent the legal person.[363] These organs are actually natural persons, so they can also be personally liable for their conduct.[364]

2.3 State Liability for Damage Caused by Civil Servants

In France, the Civil Code does not regulate the state's liability; it is regulated by administrative law.[365] Namely, administrative law (*droit administrative*) and tort law are combined in France's two-track system, with a focus on the former,[366] which will be analysed below.

This system was established in 1790 by Law 16-24, which separated judicial and administrative functions; thus, ordinary courts were forbidden to intervene in public authorities' acts or scrutinise claims brought against their official duties. First, both were liable for such claims.

[358] Le Tourneau (2012),1373. Cited in Cees van Dam, 2013, p. 508.
[359] Le Tourneau (2012), 1365. Cited in Cees van Dam, 2013, p. 508.
[360] Civ. 2e 19 February 1997, Bull. 53; JCP 1997, 4070, 25. Viney, RTD 1998, 688, Jourdain. Cited in Cees van Dam, 2013, p. 508.
[361] Suzanne Galand-Carval, 2003, 294. Cited in Cees van Dam, 2013, p. 508.
[362] Walter van Gerven et al., 2000, p. 473.
[363] Viney and Jourdain, cited in Walter van Gerven et al., 2000, p. 473.
[364] Ibid., p. 473.
[365] Cees van Dam, 2013, p. 533.
[366] Ibid., p. 532.

However, the *Conseil d'Etat* was transformed into an independent body based on a Law of May 24, 1872.[367]

Namely, administrative liability is the result of the application of the separation of powers as a constitutional principle. Therefore, the administrative courts and the State Council (*Conseil d'État*), which is the highest appeal court, have jurisdiction in this subject matter. The distinction between administrative and civil liability emerged as a result of an odd situation regarding the issue of medical negligence as well as the issue of the applicable law to it, because in the concrete case, the main task was to determine whether the patient received treatment at a private clinic or in a state hospital.[368]

In addition, the principle of administrative liability has its foundation in the notable Blanco case, in which the Tribunal of Conflicts (*Tribunal des conflits)* clarified that administrative courts hold jurisdiction over claims for compensation against the state, and which would not be subject to the rules of the Civil Code.[369]

Namely, the government commissioner gave an opinion on this topic (paraphrased): Considering that the state may be held liable for damage caused to private persons by persons employed in its service, such liability cannot be governed by the Civil Code. This liability is not general, and its specific rules, depending on the needs of the public service, should be harmonised with both state and private rights; thus, jurisdiction lies exclusively with the administrative authority.[370]

Thus, this famous French case of Blanco, which is still valid although it is from the nineteenth century, was a turning point in dividing law into "public" and "private".[371]

The case was about a five-year-old girl named Agnès Blanco, who had suffered serious injuries after being struck by a wagon from a Bordeaux state-owned tobacco factory.[372]

Her father, Jean Blanco, lodged a lawsuit before the ordinary court to hold the state liable for the damage sustained by his daughter from a traffic accident caused by a wagon driven by a

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[367] S Braconnier, 2014, 188. Cited in Thomas Perroud, 2020, in Giacinto della Cananea, Roberto Caranta (eds.): *Tort Liability of Public Authorities in European Laws*, Oxford University Press, p. 48.
[368] Ibid., p. 533.
[369] Ibid., p. 533.
[370] Jacqueline Morand-Deviller, 1995, Cours de droit administratif, Cours – Thémes de réflexion Commentaries d'arret avec corrigés, Montchrestien, p. 683.
[371] Bartłomiej Jaworski, 2019, "The case of Blanco: Epoch-making ruling vs. general law doctrine. The public–private divide in historical context", *Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne*, p.9.
[372] Tribunal des Conflits, Les grands arrêts de la jurisprudence administrative, no. 1, 8 February 1873 (Blanco). Cited in Bartłomiej Jaworski, 2019, p. 16.

state employee, citing Arts. 1382, 1383, and 1384 of the French Civil Code. At that time, the Prefect of the Département (*Le Préfet du Département)*[373] represented the state and initiated a conflict of jurisdiction proceeding, asserting that the ordinary courts lacked competence. The Tribunal of Conflicts determined that the provisions of the Civil Code governing the relations between private persons could not be applied by analogy to state liability for damage caused by its civil servants to third parties. The focus is on the public service in order to determine which statute will be applied. The father of the injured girl could not bring the lawsuit before the ordinary court; in this regard, the Prefect of the Département referred to the Civil Code. Furthermore, the state is subject to specific rules, as its liability is neither general nor absolute, but rather varies depending on the needs of the public service, the public interest, and the necessity to harmonise the rights of the state with the rights of private persons.[374]

The court considered that the employees (civil servants), when transporting tobacco by wagon, were conducting a public service. In that event, the administrative court had jurisdiction according to the court's standpoint. Therefore, the Blanco case represents the foundation of administrative law, as it established the principle of state liability for damage caused to a natural person and marked the separation between administrative and civil law.[375] However, many rules of civil law have been incorporated into administrative law, but there are also reverse situations where administrative rules have been transplanted into civil law. This phenomenon is known as the osmosis of private and public law.[376]

In addition, it should be noted that this issue under the French Constitution of 1958 (*Cinquième République*) is not regulated. The reason was that the Council of State (*Conseil d'Etat*) developed French administrative law, but the principles regarding compensation were established by the Constitutional Council (*Conseil Constitutionnel*).[377] In addition, it controls the law passed by this branch of law by using other mechanisms, while the Conseil d'Etat defines it (state liability).[378]

[373] It was about *le préfet du département de la Gironde*. See *Tribunal des conflits, du 8 février 1873, 00012, publié au recueil Lebon*, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007605886/
[374] Bartłomiej Jaworski, 2019, p. 16.
[375] Ibid., pp. 16-17.
[376] E. Huisman, 1987, pp. 273–372. Cited in Bartłomiej Jaworski, 2019, p. 17.
[377] Thomas Perroud, 2020, p. 46.
[378] Ibid., p. 47.

2.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Once again, this issue falls under the general regime of delictual liability for the act of keeping the things that caused the damage, according to Art. 1242, Sec. 1 of the Civil Code. The injured party does not have to prove that the thing was defective or dangerous, nor that the thing was guided by a human.[379] The Court of Cassation interpreted this article in a way that the presumption of liability for damage caused by a thing under the control of a person can be rebutted only if a force majeure, an external cause, or a *casus* not attributable to that person is proven. Proving that the person committed no fault is not sufficient.[380] Namely, the facts of the case were that a truck driven by an employee, which was owned by a legal person, *Aux Galeries Belfortaises*, hit a child on the street. The court of first instance assessed that the injured party had to prove the fault of the truck driver according to Art. 1242, Sec. 1 of the Civil Code (former Art. 1384, Sec. 1) and did not apply this provision because it was not applicable to a moving truck driven by a person, in this case an employee (a driver), unless there was a defect in the vehicle. However, the court of second instance held the standpoint that this provision does not distinguish whether the thing by which the damage was caused was set in motion by a human hand or not. Furthermore, the thing doesn't need to have a defect, since this article concerns liability for the control of the thing (keeping the thing) rather than the thing itself. Thus, the Court of Cassation quashed the impugned judgment on the aforementioned grounds.[381] In the old literature, the same standpoint was held. Raymond Saleilles and Louis Josserand interpreted this provision to mean that anyone who cares for things is liable for damage caused by those things, regardless of fault.[382] Solely the law is the basis of this liability.[383] The author deliberately analysed older case law and literature in this case, as the early twentieth century marked the transition from fault-based to strict liability when it came to the liability for dangerous things and dangerous activities.

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[379] Suzanne Galand-Carval in B.A. Koch and H. Koziol (Eds.), 2002, *Unification of Tort Law: Strict Liability*, Kluwer Law International, p. 132.
[380] „Cour de Cassation, Chambres réunies, du 13 février 1930, Publié au bulletin, Décision attaquée : Cour d'appel Lyon 1927-07-07, du 07 juillet 1927“. Decision of the Court of Cassation in France of 7 July 1927, published in the Bulletin ARRETS Cour de Cassation Chambres réunies N. 34 p. 68. https://www.legifrance.gouv.fr/juri/id/JURITEXT000006952821/
[381] Ibid.
[382] P. B. Mignault, 1910, “The Modern Conception of Civil Responsibility”, *Journal of the Society of Comparative Legislation*, Vol. 11, No. 1, pp. 102-113, Cambridge University Press on behalf of the British Institute of International and Comparative Law, p. 105.
[383] Ibid, p. 105.

In addition, particular special laws envisage liability for damage caused by special groups of things.[384] Regarding this topic, the most important act until 2010 was *Code de l'aviation civile* (aircraft).[385] Art. L.141–2 prescribed that the strict liability of the operator of an aircraft emerges for damage caused by the aircraft (its movement and things inside the aircraft).[386] Now it is *Code des transports* Art. L6131-2.[387] Similar liability is prescribed in Art. 6 *Loi du 8 août* 1941 for the operator of a cable car.[388]

Concerning the imposition of strict liability on the state and other public authorities for damage caused by dangerous things, the main role in developing that rule was played by the French administrative court, the *Conseil d'État*.[389] The first time such liability was adjudicated was when an explosion at an ammunition depot[390] caused damage. Later, this rule was applied to other situations, such as when police officer or soldier accidentally injured someone with a firearm,[391] or when damage occurred due to dangerous public installations.[392] As far as dangerous activities are concerned, for example, *Loi du 5 juillet* 1985 is the basic special act that regulates compensation for victims of road traffic accidents.[393] Another special law is *Loi* n° 68-943 du 30 octobre 1968 which regulates civil liability for damage arising in the field of nuclear energy.[394] Furthermore, until 2000, the Code de la santé publique was about public health, the healthcare system, medical ethics, patient protection, and medical research.[395] Now

[384] Suzanne Galand-Carval, 2002, p. 133.
[385] According to Art. L.141–2 Code de l'aviation civile, since repealed.
[386] Ibid.
[387] "L'exploitant d'un aéronef est responsable de plein droit des dommages causés par les évolutions de l'aéronef ou les objets qui s'en détachent aux personnes et aux biens à la surface.
La responsabilité de l'exploitant ne peut être atténuée ou écartée que par la preuve de la faute de la victime."
["The operator of an aircraft shall be liable, irrespective of fault, for damage caused to persons and property on the surface by the movements of the aircraft or by objects detached from it. The operator's liability may be mitigated or excluded only if the fault of the victim is established."], Art. L6131-2.
[388] Art. 6 of the Act of 8 July 1941 (still in force) establishes strict liability of the operator of a cableway.
[389] Suzanne Galand-Carval, 2002, p. 133.
[390] E, 28 March 1919, Regnault-Desroziers, [1919] Revue de droit public (RDP), 239 et seq. Cited in Suzanne Galand-Carval, 2002, p. 133.
[391] E, 24 June 1949, Franquette et Daramy, [1949] RDP, 583 et seq. Cited in Suzanne Galand-Carval, 2002, p. 133.
[392] E, 25 January 1929, Soc. du gaz de Beauvais, [1929] D.3,35. Cited in Suzanne Galand-Carval, 2002, p. 133.
[393] Loi n° 85-677 du 5 juillet 1985 "tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation" ["Act No. 85-677 of 5 July 1985 aimed at improving the legal position of victims of road traffic accidents and accelerating compensation procedures."]. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000693454/ (Access 09.03.2026.) This act is known as the 'Badinter Law' (Robert Badinter, who served as Minister of Justice from 1981 to 1986, initiated this act).
[394] Loi n° 68-943 du 30 octobre 1968 "relative à la responsabilité civile dans le domaine de l'énergie nucléaire."
["Act No. 68-943 of 30 October 1968 relating to civil liability in the field of nuclear energy."]
[395] since repealed.

it is *Loi* n° 2012-300 du 5 mars 2012.[396] In addition, according to Art. L. 1222-9 of the *Code de la santé publique*, blood agencies are strictly liable for injuries sustained by blood donors.[397]

3 Employer's Liability for Damage Caused by an Employee to a Third Party under Austrian Law

3.1 General Considerations

Under Austrian law, §§ 1313a to 1316 of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, abbreviated as ABGB) prescribe the circumstances under which the employer is liable for damage caused by their employee to a third party.[398] Primarily, this liability is vicarious, meaning that the employer, as the defendant, is liable for the acts carried out by their assistants while performing work duties. It is important to emphasise that the employer's own conduct does not need to be wrongful for liability to arise, and these cases are common in working organisations.[399] The employee is engaged as an assistant in the performance of work duties (*Besorgungsgehilfen*) by the employer, whose liability is an exception from the principle incorporated in § 313 of the ABGB.[400] This principle stipulates that no one is liable for the acts of others without their own participation in those acts, except if the statute stipulates otherwise. If that is the case, the recourse right remains as a legal remedy against that person who is liable.[401]

In addition, § 1315 foresees the vicarious liability of anyone who engages an incompetent person or a potentially dangerous person for conducting their activities, for damage caused by those persons.[402] In legal theory, the liability is strict when the person is incompetent, while

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[396] Act No. 2012-300 of 5 March 2012, Journal officiel *"Lois et Décrets*".
[397] Code de la santé publique [French Public Health Code]
[398] General Civil Code for all German hereditary lands of the Austrian Monarchy StF: JGS No. 946/1811, with all amendments up to today: last update: BGBl. I Nr. 33/2024 (NR: GP XXVII RV 2462 AB 2481 S. 257. BR: AB 11461 S. 965.). § 1313. a to 1316 .
[399] Ferdinand Kerschner & Erika Wagner, 2015, p. 112.
[400] Sandra Laleta, 2006, p. 1022.
[401] ABGB, § 1313. "Für fremde, widerrechtliche Handlungen, woran jemand keinen Theil genommen hat, ist er in der Regel auch nicht verantwortlich. Selbst in den Fällen, wo die Gesetze das Gegentheil anordnen, bleibt ihm der Rückersatz gegen den Schuldtragenden vorbehalten." ["As a general rule, no one is liable for the unlawful acts of another in which they did not participate. Even in cases where the law provides otherwise, they retain a right of recourse against the person responsible for the wrongful act"].
[402] ABGB, § 1315. "Überhaupt haftet derjenige, welcher sich einer untüchtigen oder wissentlich einer gefährlichen Person zur Besorgung seiner Angelegenheiten bedient, für den Schaden, den sie in dieser Eigenschaft einem Dritten zufügt." ["A person is liable for damage caused to a third party by an incompetent person whom they have

fault-based liability is attributed to the principal who is aware that the engaged person acts in a dangerous way.[403]

The legal literature emphasises that strict liability also stems from § 1313a ABGB.[404] According to this provision, the master's liability is strict for the acts of their servants in performing the contract (the terms master and servant are also used instead of the notions of principal and assistant in the literature).[405] The fault of the assistant (*Erfüllungsgehilfen*) is a precondition for the principal's liability, while the principal's fault is not legally relevant because the assistant's fault is considered as the principal's own fault.[406] For this reason is their liability considered strict in legal theory, as mentioned, in addition to the standpoint that the liability based on this § 1313.a is contractual, although it is in the domain of vicarious liability.[407] The answer lies in the fact that a principal in a contractual setting is generally liable for the unlawful acts of their assistants who are hired to perform the contract.[408] Since assistants are not a contracting party in this contractual relationship between the principal and the contractual partner, the latter could lose their right to claim damages if this liability were not vicarious.[409]

The following case describes this situation. It relates to medical malpractice, where the patient and the hospital are the sole contracting parties, while the hospital's staff fall outside the contractual relationship.[410] Based on this, they are outside the medical treatment contract and are liable according to the rules of the law of delicts. By contrast, the rules of contractual liability apply to the contracting parties.[411] However, regarding the legal relationship between the doctor and the patient, it is considered contractual.[412]

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entrusted with the conduct of their affairs, or by a person whom they knowingly knew to be dangerous, when acting in that capacity."].

[403] Sandra Laleta, 2006, p. 1022.

[404] Bernhard Burtscher and Martin Spitzer, 2021, p. 88.

[405] Ibid.

[406] ABGB, § 1313. a. "Wer einem andern zu einer Leistung verpflichtet ist, haftet ihm für das Verschulden seines gesetzlichen Vertreters sowie der Personen, deren er sich zur Erfüllung bedient, wie für sein eigenes". ["A person who owes performance to another is liable for the fault of their legal representative and of any person engaged to perform the obligation, as if the fault were their own."], Similar, Bernhard Burtscher and Martin Spitzer 2021, p. 88.

[407] Bernhard Burtscher and Martin Spitzer in Ernst Karner (ed), 2021, *Tortious and Contractual Liability*, Wien 2021, Jan Sramek Verlag KG, pp. 87-88.

[408] Bydlinski (fn 46) 206ff; A Ehrenzweig, (1928) 295; HP Westermann 2017, § 278 no 1; M Wilburg, 1930, 641, 649. 125 Koziol (fn 108) no 6/106. Cited in Bernhard Burtscher and Martin Spitzer, 2021, p. 88.

[409] Bernhard Burtscher and Martin Spitzer, 2021, p. 88.

[410] Bernhard A. Koch, 2003, "Austrian Cases on Medical Liability", *European Journal of Health Law*, June 2003, Vol. 10, No. 2 (June 2003), Brill, pp. 91-114, p. 91.

[411] Ibid., p. 91.

[412] W. Holzer, 1992, p. 1 (pp. 18-19); D. Engljähringer, (1996), pp. 17... Bernhard A. Koch, 2003, p. 92.

Following this approach and the theoretical interpretation of the application of § 1313a ABGB (*ex contractus*), some scholars, such as Andreas Kletečka,[413] draw a clear line between §1313a ABGB, which is primarily interpreted as a rule of contractual liability, and § 1315 ABGB, regulating torts, because they consider the tortfeasor and the injured party to be in an equal position.

This approach is also supported by Martin Karollus,[414] although he noted that there are cases when the assistant is exempt from liability, their conduct is then attributed to the principal.[415]

In case law, the patient usually brings a claim based on the rules of contractual liability rather than the rules of non-contractual liability.[416]

The conditions for establishing liability under § 1313a ABGB are the existence of a special legal relationship (obligation) between the principal and the third party, and the damage caused by the assistant (*Erfüllungsgehilfen*) in the course of fulfilling that special obligation.[417]

Having regard to the medical malpractice, in addition to the two previous conditions, which pertain to contractual liability, the injured party has to prove the requirements that stem from tort liability: causation, wrongfulness, and fault.[418]

Concerning causation, the plaintiff must prove that their injuries were caused by the defendant, in this case, the doctor's acts or omissions.[419] According to case law, it is sufficient that the doctor did not act as necessary in the given circumstances.[420] Namely, it is common in tort law that a connection between the tortfeasor and the damage must exist in order to establish their liability.[421] This is in line with the general rules of tort law incorporated in § 1294 and § 1295

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[413] Mitverschulden 28ff. Zustimmend F. Bydlinski, Zur Haftung der Dienstlei- stungsberufe in Österreich und nach dem EG-Richtlinienvorschlag. JBI 1992,347: Grassl- Palten, Gehilfenmitverschulden, Fremdversicherung und anderes, JBI 1992, 505 ff. Cited in Helmut Koziol, 1997, Österreichisches Haftpflichtrecht, Vienna: Manz, p. 402.
[414] ÖJZ 1994, 257. Cited in Helmut Koziol, 1997, p. 402.
[415] Helmut Koziol, 1997, p. 402.
[416] Bernhard A. Koch, 2003, p. 92.
[417] Ferdinand Kerschner & Erika Wagner, 2015, p. 113.
[418] Bernhard A. Koch, 2003, pp. 92-94.
[419] Ibid., p. 92.
[420] OGH Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen (SZ) 62/53; SZ 63/90; Juristische Blätter (JB1) 1993, 316; JB11994, 540 (cmt. by R. Bollenberger); SZ 67/9 = JB11995, 245 = Recht der Medizin (RdM) 1994/25 (cmt. by C. Kopetzki); JB11995, 453 (cmt. by J.Steiner) = RdM 1995/15 (cmt. by C. Kopetzki); SZ68/207 = JBl 1996, 181 = RdM 1996/7; JB11999, 246 (cmt. by C. Bumberger) = RdM 1999/1. Cited in Bernhard A. Koch, 2003, p. 92.
[421] Helmut Koziol in J. Spier (ed.), 1998, *Unification of tort law: Causation*, The Hague: Kluwer Law International, p. 11.

ABGB.[422] The direct tortfeasor *Beschädiger* is obliged to compensate for the damage attributable (*zugefügt*) to him or her.[423]

However, in situations of vicarious liability, the damage is not caused directly by the principal, but it is caused in the sphere of their activities.[424] The main issue in this regard is attributing damage, and the theory of causation answers it.[425] However, under the *Äquivalenztheorie* (theory of equivalence), which prevails, every fact which is a cause of the damage is considered causal.[426]

There are two exceptions: the first relates to a situation when multiple causes lead to the damage and joint and several liability applies.[427] The second is the situation when there is no causation, in which case the liability cannot be established, and the tortfeasor is not obliged to pay compensation.[428]

§ 1294 ABGB foresees the requirement of unlawfulness, or wrongfulness.[429] According to this provision, an unlawful act or omission can cause damage in addition to coincidence (accident). Fault involves unlawful behaviour.[430]

Based on the following § 1295 Sec. 2 ABGB unlawful behaviour means acting *contra bonos mores*.[431]

Both § 1294 and § 1295 ABGB are relevant for the employer's liability for damage caused by employees in light of their earlier interpretation in legal literature and case law. Namely, under Austrian law, according to the earlier literature, the general rules of the law of obligations incorporated in the ABGB applied to the issue of the employee's liability for damage caused either to the employer or a third party.[432]

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[422] General Civil Code [ABGB], § 1294 and § 1295.
[423] Helmut Koziol, 1994, p. 11.
[424] Cf. R. Bienenfeld,Die Haftung ohne Verschulden (1933) pp. 119 et seq. Cited in Helmut Koziol, 1998, p. 11.
[425] Helmut Koziol, 1994, p. 11.
[426] H. Koziol, 1997, cited in Helmut Koziol, 1994, p. 11.
[427] F. Bydlinski, pp. 16-17. Cited in Helmut Koziol, 1994, p. 14.
[428] Helmut Koziol, 1994, p. 11.
[429] Helmut Koziol in Helmut Koziol (ed.), 1998, *Unification of tort law: Wrongfulness*, The Hague: Kluwer Law International, p. 11.
[430] Ibid., p. 11.
[431] Ibid., p. 15.
[432] Koziol, Helmut, Österreichisches… 1975, p. 161. Konowalczyk, Thomas, Sauer, Stefan, Arbeitnehmerhaftung… 1995, 383. Cited in Sandra Laleta, 2006, "Neka pitanja odgovornosti za štetu koju prouzroči posloprimac"...*Zb. Prav. fak. Sveuč. Rij*. (1991) v. 27, br. 2, 1005-1031 (2006), pp. 1005-1006.

That interpretation was based on § 1295 Sec. 1[433], which prescribes the right of every person to claim damages from a tortfeasor who is at fault for the damage caused. In addition, liability may arise from either a contract or a tort.[434] Fault is a requirement of liability which is based on *iustitia commutativa*.[435] However, case law demonstrated prior to and around 1956 (earlier in the twentieth century) that applying this provision would place the employee in an unfavourable position if they were held liable for every degree of fault.[436] The same view is supported in the literature, especially because the employer bears the risk for commercial success, and based on this, it would be unjust for the employee to bear the consequences of a claim for damages.[437] These were the reasons for enacting, in addition to the ABGB, the Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*) of 31 March 1965, in order to limit employees' liability.[438] First, this Act differentiates between direct and indirect damage caused to the employer.[439] In this regard, indirect damage is the subject matter of this research because the employer is an indirectly injured third party in situations when the employee causes damage to a third party by fault in the performance of work duties.[440] It means that the employer is liable in line with the rules of civil law to the third party in that event. However, the injured party may claim damages from the employee, but usually the defendant is the employer because the employee is the economically weaker party, who has, in that event, the right of recourse against the employee.[441] This right is stipulated by § 4. Sec. 1 of the Employees' Liability Act.[442] It foresees the employer's liability for damage caused by the employee to a third party

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[433] "§ 1295. (1) Jedermann ist berechtigt, von dem Beschädiger den Ersatz des Schadens, welchen dieser ihm aus Verschulden zugefügt hat, zu fordern; der Schaden mag durch Übertretung einer Vertragspflicht oder ohne Beziehung auf einen Vertrag verursacht worden sein". ["Everyone is entitled to claim compensation from the person who caused the damage for any loss that the latter has culpably inflicted upon them; the damage may have been caused either by the breach of a contractual obligation or independently of any contractual relationship."]

[434] § 1295. ABGB

[435] F. Bydlinski, 1996. Canaris, 1995, 15-16. Cited in Helmut Koziol in P. Widmer (ed.), 2005, *Unification of tort law: Fault*, The Hague: Kluwer Law International, p. 13.

[436] Schwarz, Walter, Die Haftung des Dienstnehmers, DRdA, 6. Jahr, H. 24 (1956), p. 112. Cited in Sandra Laleta: 2006, p. 1006.

[437] Floretta, Spielbüchler, Strasser, Arbeitsrecht 1998. 208-209.; Fenzl, Friedrich, Einschränkung der…1952. 567. i d.; Schwarz, W., op. cit., p. 112. ; Weinzierl, Johann, Die Beschränkung der Haftung des Arbeitnehmers gegenüber dem Arbeitgeber 1964., p. 1. i d.; Hannak, Karl, 1962., p. 120. Dirschmied, Karl, 1980. p. 115. Cited in Sandra Laleta, 2006, p. 1006.

[438] with all amendments, Bundesgesetz über die Beschränkung der Schadensersatzpflicht des Dienstnehmers was the full title of the statute, (*Bundesgesetzblatt,* Federal Law Gazette BGB1), 1965, No. 80. Cited in Sandra Laleta, 2003, *Odgovornost za štetu koju prouzroči radnik na radu i u vezi s radom trećim osobama (usporedba s Njemačkim, Austrijskim i Europskim pravom*), ["Liability for Damage Caused by an Employee in the Course of Employment and in Connection with Work to Third Parties (A Comparison with German, Austrian, and European Law)", Veleučilište u Rijeci, Pravni fakultet, p. 229.

[439] Nora Melzer, 2023, *Labour law in Austria*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, p. 99.

[440] Ibid., p. 100.

[441] Ibid., pp. 100-101.

[442] Sandra Laleta, p. 232.

at work, grounded on §§ 1313a to 1316 ABGB or another obligation, in which situation the employer has to notify the employee about these circumstances without delay, and the same applies in case of bringing a lawsuit.[443]

Furthermore, Sec. 2 provides that where the employer has compensated a third party for damage, either with the employee's consent or pursuant to a final and binding court decision, the employer shall have a right of recourse against the employee for the amount of compensation paid, including necessary legal and enforcement costs. In cases where the damage was caused by negligence, the court may, on equitable grounds, reduce the compensation or waive it entirely where the negligence was of a lesser degree. In addition, this provision also applies § 2, Sec. 2 regarding the amount of damage.[444]

Thus, only when damage is caused by the employee with the intent to the third party, the employer can recover the full amount of damages. Otherwise, they do not have this right when the damage is caused by the employee with "excusable carelessness" (*entschuldbare Fehlleistung*).[445]

In addition, § 1313 ABGB stipulates the right of redress of the employer.[446] However, when the assistant has the status of an employee of the employer, then the application of previously § 2 *Dienstnehmerhaftpflichtgesetz* (DHG; Employee Liability Act) is required.[447]

Furthermore, it should be noted that in Austria not all employees have a unified labour code, especially since special laws make a difference between different categories of employees, for example, whether an employee is a manual worker or not. The correct legal terms for these categories of employees are white- or blue-collar workers (*Angestellter or Arbeiter*).[448]

Therefore, regarding the blue-collar workers, the most important category is industrial workers (*Gewerbearbeiter, Gewerbearbeiterinnen*).[449]

[443] Employees' Liability Act [*Dienstnehmerhaftpflichtgesetz*], § 4. Sec. 1.
[444] Employees' Liability Act, §4. Sec. 2.
[445] Nora Melzer, 2023, p. 101.
[446] ABGB, §1313 .
[447] Kerschner; Oberhoferin Schwimann (ed.), ABGB § 4 DHG. Cited in Ferdinand Kerschner & Erika Wagner, 2015, p. 114.
[448] Nora Melzer, 2023, p. 79.
[449] Ibid., p. 79.

The Industrial Code of 1859 (*Gewerbeordnung*) applies to **"**qualified craftsmen, assistants, factory workers, apprentices and unskilled workers".[450] Those are blue-collar workers, while white-collar workers (who perform their work duties in offices or do commercial or trading non-manual work) are excluded from this statute.[451] In addition to this category, there are construction workers who are subject to two statutes: the Construction Workers' Holiday and Severance Pay Act (*Bauarbeiter-Urlaubs- und Abfertigungsgesetz*) and the Construction Workers' Bad Weather Compensation Act (*Bauarbeiter-Schlechtwetterentschädigungsgesetz*).[452] Furthermore, there are plenty of special acts that regulate other categories of workers, such as mine workers, agricultural and forestry workers, domestic servants (*Hausgehilfen*), and janitors (*HausbesorgerInnen*). Regarding a group that does not belong to any category, the Civil Code applies.[453] The second category of workers, white-collar workers, is defined by the White-collar Workers Act (*Angestelltengesetz*).[454]

3.2 Liability of a Legal Person for Damage Caused by its Organ

A legal person is liable for damage caused by its organs in the same way as a natural person. It is required that the individual acted in their capacity as an organ. The relevant provisions are the same as in the previous section: §§ 1313a and 1315 ABGB.[455] However, in legal theory,[456] liability is not limited only to the rules of § 1315 ABGB because it also encompasses executive employees or representatives with their own autonomy which makes this standpoint analogous to § 337ABGB (it concerns the German term *Machthaber*, which means a person with decision-making authority).[457]

Namely, in judicial practice, in one case, according to the opinions of the first and second instance courts addressed whether the personal liability of an executive officer of a legal person

[450] Nora Melzer, 2023, p. 79. Similar, Industrial Code 1859 (Gewerbeordnung), RGBl. Nr. 227/1859, RGBl. Nr. 22/1885, StGBl. Nr. 42/1919, BGBl. Nr. 277/1925, BGBl. Nr. 52/1933, BGBl. Nr. 104/1933, BGBl. Nr. 548/1935, BGBl. Nr. 399/1974, BGBl. I Nr. 153/2017. **§** 73
[451] Nora Melzer, 2023, p. 79.
[452] Ibid., p. 80.
[453] Ibid. pp. 80-81.
[454] Bundesgesetz vom 11. Mai 1921 über den Dienstvertrag der Privatangestellten (Angestelltengesetz). StF: BGBl. Nr. 292/1921 with amendments.
[455] Ferdinand Kerschner & Erika Wagner, 2015, p. 114.
[456] Koziol, Haftpflichtrecht 2II 376, Bydlinski, in Götz/Seifert (eds.), Verantwortung in Wirtschaft und Gesellschaft (2000) 21 ff. Apathy, in FS Krejci (2001) I 427. Cited in Ferdinand Kerschner & Erika Wagner, 2015, p. 114.
[457] Ibid., p. 114.

as a legal person's organ was established.[458] The facts of the case were that the defendant was an executive officer of a legal person, "Gastro GmbH," which was a contracting party to a Restaurant Equipment Supply Agreement with the plaintiff. The plaintiff supplied the restaurant equipment under a retention-of-title agreement (*Eigentumsvorbehalt*). After "Gastro GmbH" failed to pay in full, the plaintiff successfully sued for its return in 2012. He subsequently agreed with the defendant's father, an executive officer of the company, that the equipment would be dismantled with the assistance of his helpers.[459] However, the dismantling was carried out in an unprofessional manner, causing damage to the equipment. Accordingly, the plaintiff brought an action against the executive officer seeking damages for the damage sustained. The court of first instance found that the executive officer was personally liable pursuant to § 1313a ABGB, on the ground that she was under a duty to ensure that her assistants (*Gehilfen*) handled the plaintiff's goods with due care.[460] According to the second-instance court, as no contractual relationship existed between the executive officer and her father or his assistants, § 1313a could not be applied in the manner assessed by the court of first instance; instead, the case should have been assessed under § 1315 ABGB because they were not qualified professionals, and the manner in which they caused damage demonstrated that they were habitually unfit (*habituell untüchtig*) for such work.[461] However, as a legal person acts through its organs; therefore, the executive officer cannot be held personally liable for the acts of the legal person; they can be liable only for their own acts[462] (for example, a director is personally liable in cases of intentional damage to creditors, when they commit criminal offences, or if they act for personal interest, etc.). The Supreme Court pointed out that these grounds for personal liability of an executive officer were not applicable in the present case. Namely, the legal person was obliged to return the equipment, not the executive officer. The second-instance court incorrectly held that the defendant (executive officer) had entrusted her father with the dismantling. According to the first-instance findings, there was no such authorisation; therefore, no *Gehilfenverhältnis* under § 1315 ABGB existed, and the defendant was not liable.[463]

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[458] In its judgment No. 15 R 8/16f-49 of 21 March 2016, the Higher Regional Court of Vienna upheld the judgment of the Regional Civil Court of Vienna, No. 9 Cg 48/13i-45 of 26 November 2015. Cited in the judgment of the Austrian Supreme Court - Oberster Gerichtshof (OGH) No. 8 Ob 62/16z, p. 2.
[459] Judgment of the Austrian Supreme Court, No. 8 Ob 62/16z, p. 3.
[460] Ibid., pp. 3-4.
[461] Ibid., pp. 3-4.
[462] Koppensteiner, Zur Außenhaftung von Geschäftsführern und Vorständen, 2015, 379. Cited in Judgment of the Austrian Supreme Court No. 8 Ob 62/16z, pp. 4-5.
[463] Judgment of the Austrian Supreme Court No. 8 Ob 62/16z, p. 7.

3.3 State Liability for Damage Caused by Civil Servants

The issue of state liability is generally governed under Art. 23 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, abbreviated as B-VG).[464] Sec. 1 prescribes the liability of every entity established under public law (such as the Federation, the provinces, the municipalities and the other bodies and institutions) for damage caused to a third party by illegal behaviour of persons, for example, civil servants, acting on their behalf in execution of the laws.[465] Thus, these persons act under public law while executing the law. This notion ("in execution of the law") involves acts of jurisdiction and sovereign administration by which the damage was caused.[466]

In addition, the Federal Act on the Liability of Territorial Authorities and other Bodies and Institutions of Public Law for Damage caused when Implementing the Law (abbreviated as AHG) stipulates public authority liability in detail.[467] In line with § 1, Sec. 1, uses the German colloquial term *Rechtsträger* (in English, "legal entity") to denote the Federal Government, the Länder (states), the districts, the municipalities, other public corporations, and the social security institutions as legal entities which are liable according to the rules of civil law for damage caused at fault to any party or property by the unlawful acts of public official while executing the law.[468]

The state is always the legal subject against whom the claim should be addressed. On the contrary, a claim against the organs themselves is inadmissible.[469] The conditions for establishing the state's liability are: first, there must be an act of a natural person or organ executing the law on behalf of the state. Secondly, the damage (in German: *Schaden*) must be caused by them. Thirdly, causality (in German: *Rechtswidrigkeit*) must exist between the damage and the application of the law. The fourth condition is the unlawfulness (*Rechtswidrigkeit*) of the act, and the fifth is the existence of fault (*Verschulden*).[470] It comprises every degree of fault for the following reasons: as far as slight negligence is

[464] Bundes-Verfassungsgesetz, Federal Law Gazette No 1/1930 with amendments. Art. 23.
[465] Ibid.
[466] Stefan Storr, Kathrin Bayer, Daniela Bereiter, and Luca Mischensky in Giacinto della Cananea and Roberto Caranta (eds.), 2020, Tort Liability of Public Authorities in European Laws, p. 39.
[467] Liability of Public Bodies Act, Federal Law Gazette No 20/1949 with amendments. Cited in Stefan Storr, Kathrin Bayer, Daniela Bereiter, and Luca Mischensky, 2020, p. 39.
[468] Ibid. § 1, Sec. 1.
[469] Stefan Storr, Kathrin Bayer, Daniela Bereiter, and Luca Mischensky, 2020, p. 39.
[470] Ibid., p. 39.

concerned, the liability of the state is for financial loss; for gross negligence or intent, § 1324 Civil Law Code applies.[471]

It should be noted that if the damage is caused within the private sphere of administration, in that regard, the ABGB applies.[472]

Furthermore, § 1299 ABGB applies to state organs' liability in the sense that they are liable as experts.[473] Regarding the aforementioned slight negligence, the *Organhaftpflichtgesetz* (abbreviated OrgHG, or in English, the Public Officers Liability Act) applies in cases where the damage is caused by the organ administrator, even with slight negligence.[474] In this regard, § 3 OrgHG and § 2 of the Employee Liability Act apply in order to mitigate the damages.[475]

3.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Under Austrian law, there are plenty of special statutes prescribing strict liability for damage caused by using a dangerous thing or performing a dangerous activity. In addition, they extend the scope of their application to the issue of vicarious liability under § 1315 ABGB.[476]

The possessor of a dangerous thing, alongside to their liability for damage that emerges from the risk that possession bears, is also liable for the fault of their personnel engaged in using a dangerous thing or performing a dangerous activity.[477]

The following special acts prescribe liability for damage arising from using a dangerous thing or performing a dangerous activity. § 79a GTG - *Gentechnikgesetz* (Genetic Engineering Act) prescribes the liability of anyone who operates a genetic engineering facility for damage caused by activities involving genetically modified organisms.[478] This is an example concerning substances as a dangerous thing.[479] The next example is about energy, as also considered a

[471] Ibid., p. 40.
[472] Ferdinand Kerschner & Erika Wagner, 2015, p. 115.
[473] Stefan Storr, Kathrin Bayer, Daniela Bereiter, and Luca Mischensky, 2020, p. 40.
[474] Ferdinand Kerschner & Erika Wagner, 2015, p. 116.
[475] Ibid., p. 116.
[476] §17 AtomHG, §19 subs.2 EKHG, §56 subs.2 ForstG, §79h subs. 2 GTG, §166 MinroG, §2 RHPflG. Cited in B.A. Koch and H. Koziol (Eds.) 2002, *Unification of Tort Law: Strict Liability*, Kluwer Law International, p. 33.
[477] B.A. Koch and H. Koziol, 2002, p. 33.
[478] Gentechnikgesetz [Genetic Engineering Act] Federal Law Gazette No. 510/1994, last amended by Federal Law Gazette I No. 73/1998, § 79a.
[479] B.A. Koch and H. Koziol, 2002, p. 16.

dangerous thing in this regard.[480] Namely, the Reich Liability Act (*Reichshaftpflichtgesetz*, abbreviated as RHPflG) in § 1a prescribes the liability of the owner of a facility for transmitting or distributing electricity or gas, if the damage is caused by the effects of these dangerous things. In addition, the mere presence of such a facility can cause damage. Thus, this rule applies even if electricity and gas did not have any influence on the occurence of the damage, except if the facility for transmitting or distributing electricity or gas was in proper working order, which means that it was in line with engineering standards.[481]

In cases where damage is caused by pipelines and long-distance gas pipelines, strict liability is provided by § 10 RohrlG.[482]

4 Employer's Liability for Damage Caused by an Employee to a Third Party under Italian Law

4.1 General Considerations

The liability for auxiliaries is regulated by two norms of the Italian Civil Code: Art. 1228, triggering contractual liability, and Art. 2049, relating to extra-contractual liability.[483]

In Italian law, the liability of the master for the damage caused by their servant is an expression of a civil law principle. It is rooted in the Roman law principle *qui facit per alias facit per se*,

[480] Ibid.
[481] §. 1a, RHPflG.
[482] Federal Law of 3 July 1975 on the commercial transport of goods in pipelines (Pipeline Law), (Gesamte Rechtsvorschrift für Rohrleitungsgesetz), BGBl. No. 411/1975, with amendments. "§ 10. (1) Der Inhaber einer im § 2 genannten Anlage haftet ohne Rücksicht auf die Gewerbsmäßigkeit des Betriebes für den Ersatz der durch einen schädigenden Vorgang beim Betrieb der Rohrleitung und der Anlagen verursachten Schäden insoweit, als dadurch ein Mensch getötet, an seinem Körper oder an seiner Gesundheit verletzt oder eine Sache beschädigt wird" ["The owner of a facility referred to in Sec. 2 shall be liable, irrespective of whether the operation is conducted on a commercial basis, for compensation for damage caused by a harmful incident arising from the operation of the pipeline and the facilities, to the extent that such incident results in the death of a person, injury to a person's body or health, or damage to property."].
[483] Cristina Amato and Giovanni Comandé, 2019, p, 302.

which has endured to the present day, adapted to modern times and circumstances.[484] From a historical perspective, the Italian Civil Code of 1865 (*Codice civile del Regno d'Italia or codice civile, cc*), which was modelled on the Code Napoleone, in Art. 1183 stipulated the principle of vicarious liability. Today, the Italian Civil Code of 1942 envisages this principle almost verbatim as in the Civil Code of 1865.[485] Art. 2049 stipulates the vicarious principle as the liability of masters and employers for the damage caused by an unlawful act of their servants and employees in exercising the functions to which they are assigned.[486]

Under this article, for establishing an employer's liability, a formal subordinate or agency relationship need not exist. Rather, collaboration or auxiliary involvement suffices, indicating that these activities are genuinely executed on behalf of the employer and fall within the scope of the principal's operational framework or business organisation.[487]

In theory, according to some legal scholars such as Mauro Paladini,[488] this is a direct liability of the master and the employer, where their personal fault is not legally relevant.[489] Their liability is strict even if they act with due care.[490] Others consider this liability indirect, but in the final analysis, the difference between these two approaches is purely terminological.[491] There are several conditions that have to be met and proved by the injured party in order to establish of masters' or employers' liability. Namely, there must be damage caused by a wrongful act committed by the "employee or agent". That act has to be attributed to the employee's or agent's duties. In addition, there must be established a relationship of subordination between the employee and the "master or principal".[492] In the Italian language,

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[484] Grech Alfred, 1973, The 'ratio' behind Art. 2049 of the Italian civil code, *Għaqda Studenti tal-Liġi*, p. 15.
[485] Ibid., p. 15.
[486] Art. 2049. titled "Responsabilita' dei padroni e dei committenti" ["Liability of employers and principals"] prescribes as follows: "I padroni e i committenti sono responsabili per i danni arrecati dal fatto illecito dei loro domestici e commessi nell'esercizio delle incombenze a cui sono adibiti" ["Employers and principals are liable for the damage caused by the wrongful acts of their employees and agents committed in the course of the duties to which they have been assigned"]. Italian Civil Code [*Codice civile* 042U0262] was enacted by the Royal decree "Regio decreto 16 marzo 1942, n. 262". The king was Vittorio Emanuele III, the king of Italy and Albania, and emperor of Ethiopia ("Per grazia di dio e per volonta' della nazione re d'Italia e di Albania, imperatore d'Etiopia"). "Approvazione del testo del Codice civile, GU 79/1942.", last changes Decreto legislativo of 26. October 2020., No. 147, GU 276/2020.
[487] Paolo Cagliari: "*La responsabilità del preponente ex art. 2049 c.c*" ["The liability of the principal under Art. 2049 of the Civil Code"] p. 51, access 24.05.2025.
[488] Responsabilita civile e penale p. 36-37. Cited in Grech Alfred, 1973, p. 15.
[489] Grech Alfred, 1973, p. 15.
[490] T. Primarchi 2021, 314, M. Barcellona, 2021, 211, G. Visintini 2021, 250, De Menech et all. Cited in Claudio Scognamiglio (ed.), 2024, *Enciclopedia de diritto, I Tematici, VII Responsabilita civile*, Giuffre Francais Lefebvre S.p.A., Milano, p. 1162.
[491] Grech Alfred, 1973, p. 15.
[492] Ibid., p. 15.

this relationship is called *preposizione,* which means that the employee is under the employer's control.[493]

Furthermore, considering the aforementioned wrongful act, the term wrongfulness was codified in Art. 2043 of the Civil Code, which represents a general norm of tort.[494] It prescribes the obligation of the tortfeasor to compensate the damage wrongfully caused to the injured party, regardless of whether it was caused by intent or negligence.[495] The notion of wrongfulness was a new category placed alongside the damage in the new Civil Code of 1942, unlike the previous Civil Code of 1865 (Art. 2043 compared to Art. 1151), where it did not exist.[496] Furthermore, this comparison demonstrated the rigid German influence on the latter Code, although the former is based, as mentioned, on the *Code Napoleone* (Art. 1382 as the general clause in this event). The German model involves sanctioning plus damage compensation as rewritten in Art. 2043 of the Civil Code (according to the literature), and the intention of the lawmaker was to create a middle Italian model, which is placed between the German and French models.[497] However, nowadays in the contemporary interpretation of Art. 2043, the focus is on compensation, not on sanctioning, and rather on damage than on the wrongful act. Thus, this is a functional concept of damage compensation, which gives ground to the court for a flexible interpretation of this provision.[498]

Moreover, according to the earlier theoretical interpretation concerning the general rule in Art. 2043, liability cannot be established without the fault of the tortfeasor, and the employer's liability is considered as an exception to this rule.[499] In this regard, for all kinds of vicarious liability, the fault of the tortfeasor is presumed, and it relies on the aforementioned general rule concerning the existence of fault, that is, the employer is liable based on *culpa in vigilando, culpa in eligendo* or *culpa in instruendo*.[500]

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[493] Francesco Donato Busnelli, Elena Bargelli and Giovanni Comandé, 2003, p. 165.
[494] Francesco D. Busnelli and Giovanni Comande in Helmut Koziol (ed.), 1998, *Unification of tort law: wrongfulness, Italy 'Wrongfulness' in the Italian legal system*, The Hague: Kluwer Law International, p. 69.
[495] Art. 2043. of the Civil Code titled as "Risarcimento per fatto illecito" ["Compensation for a tortious act"], states as follows: "Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno" ["Any intentional or negligent act that causes unjust damage to another obliges the person who committed the act to compensate for the damage."]
[496] Francesco D. Busnelli and Giovanni Comande, 1998, p. 69.
[497] Ibid., p. 69.
[498] Ibid., p. 70.
[499] Francesco Donato Busnelli, Elena Bargelli and Giovanni Comandé in J. Spier (ed.), 2003, *Unification of tort law: Liability for damage caused by others*, The Hague: Kluwer Law International, p. 159.
[500] Francesco Donato Busnelli, Elena Bargelli and Giovanni Comandé, 2003, p. 159.

Culpa in eligendo vel vigilando was developed by Baudrio Lecaucinerie and Giorgio Giorgi, who held the view that the employer was liable for the negligent selection of the employee during the hiring process and, as mentioned, presumed fault in the absence of any contrary evidence.[501]

However, Adriano De Cupis held the view that the employer's liability is independent of fault and it is irrelevant whether the selection of staff was done with due care. Furthermore, the theory of *rischio profitto* (risk and profit) was accepted by authors such as Lodovico Barassi, Giovanni Pacchioni, and Pietro Trimarchi, under which the employer and the company (legal person) are the same subject. If the employer gains a benefit from the employee's work, then they must also bear the consequence of any damage the employee causes in the course of that work.[502] The same is explained by the theory of *rischio d'impresa* (risk of the enterprise), which was accepted by Adriano De Cupis.[503] Thus, based on these interpretations, the employer's liability is strict.[504]

Art. 2043 applies to the category of "borrowed employees" because the liable person is the one who exercises control and supervision over them.[505] The following example from case law focuses more on the relationship of *preposizione* rather than the business risk.[506] The case was before the Supreme Court, which brought the decision on the issue of who is liable regarding the institute of secondment (*distacco*).[507] Namely, it concerns a workplace injury that occurred to an employee seconded to another entity (*distaccatario*). The employee was assigned to work on the conveyor belt when another, also a seconded employee, forcefully struck the conveyor belt with a hammer, after which the employee sustained an injury.[508] Thus, the injured employee brought an action before the court, following which the lower courts established the liability of the shift leader and the team leader, as well as of the principal for their subordinate employee, but the obligation to pay damages attached to the host employer (*datore di lavoro distaccatario*).[509] However, taking into account that the liability of the employer seconding the employee (*datore di lavoro distaccante*) was not established, the injured employee lodged an

[501] Grech Alfred, 1973, p. 15.
[502] Ibid, p. 16
[503] Ibid., p. 16.
[504] Ibid., p. 17.
[505] Francesco Donato Busnelli, Elena Bargelli and Giovanni Comandé, 2003, p. 165.
[506] Elena Magi, 2018, *Responsabilità ex art. 2049 c.c. e obbligo di sicurezza nella fattispecie del distacco*, [*Liability under Art. 2049 of the Civil Code and the Safety Obligation in the Context of Employee Secondment*], Diritto della Sicurezza sul Lavoro, 2-2018, p. 25.
[507] Cass. civ., III, 23, 2018, No. 1574, Available at: http://olympus.uniurb.it. Cited in Elena Magi, 2018, p. 25.
[508] Elena Magi, 2018, p. 25.
[509] Ibid., p. 25.

appeal against that judgment for the inappropriate application of Art. 2049 of the Civil Code.[510] The Supreme Court merely upheld the judgment on the grounds that only the employer who has direct control over the employee is liable within the meaning of Art. 2049 of the Civil Code.[511]

Following this case, it is necessary to revert to the third condition: the relationship of subordination between the employee and the employer. It is essentially a factor which differentiates between an employee engaged under a contract of employment and, for instance, a self-employed person or a partnership.[512] The employee is obliged to follow the employer's instructions on how the work should be performed, and this is an essential component of subordination. It should be noted that although Arts. 2224 and 1665 of the Civil Code pertain to self-employment and contractors, they also contain limitations to their independence.[513] Art. 2224 prescribes the right of the client (*committente*) to terminate the contract if the contractor fails to perform the work in accordance with the contractual terms and the rules of professional practice, [514] while Art. 1665 stipulates the right of the client (*committente*) to verify the completed work.[515] There is no unique definition of the notion of subordination. In case law, it is common to apply conditions such as a fixed working hours, the employer's power of control and discipline, remuneration, etc. in order to determine the employment relationship.[516] In

[510] Ibid., pp. 25-26.
[511] Ibid., p. 26.
[512] T. Treu, 2023, *Labour Law in Italy*, Alphen aan den Rijn, the Netherlands, p. 41.
[513] T. Treu, 2023, p. 42.
[514] Art. 2224. of the Civil Code is titled as: "Esecuzione dell'opera", ["Performance of the Work"], and prescribes as follows: "Se il prestatore d'opera non procede all'esecuzione dell'opera secondo le condizioni stabilite dal contratto e a regola d'arte, il committente puo' fissare un congruo termine, entro il quale il prestatore d'opera deve conformarsi a tali condizioni. Trascorso inutilmente il termine fissato, il committente puo' recedere dal contratto, salvo il diritto al risarcimento dei danni" ["If the contractor does not proceed with the performance of the work in accordance with the terms established by the contract and in a workmanlike manner, the client may set a reasonable period within which the contractor must comply with such terms. Upon the expiry of the period without compliance, the client may withdraw from the contract, without prejudice to the right to claim damages"].
[515] Art. 1665. of the Civil Code is titled: "Verifica e pagamento dell'opera" ["Inspection and Payment for the Work"] and prescribes as follows: "Il committente, prima di ricevere la consegna, ha diritto di verificare l'opera compiuta. La verifica deve essere fatta dal committente appena l'appaltatore lo mette in condizione di poterla eseguire. Se, nonostante l'invito fattogli dall'appaltatore, il committente tralascia di procedere alla verifica senza giusti motivi, ovvero non ne comunica il risultato entro un breve termine, l'opera si considera accettata. Se il committente riceve senza riserve la consegna dell'opera, questa si considera accettata ancorche' non si sia proceduto alla verifica. Salvo diversa pattuizione o uso contrario, l'appaltatore ha diritto al pagamento del corrispettivo quando l'opera e' accettata dal committente." ["Before taking delivery, the client has the right to inspect the completed work. The inspection must be carried out by the client as soon as the contractor has placed the work in a condition that enables such inspection to be performed. If, despite having been invited by the contractor to do so, the client fails to carry out the inspection without justifiable reasons, or fails to communicate the result thereof within a short period, the work shall be deemed to have been accepted. If the client takes delivery of the work without reservation, the work shall be deemed to have been accepted even if no inspection has been carried out. Unless otherwise agreed or customary practice provides otherwise, the contractor shall be entitled to payment of the agreed consideration when the work is accepted by the client"].
[516] T. Treu, 2023, p. 42.

addition, there are different categories of subordinate employees, depending on the type of work.[517] Art. 2095 makes a distinction between managers, executives, clerical staff, and workers.[518] The proper legal terms for these categories of employees are blue-collar, white-collar, and managers (*dirigenti*).[519] At the beginning of the twentieth century, according to the legal interpretation by the courts of Act No. 1825 of 13 November 1924, the main criterion which made a distinction between whether someone belonged to blue-collar or white-collar was the division between intellectual and manual work.[520] Nowadays, notice periods, trial clauses, etc., are the conditions on which the difference is made.[521] Concerning the notion of managers, collective agreements and courts establish the criteria for distinction in relation to white-collar staff. According to the prevailing view, a distinction should be drawn between higher managers, and middle, and lower-level managers.[522]

4.2 Liability of a Legal Person for Damage Caused by its Organ

The Italian Civil Code does not specifically prescribe the liability of a legal person for damage caused by its organ. Art. 2043 can also be applied to this kind of liability, in addition to Arts. 1337 and 2339, and an example of liability for misleading information by a company will be provided in this subtitle.[523] Namely, Art. 2043 is the basic provision that regulates tort liability:[524] "a deliberate or negligent act of any sort, which causes an unjust harm to another, obliges the person who committed it to compensate for the harm".[525] Thus, regarding the liability of a company (legal person), the company structure needs to be presented first, taking into account that it involves the legal person's organs. As the most common form, the limited liability company is presented.[526] In Italian, the two most significant forms of limited liability

[517] Ibid. p. 44.
[518] Civil Code, Art. 2095.
[519] T. Treu, 2023, p. 44.
[520] Ibid., p. 44.
[521] Ibid., p. 45.
[522] Ibid., p. 45.
[523] G. Ferrarini, 1986, cited in Guido Ferrarini and Paolo Giudici, 2019, *The Protection of Minority Investors and the Compensation of Their Losses*, Cambridge University Press, p. 454.
[524] Rossi Filippo, 2003, "Tort Liability of Financial Regulators, A Comparative Study of Italian and English Law in a European Context", European Business Law Review, 14, Issue 6, pp. 643-671, p. 655.
[525] T.G. Watkin, 1997, 247. Cited in Original: "Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno." ["Any intentional or negligent act that causes unlawful damage to another obliges the person who committed the act to compensate for the damage."], Art. 2043 of the Civil Code.
[526] Fagnano Gabriele in Alexander Loos (ed.), 2016, *Directors' Liability*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, p. 275.

companies are *Società per azioni* (*S.p.A.*) and *Società a responsabilità limitata* (*S.r.l.*).[527] For the former, a characteristic is that it has a traditional, single-body, and two-tier system of corporate governance. However, all of them regulate the executive officer's liability as an organ of a company (legal person) in the same way.[528] As mentioned, the given example, reading Art. 2043 through the prism of Art. 2395, it addresses disclosure liability.[529] Namely, under the tort law rules, it does not make a difference between negligent and intentional acts. Thus, liability applies to both cases of misleading or false information and situations involving omissions (negligent or intentional).[530] In this case, executive officers are held liable for disclosing inaccurate or false information; and in other words, they are not protected by the legal person.[531] When executive officers cause damage with intent or negligence, a the third party can directly sue them, provided that they prove this intent or negligence.[532] This is prescribed by Art. 2395.[533] In this case, the executive officers were acting as an organ of the legal person; therefore, the legal person will also be liable (it cannot waive liability).[534] According to Art. 2407, statutory auditors will be liable in addition to them.[535] Furthermore, liability can also extend to aiders and abettors due to the rules on liability for negligence, leading to joint and several liability.[536]

4.3 State Liability for Damage Caused by Civil Servants

From a historical perspective, the issue of applying private legal rules against the state was widely discussed.[537] In the nineteenth century, legal scholars had opposing viewpoints[538] on

[527] Ibid., p. 275.
[528] Ibid., 275.
[529] Guido Ferrarini and Paolo Giudici, 2019, p. 455.
[530] Ibid., p. 455.
[531] Ibid., p. 455.
[532] Ibid., p. 283.
[533] "Le disposizioni dei precedenti articoli non pregiudicano il diritto al risarcimento del danno spettante al singolo socio o al terzo che sono stati direttamente danneggiati da atti colposi o dolosi degli amministratori.
L'azione puo' essere esercitata entro cinque anni dal compimento dell'atto che ha pregiudicato il socio o il terzo." ["The provisions of the preceding articles shall not prejudice the right to compensation for damage belonging to an individual shareholder or a third party who has been directly harmed by negligent or intentional acts of the directors.
The action may be brought within five years from the date on which the act that caused harm to the shareholder or the third party was committed."], Art. 2395 of the Civil Code.
[534] Ferrarini, 142; A. Tina, 2008. Cited in Guido Ferrarini and Paolo Giudici, 2019, p. 455.
[535] Guido Ferrarini and Paolo Giudici, 2019, p. 455.
[536] Ibid., p. 456.
[537] FD Busnelli, 1999; A Lazari, 2005. Cited in Giovanni Comandé and Luca Nocco in Ken Oliphant, 2019, *The Borderlines of Tort Law, Interactions with Contract Law*, Intersentia, p. 251.
[538] Santilli (fn 1) and Caranta (fn 1) 44. Cited in Giovanni Comandé and Luca Nocco, 2019, p. 252.

the justification of applying private law rules to public administration. The Civil Code had supremacy at the time, and that was the reason why the idea of applying the general rules of *ius privatum* in this regard prevailed.[539] However, this issue is still debated today.[540] Namely, the direct liability of civil servants is provided by the Constitution of 1948. Art. 28 prescribes their liability in criminal, civil, and administrative matters. In addition, civil liability applies to the state and its agencies.[541] Through this provision, the principle of liability is raised to the constitutional level, implying that the rules of civil law apply.[542] In case law, the regulation of governmental liability is based on Art. 2043 of the Civil Code.[543] The idea was that civil and administrative law apply, while jurisdiction is divided between ordinary and administrative courts.[544] In cases involving administrative orders, administrative courts have jurisdiction, while in all other cases, ordinary courts are competent to handle them.[545]

In addition, the state is directly liable for damage caused by its civil servants.[546] In this regard, the state is in a role similar to that of an insurer for its injured citizens.[547] However, this solution is not absolute because civil servants are liable directly as well as personally for damage caused with intent or gross negligence, as stipulated by Art. 28 of the Constitution. An injured party can opt between the civil servants and the state (public administration) against whom to bring an action. If the public administration pays damages, it has a recourse right against the civil servant.[548] The way of exercising this right is stipulated by Law No. 20/94 because it provides favourable treatment for the tortfeasor in cases of slight negligence.[549]

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[539] Giovanni Comandé and Luca Nocco, 2019, p. 252.
[540] Ibid., p. 252.
[541] Costituzione della Repubblica Italiana [Constitution of the Italian Republic], Gazzetta Ufficiale della Repubblica Italiana. Art. 28: "I funzionari e i dipendenti dello Stato e degli enti pubblici sono direttamente responsabili, secondo le leggi penali, civili e amministrative, degli atti compiuti in violazione di diritti. In tali casi la responsabilità civile si estende allo Stato e agli enti pubblici" ["Officials and employees of the State and public entities shall be directly liable, under criminal, civil and administrative law, for acts committed in violation of rights. In such cases, civil liability shall extend to the State and public entities."].
[542] Giovanni Comandé and Luca Nocco, 2019, p. 254.
[543] Jean-Bernard Auby in in Giacinto della Cananea and Roberto Caranta (eds.), 2020, *Tort Liability of Public Authorities in European Laws*, p. 299.
[544] Giovanni Comandé and Luca Nocco, 2019, p. 252.
[545] Jean-Bernard Auby, 2020, p. 300.
[546] Elisa Scotti, 2011, "Liability of Public Administration in Italy: Considerations on Recent Changes", *International Journal of Public Administration*, 34: 104–109, p. 105.
[547] Ibid., p. 105.
[548] Ibid., p. 105.
[549] Legge 14 gennaio 1994, n. 20, (GU n.10 del 14-01-1994), Art. 1.

4.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Art. 2054 of the Civil Code in a general way regulates liability stemming from the performance of dangerous activities. It specifies that any person performing a dangerous activity is obliged to compensate for any damage caused by that activity, whether it results from the nature of the activity itself or from the nature of the means used for such activity. That person may be released from liability only if they prove that they applied all measures necessary to prevent the damage.[550] It means that measures are taken with the standard of diligence; therefore, that person is not at fault if they did so in order to be released from liability. Furthermore, according to the court's interpretation, the cause must be outside of their control (*casus*), whether it is an accidental cause, an act by the victim, or an act by a third party.[551] In line with this understanding, in theory, this liability is described as a quasi-strict.[552] Among numerous authors, Pietro Trimarchi offered an intermediate solution, qualifying this liability as one between fault-based and strict. According to him, the standard of care should not be set excessively high, but rather in proportion to the benefits obtained and the costs involved.[553] Moreover, many legal scholars claim that for liability to be established, it is only necessary to prove a causal link between the dangerous activity and the damage.[554] Another legal scholar, Demetrio De Martini, has a standpoint that this is a strict liability due to the dangerous characteristic of the activity; therefore, it does not concern the quality of the conduct of an agent.[555]

Namely, it is not sufficient that special statutes merely prescribe which activities are considered dangerous; rather, courts are granted broad discretion to interpret and determine which activities are dangerous in line with Art. 2050 of the Civil Code.[556] According to this provision, an activity is dangerous if it, by its nature as well as by the means are used, creates a higher

[550] Art. 2050. titled "Responsabilita' per l'esercizio di attivita' pericolose" ["Liability for the Exercise of Hazardous Activities"] prescribes as follows: "Chiunque cagiona danno ad altri nello svolgimento di un'attivita' pericolosa, per sua natura o per la natura dei mezzi adoperati, e' tenuto al risarcimento, se non prova di avere adottato tutte le misure idonee a evitare il danno." ["Anyone who causes damage to another in the course of carrying out a hazardous activity, whether by its nature or by the nature of the means employed, shall be liable to compensate for the damage unless they prove that they adopted all appropriate measures to prevent the damage."] Civil Code.
[551] Koch and H. Koziol (Eds.), 2002, *Unification of Tort Law: Strict Liability*, Kluwer Law International, p. 212.
[552] Ibid. p. 212.
[553] Salvatore Cardillo and Hans-Bernd Schäfer, 2022, p. 4.
[554] Koch and H. Koziol, 2002, p. 212.
[555] Salvatore Cardillo and Hans-Bernd Schäfer, 2022, p. 5.
[556] Ibid., p. 212.

probability of causing damage.[557] For example, the following activities are considered dangerous: transporting fuel by ship, medical activities, oil transportation, producing and distributing gas tanks, managing an electric line, a cave or a mine, and building activities, etc.[558]

It should be noted that Art. 2050 only refers to activities (i.e., the agent's *commissio)* while omissions are not included under this norm.[559] In addition, it refers to a continuous process of activities ("*esercizio di attività*" *or* "*svolgimento di attività*", English translation as "performance of an activity" or "carrying out an activity"), not a separate, only one act, because if so (regardless of whether it is dangerous) it could not be included in Art. 2050 of the Civil Code.[560]

[557] Ibid., p. 213.
[558] Ibid., p. 213.
[559] Parziale, 2019; Monateri, 1998. Cited in Salvatore Cardillo and Hans-Bernd Schäfer, 2022, "A Unique Liability Regime for Hazardous Activities in a Civil Law Country: The Enhanced Level of Due Care and Presumption of Negligence in Art. 2050 of the Italian Civil Code", p. 2.
[560] Graziadei, 2010. Cited in Salvatore Cardillo and Hans-Bernd Schäfer, 2022, pp. 2-3.

5 Employer's Liability for Damage Caused by an Employee to a Third Party under Hungarian Law

5.1 General Considerations

From a historical perspective, the regulation of the employer's vicarious liability in Hungarian law began with the draft Civil Code of 1928. Although it was never enacted, its influence on case law was significant at the time.[561] Specifically, §1721 of this draft provided, in general terms, for the liability of a person (the principal) who entrusted another person with their tasks, for damage caused by the unlawful acts of the latter to a third party during the course of the entrusted duties, unless they could prove that they had demonstrated due care in selecting, supervising, and instructing the another person, or that the damage would have occurred in any case.[562]

This rule reached its final form with the adoption of the Civil Code of 1959, specifically through §§ 348 to 351 concerning vicarious liability.[563] The 1959 Code regulated the legal relationship for both state enterprises and private persons.[564]

These articles included provisions regarding damage caused by employees, members of cooperatives, representatives and agents who were involved in Chapter 30 titled "Specific Cases of Liability," concerning liability for non-contractual damage and unjust enrichment (Book 4 of the 1959 Civil Code). Thus, in line with § 348, the employer was liable for damage caused by an employee to a third party within the scope of their duties and authority. When the employee caused damage by a criminal offence intentionally, the employee and the employer were jointly liable. The same rule was applicable to members of cooperatives. When an

[561] Barry, D., 1970, *Governmental Tort Liability in the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland, Romania and Yugoslavia. Leyden*, Sijthoff, p. 201.
[562] Ibid., p. 204.
[563] Ibid., p. 211.
[564] Attila Harmathy and Ágnes Németh (eds.), 1990, *Questions of civil codifications*, Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, Budapest, p. 58.

employee was hired by a private employer who could not pay the compensation for damage caused by the employee, the employee was obliged to pay it instead of the employer.[565]

The next § 349 pertained to liability regarding state authority, while § 350 stipulated the liability of the principal for damage caused by their agent to a third party.[566]

The principal could exempt themselves from liability, if they could prove that they did not negligently select, instruct, and supervise the agent (*culpa in eligendo*, *culpa in instruendo, culpa in vigilando*). This rule was not applicable to damage caused by dangerous activities. However, it applied to the relations between the principal and the injured party when the principal and agent were in the capacity of socialist organisations, or when there was a permanent agency relationship between them. In relationships between the legal representative and the person represented, the latter was not liable for damage caused by the former.[567] The following § 351 regulated that the agent and legal representative were liable to the employer or represented person, and the employer or represented person had recourse right against them for damages paid to the third party. However, for claims between the principal and agent, or the represented person and the legal representative, the provisions of the Labour Code were applied.[568]

The former Labour Code of 1992 (*Munka Törvénykönyve 1992 évi XXII*), in § 181, Sec. 1, also provided for the employer's liability for damage sustained by relatives of the employee. The employer was also obliged to compensate expenses arising from the damage. In the proceedings, the "preliminary issue" that had to first be determined was whether the employer was liable for the damage caused; thus, the relatives' claim for damages was subsidiary.[569] The same solution applies according to the Labour Code in force. Based on § 171, Sec. 1 of the Labour Code of 2012, employers bear liability to compensate the relatives of employees who sustained any damage connected to the incident. Sec. 2 prescribes that in the event that an employee loses their life due to such incidents, their relatives are entitled to claim compensation that substitutes the lost support in addition to the damages from Sec. 1. This compensation is intended to cover the financial void left by the deceased, ensuring that the family can maintain their previous standard of living. The amount they may claim will be reflective of the

[565] Barry, D., 1970, p. 211.
[566] Ibid., p. 211.
[567] Ibid., p. 211.
[568] Ibid., p. 212.
[569] Barany, 4. Cited in Sipka Péter, 2021, *A munkáltatói kárfelelősség elmélete és gyakorlata*, [*The Theory and Practice of Employer's Liability for Damage*], orac, Budapest, p. 31.

employee's actual or reasonably expected earnings, taking into consideration the income that would have supported them had the tragedy not occurred.[570]

The new Civil Code, which entered into force on 15 March 2014 (Act V of 2013 of the Civil Code), replaced the previous Act IV of 1959 of the Civil Code. The novelty related to this topic is the fact that the basis of liability is divided into contractual and non-contractual liability,[571] where the non-contractual liability regime encompasses liability for "employees, agents, obligors of other contracts; shareholders and executive officers of legal persons; liability for the actions of public authorities (civil servants, judges, public prosecutors, bailiffs and public notaries); liability for the acts of non-culpable persons and, last but not least, liability for damages caused by animals".[572] Furthermore, in addition to the liability for employees and agents, there is the liability of legal persons and public authorities (as well as under this non-contractual liability regime is the liability for dangerous things and dangerous activities)[573] which will be discussed below as well.

Namely, this issue is in the domain of the rules regarding liability for damage caused by another person. It applies when these persons act on behalf of the liable person based on employment, agency, or other contractual relationships and cause damage to third parties who are not in a contractual relationship with the liable party. That fact is essential because otherwise, contractual liability principles may be invoked. The rationale for the existence of this specific liability rule includes that these persons are acting on behalf of another who can control their behaviour and gain profit, but at the same time bear the risk for the conduct of the former. As the degree of control that the liable person exercises over the actions of these other persons increases, so too does the strictness of their liability, which can make it challenging to assert exemptions. Moreover, establishing liability for employers, legal persons, or principals can significantly enhance the prospects of the injured party receiving fair compensation from a financially stable subject.[574]

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[570] Act I of 2012 on the Labour Code, Art. 171, Sec. 1 and 2.
[571] László Pribula, 2019, "Practical Problems Concerning the Introduction of a New Legal Institution – Tort in Hungarian Civil Law", *Studia Iuridica Cassoviensia*, p. 87.
[572] Ádám Fuglinszky, 2014, "Risks and Side Effects: Five Questions on the 'New' Hungarian Tort Law", *Elte Law Journal*, p. 200
[573] Ibid., p. 200.
[574] Ádám Fuglinszky, 2019, in Attila Harmathy (ed.) Introduction to Hungarian law, *Kluwer Law International B.V.*, Alphen aan den Rijn, p. 190. What is specific in Hungarian tort law theories is the question of what the primary aim of liability is - compensation or prevention? Menyhárd Attila in Helmut Koziol (ed.) 2015, p. 254.

Specifically, in Chapter LXIX titled: "Liability for the Acts of Another Person", in 6:540 §, subtitled: "Liability for the acts of employees and members of legal persons", Sec. 1 of the Hungarian Civil Code, it is prescribed that the employer is liable for damage caused by the employee to a third party "in connection with his employment relationship".[575] Sec. 2 prescribes verbatim the same, with the only difference that instead of the tortfeasor, that is, the employee, a member of a legal person causes the damage to the third party in connection with their membership, and instead of the employer, the liable party is the legal person.[576]

Case law broadly interprets the phrase "in connection with his employment relationship" as a prerequisite for establishing the employer's liability.[577] That means that the employment relationship provided the opportunity for the employee to cause damage, therefore all costs are in connection with the employment relationship of the employee (they are considered attributable). According to the interpretation in the case law, this is a strict approach to the liability of the employer because they are liable even if the employee did not follow their instructions or committed a criminal offence against a third party. The employer cannot be released from liability if they prove that the damage is not attributable to their fault. However, the employer has the possibility of indirect exemption, by proving that the employee is not at fault. The justification for these interpretations is that the employees are involved in the employer's organisations and they are subjects of latter's control, direction and supervision.[578] In cases, where an employee or a member of a legal person causes damage intentionally, they will be jointly and severally liable together with the employer or the legal person.[579]

6:541 § was repealed by the Act LXXVII of 2016, which was in force from 2 January 2017 to 31 December 2023, and was applicable if the damage was caused before 1 July 2016 as well as after the entering into force of the Civil Code.[580] This section concerned the liability of a senior officer for damage caused to a third party.[581] They were jointly and severally liable with the legal person to the injured party. It meant that the senior officer was a party against whom

[575] Act V of 2013 on the Civil Code, promulgated on 26 February 2013, Art. 6:540, Sec. 1.
[576] Civil Code, Art. 6:540, Sec. 2.
[577] Fuglinszky Ádám, 2019, p. 191.
[578] Ibid., p. 191.
[579] Civil Code, Art. 6:540, Sec. 3.
[580] See National Legislation Database https://njt.hu/jogszabaly/2016-77-00-00, accessed 17/07/2025.
[581] Hanyu Henrietta, 2015, *Munkajogi kárfelelősség a gyakorlatban* [*Liability for Damages in Employment Law in Practice*], Wolters Kluwer, Budapest, p. 101.

the claim should have been addressed by the injured party if they could prove the damage and its causal relationship with the activities of the senior officer.[582]

If a top manager caused damage negligently, it was also possible to bring a direct claim against them, as the statute did not prescribe any additional requirements. This served to prevent abuse, since before this statute, such a possibility existed, and top managers exploited limited liability to cause damage to the third parties with intent.[583]

However, such a legislative solution created a risk that even a manager who acts with due diligence could be held liable. For slight errors, they could be held liable with their entire personal assets, whereby such errors are easy to make. Therefore, after the entry into force of the new Hungarian Civil Code in 2014, insurance companies offered directors' and officers' liability insurance (*D&O insurance)*.[584] The role of insurance is becoming increasingly important in terms of risk allocation. However, the insurance company is entitled to a right of recourse against the perpetrator based on insurance law regulations.[585]

In addition, it should be noted that there are two ways in which an executive officer may perform their duties, either based on an assignment agreement (mandate agreement) regulated by the Hungarian Civil Code, or based on an employment agreement regulated by the Labour Code. Namely, labour law divides managers into different categories.

As they are leading employees, three categories are distinguished: first, the executive employee, which means that a particular individual is the director of the employer; second, the deputy director, who is under direct supervision of the director and has the authorisation to act in that capacity; and third, contractually employed executive employees as a specific category based on an agreement which involves a special provision on the executive employee as a special position of significant importance in the company with a salary seven times greater than the average.[586]

The following 6:542 § regulates liability for agents.[587] It foresees the joint and several liability of the principal and the agent if the agent caused damage in that capacity and in the course of the performance of the agency, through actions required to complete the tasks within the

[582] Ibid., p. 101.
[583] Ibid., p. 101.
[584] Ibid., p. 101.
[585] Menyhárd Attila, 2015, p. 254.
[586] B. Zoltán, B. Gyula, K. György, S. Gergely L. Nagy 2019. Cited in József Hajdú, 2024, *Labour Law in Hungary*, Kluwer Law International BV, The Netherlands, p. 116.
[587] Fuglinszky Ádám, 2019, p. 191.

agency's work. In addition, it is not relevant if the agency merely created the opportunity for the agent to cause damage. Another peculiarity is that the agent and the principal are jointly and severally liable, but the principal's liability must be proven. The principal can be released from liability if they prove that the agent was not at fault, and that the principal was not at fault for selecting, instructing and supervising the agent either (*culpa in eligendo, culpa in instruendo et culpa in inspiciendo*). However, as the agent enjoys greater autonomy in performing the tasks, over which the principal has limited control, this liability is less strict than that under 6:540 §. If the agency relationship is long-term, the employee's liability is stricter.[588] Namely, if the agency relationship is permanent, the injured party may also claim damages based on the rules applicable in situations where an employee causes damage.[589]

The last 6:543 § applies if there is no agency or employment relationship between the tortfeasor and the person in whose name the tortfeasor acted.[590] This provision is titled "Liability for damage caused by the obligor of another contract" and involves three parties: 1) the obligee of another contract, 2) the obligor and 3) the third party. It prescribes that the obligee of another contract is liable for any damage caused by the obligor to a third party due to the conduct of the contract, since the obligor is engaged in a contractual relationship with the obligee during the execution of the contract. However, they will not be liable if the injured party does not know the identity of the person who caused the damage.[591]

5.2 Liability of a Legal Person for Damage Caused by its Organ

As previously mentioned, 6:540 §, Sec. 2 of the Hungarian Civil Code stipulates a legal person's liability for damage caused by a member to a third party related to their membership relationship.[592] First, it should be noted who is considered a member of a legal person. László Schmidt highlights that the former Labour Code of 1992 defined an employee in a managerial position as the head and deputy of the employer (Sec. 188), and following this definition, the terms "manager", "senior official" and "executive officer" are used to refer to this employee.[593]

[588] Ibid., p. 191.
[589] Civil Code, 6:542 §, Sec. 2.
[590] Fuglinszky Ádám, 2019, p. 192.
[591] Civil Code, 6:543 §.
[592] Hungarian Civil Code, § 6:540, Sec. 2.
[593] László Schmidt, 2022, "The status and liability of executive officers in the Hungarian judicial practice - with particular reference to the new legislation", No. 4/2022, p. 234. Published online: 31.05.2023.

The new Labour Code of 2012, in Sec. 208, provides a definition as follows: "An employee in a managerial position is the manager of the employer, as well as another employee who is under his direct control and authorized to replace him - in whole or in part - (hereinafter collectively: manager)".[594]

Concerning the term of management, it depends on the legal form of the legal person.[595] In cases where the legal person is in the form of a stock company, that is a directorate. The same applies to a form of cooperative (a directorate). Associations have a management or presidency; foundations have a Board of Trustees. Regarding the union, that is a director. For business organisations, the legislator uses the term management; previously, the term managers was used in general partnerships and limited partnerships.[596]

Furthermore, the Bankruptcy Act in Sec. 3, par. 1, point d) defines managers in the following way: "head of economic operator shall mean, in the case of companies, the registered executive officer (representative); in the case of law offices and patent agents' offices, the office manager; in the case of voluntary mutual insurance funds, the managing director or member of the board of directors; in the case of private pension funds, the representative; in the case of foundations and associations, the registered executive officer, in the case of a business association established in another Member State of the European Union, the person registered in Hungary as the representative authorized to make legal statements, or failing this, the person vested with authority to represent a business association, with or without legal personality, before the authorities or in civil relations".[597] Following these distinctions, it can be concluded that 6:540 §, Sec. 2 of the Hungarian Civil Code from the beginning of this chapter is a general provision pertaining to this subject matter. The conditions for establishing a legal person's liability are the same as those applicable to establishing the employer's liability analysed in the previous chapter (see *General Considerations*). Furthermore § 6:540 Sec. 3 foresees that if the damage is caused with intent by a member of a legal person, they bear joint and several liability with the legal person.[598] It should be noted that in situations when an executive officer (*vezető tisztségviselők*) is jointly and severally liable with the legal person, civil law rules apply if the

[594] Act I of 2012 (Labour Code) 208 § Sec. 1.

[595] Barbara Páhi, 2019, "The system of civil liability of executive officers, particularly considering the rules of "wrongful trading", *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica, Tomus XXXVII/2*, p. 435.
[596] Ibid., pp. 436-437.
[597] Act XLIX of 1991 on the Bankruptcy and Liquidation Proceedings, Sec. 3, par. 1, point d).
[598] Hungarian Civil Code, § 6:540, Sec. 3.

legal person is in the course of its normal business operations. However, if a legal person is in a state of insolvency, the rules of company law apply.[599] In addition, concerning the civil law rules of this subject matter, 3:24 § of the Civil Code, titled "Liability of executive officers", Sec. 2 foresees the liability of the legal person for damage caused by its executive officers to a third party. However, in the second sentence of this provision, the joint and several liability of a legal person and its executive officers is stipulated for damage caused by executive officers with intent.[600] The previously mentioned repealed 6:541 § of the Civil Code also stipulated the joint and several liability of a legal person and its executive officers for damage caused by executive officers[601]; however, it did not require that the executive officers cause damage with intent. In the literature, this provision was variously interpreted. According to the first interpretation, this provision gave the possibility to the injured party to claim damages directly from the executive officer. The second interpretation was that the executive officer acts in their capacity and status as a representative of the legal person, enabling them to perform a wrongful action; therefore, it is justified that a legal person and its executive officers are jointly and severally liable. The last interpretation stands between these two and raises doubts whether the application of this provision is justified in certain cases. For example, instead of being transported to a hazardous materials storage facility, the hazardous waste is stored on the neighbour's land. In this situation, the executive officer knew that this activity was wrongful, thus their liability cannot be exempted.[602]

5.3 State Liability for Damage Caused by Civil Servants

The Constitution of Hungary (the Fundamental Law of Hungary) regulates the issue of state liability in two articles: Art. XXIV, Sec. 2 and Art. IV Sec. 4.[603]

According to Art. XXIV, Sec. 2, everyone has the right to compensation for any damage that the authorities in the course of their duties unlawfully cause, according to special statute.[604]

[599] Hanyu Henrietta, 2015, p. 102.
[600] Civil Code, § 3:24, Sec. 2.
[601] Fuglinszky Ádám, 2014, p. 204.
[602] Ibid., pp. 204, p. 205, p. 206.
[603] Lilla Berkes in Giacinto della Cananea, Roberto Caranta (eds.), 2020, *Tort Liability of Public Authorities in European Laws*, Oxford University Press, p. 55.
[604] Magyarország Alaptörvénye, 2011. április 25. [Hungarian Constitution of 2011], Art. XXIV, Sec. 2.

Furthermore, Art. IV Sec. 4 stipulates the right to compensation for damage to anyone whose freedom has been restricted unlawfully or without grounds.[605]

In addition, under the Civil Code, Chapter LXXI is titled "Liability for damage caused in the course of exercising public authority", and 6:548 § provides for the liability for any damage that occurs while exercising administrative powers when such damage occurs from such exercise public authority, particularly when ordinary legal remedies or actions in administrative courts fail to prevent it.[606] Notwithstanding that fault is not prescribed in this provision, according to the literature, the liability is still assessed as fault-based. Namely, fault is presumed by the application of the general rules on extra-contractual liability.[607]

The courts expressed an opinion that there must be an extraordinary breach of law. It introduces an additional, uncodified requirement for establishing the liability of public authorities, despite criticism in legal theory. According to this approach, liability arises only when the conduct of the authority qualifies as an extraordinary breach of legal norms, such as in situations when a legal provision is not applied, or it is not correctly interpreted, in addition to a wrong evaluation of facts or evidence.

For example, if building authorities approve permits despite clear violations of building regulations, or unjustifiably refuse them when all legal requirements are met. A similar example is land registry offices, when they unlawfully remove, register, or refuse entries into the registry. Claims must be directed against the authority possessing legal personality.[608]

The issue of whether the state can be held liable for damage caused by legislative acts is somewhat controversial. The Civil Code does not explicitly provide for such liability, although the "big general clause" might, in theory, be interpreted to include it. The opinion of legal scholars is divided.

Some completely reject this kind of liability, arguing that legislative acts do not create direct civil legal relationships between the state and natural persons. They are also of the opinion that compensation for damage for "wrongful legislation" would violate the separation of powers and sovereignty, especially in matters involving the state budget. Others claim that the state should be liable under the general rules of tort law, non-contractual, without any special

[605] Hungarian Constitution, Art. IV, Sec. 4.
[606] Civil Code, § 6:548.
[607] Ádám Fuglinszky, 2019, in Attila Harmathy (ed.) p. 193.
[608] Ibid., p. 194.

preconditions. In addition, there are those who argue that state liability should only arise if the Constitutional Court declares a statute which is a subject matter before the court as unconstitutional (ideally with retroactive effect) or finds that the legislature failed to act where it had a constitutional duty (unconstitutional omission). In practice, the courts have followed either the first or third standpoint.[609]

The civil court has jurisdiction over this type of claim for damages, including those brought against public authorities, under the rules of civil procedure. However, when the new Act on Administrative Court Procedure entered into force, claims for damage compensation caused by administrative or public service relationships now fall under the jurisdiction of administrative and labour courts, and the law on administrative court procedure applies to this issue.[610]

This applies only when the damage is caused within such legal relationships. If it is sustained by someone outside of this relationship, then the general court has jurisdiction.

Administrative courts have jurisdiction to annul unlawful administrative decisions but most of the cases are decided by the general civil courts. Thus, it should be noted that different courts have jurisdiction for annulling an administrative decision or for awarding damages.[611]

5.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Under the first Hungarian Civil Code of 1959 (Act IV of 1959), one general rule was dedicated to all activities which involved an elevated risk of causing damage.[612] The Civil Code in force continued this statutory solution and foresees one *Generalklausel* on strict liability for performing highly dangerous activities, which contains a few exceptions.[613]

Namely, 6:535 § Sec. 1 stipulates the duty to compensate for damage by a person who performs a dangerous activity. If the damage was caused by an unavoidable event outside the scope of

[609] Ibid., pp. 194-195.
[610] Act I of 2017—on the Code of Administrative Litigation Art. 38, Sec. 1. Cited in Lilla Berkes, 2020, p. 57.
[611] Lilla Berkes, 2020, p. 57.
[612] Pusztahelyi Réka, 2025, "Analysis of the Changing Position of the Strict Liability Rule for Highly Dangerous Activities under the Civil Code of Hungary 2013", *European Review of Private Law* 1 & 2-2025, Kluwer Law International BV, The Netherlands, p. 390.
[613] Ibid., p. 390.

the dangerous activity, the operator is relieved from liability, if that person can prove those circumstances.[614] According to Pusztahelyi, this provision does not define which activities are considered dangerous or to what extent, nor does it specify the person (operator) who is liable.[615] Rather, in court practice, guidelines have been elaborated for assessing what is considered a dangerous activity and who will be liable for it (the operator). The court considers all the facts of the case when deciding if an activity is dangerous.[616] For example, dangerous activities include "the operation of motor vehicles or industrial machines, [the use of] chemicals, explosives, acids or other dangerous materials; [and] activities requiring special prevention such as mining, well-digging, etc [,] [which] are specified as considerably hazardous, triggering the application of the strict liability regime".[617] However, the person who physically performs the dangerous activity is not always the one held liable; the so-called "operator" is the liable person.[618] As referred to above, the notion of the operator was not specified by law, giving the case law the flexibility to determine the conditions under which the proper person will be designated.[619] Firstly, the question regarding the ownership of the equipment used for performing the dangerous activities must be answered. Secondly, in whose interest is the dangerous activity performed, and who derives the profit from these activities? Third, who controls them? Fourth, at which place and at what time were the dangerous activities performed?[620]

Regarding the liability for things, there is no particular provision except for the one that addresses the liability for damage caused by animals.[621]

In Hungarian law, there is no distinction between holding a dangerous thing and performing a dangerous activity. Therefore, the holding of a dangerous thing could fall under the liability for dangerous activities. Moreover, the liability of a legal person does not have a special form in this regard. As mentioned, strict liability is prescribed for dangerous activity, and two characteristics ease the position of the injured party.[622] Namely, liability falls on the operator,

[614] Civil Code, 6:535 § Sec. 1.
[615] R. Pusztahelyi, "A veszélyes üzemi felelősség szabályozási környezete", pp. 129–130. Cited in Pusztahelyi Réka, 2025, p. 390.
[616] Menyhárd Attila, 2015, p. 322.
[617] Ibid., p. 323.
[618] Fuglinszky Ádám, 2014, "Risks and Side Effects: Five Questions on the 'New' Hungarian Tort Law", *ELTE Law Journal, ELTE Eötvös University Press*, p. 203.
[619] Ibid., p. 203.
[620] Lábady Tamás, in Vékás Lajos, Gárdos Péter (eds.), Kommentár a Polgári Törvénykönyvhöz 2014, 2274. Cited in Fuglinszky Ádám, 2014, p. 203.
[621] Menyhárd Attila, 2015, p. 321.
[622] Menyhárd Attila, 2015, p. 323.

not just on the person who performed the dangerous activities. Their liability will be established if it cannot be proven that the cause of the damage was outside the scope of this activity, in addition to the fact that it was unavoidable.[623]

6 Employer's Liability for Damage Caused by an Employee to a Third Party under Czech Law

6.1 General Considerations

There is no particular provision regulating the employer's vicarious liability in the Czech Civil Code.[624] In Art. 2914 of the Civil Code, this issue is regulated as a general type of liability of an associate who causes damage to a third party.[625] Namely, it regulates the liability of a person who assigns an agent, employee, or associate (auxiliary) in their activities. Thus, that person is liable for any damage caused by an agent, as if they caused it directly. Conversely, if the assisting person is tasked with performing a specific activity independently, then they do not qualify as an auxiliary (helper, assistant). However, if that person fails to appoint an agent with due diligence or exerts insufficient oversight, they may be held liable as a surety for the obligation to compensate for any damage.[626] There is a similarity between this article and § 831 of the German Civil Code, in that the principal is liable for the acts of their associates. However, the main difference is that the employer's fault is not of legal relevance. The principal is liable for the appointment of the associate and has to bear the risk for their fault if they wish to gain benefits from their work. The principal cannot be released from liability even if they prove that they selected, supervised, and instructed the employee with due care.[627] In addition, taking into account that a comparison is made between the Czech and German Civil Code regarding § 831, it should be emphasised that the Austrian legal tradition influenced some basic characteristics of the Czech general concept of civil liability, because until 31 December 1950, the ABGB was in force in the Czech Republic. The general rule of § 1295 of the ABGB was

[623] Ibid., pp. 323-324.
[624] Lenka Dobešová and Jan Hurdík, 2020, *Tort Law in the Czech Republic*, Kluwer Law International B.V., Alphen aan den Rijn, p. 67.
[625] Law No. 89/2012 Coll. as amended up to Act No. 163/2020 Coll., Civil Code of the Czech Republic, Art. 2914.
[626] Ibid.
[627] Lenka Dobešová and Jan Hurdík, 2020, p. 67.

incorporated in the Czech Civil Code (*Obcanský zákoníkof* 1950, which was in force from 1 January 1951 to 31 March 1964). It continued its influence also on the subsequent Civil Code (*Obcanský zákoník* of 1964, in force).[628] As mentioned above regarding the extensive interpretation of the terms employer and employee, it should be noted that Art. 7 of the Labour Code defines the employer (*zaměstnavatel*) as a legal or natural person who hires individuals based on of labour relations.[629] Art. 8 is repealed, but it gave the same definition of the employer in the old Labour Code, (the employer is a legal or natural person who hires individuals because of labour relations and "other analogous labour relations").[630]

The Labour Code does not provide a definition of an employee. Art. 6 of the Labour Code uses the terms "individual" or "natural person" for the employee and prescribes conditions regarding the age when that natural person can conclude the employment contract and acquire rights and obligations in terms of the employment relationship.[631] Thus, according to the Civil Code, the term "agent" is understood widely, and it implies the terms as associate or auxiliary in its meaning.[632] However, the main criterion to determine the real meaning is the relationship between the agent and principal, according to which the principal, as mentioned above, gives instructions to them, and the agent is in a dependent position related to the principal.[633]

In addition, according to the Civil Code, there is another specific liability for an associate who causes damage while fulfilling a debt. In that situation, the position of the associate is irrelevant, whether it is related to the debtor or to an autonomous subcontractor, or whether the debt arose from a contract or a statute, such as unjust enrichment.[634] Another specific rule is applied in

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[628] Luboš Tichý in B.A. Koch and H. Koziol (ed.), 2002, p. 75.
[629] Zákoník práce, No. 262/2006 Coll., as amended by Acts No. 585/2006 Coll., No. 181/2007 Coll., No. 261/2007 Coll., No. 296/2007 Coll., No. 362/2007 Coll., Judgment of the Constitutional Court No. 116/2008 Coll., Acts No. 121/2008 Coll., No. 126/2008 Coll., No. 294/2008 Coll., No. 305/2008 Coll., No. 306/2008 Coll., No. 382/2008 Coll., No. 286/2009 Coll., No. 320/2009 Coll., No. 326/2009 Coll., No. 347/2010 Coll., No. 427/2010 Coll., No. 73/2011 Coll., No. 180/2011 Coll., No. 185/2011 Coll., No. 341/2011 Coll., No. 364/2011 Coll., No. 365/2011 Coll., No. 367/2011 Coll., No. 375/2011 Coll., No. 466/2011 Coll. and with regard to Decrees No. 567/2006 Coll., No. 462/2009 Coll., No. 377/2010 Coll. And No. 429/2011 Coll. Art. 7.
[630] Zákoník práce No. 65/1965 Coll., as amended by Acts No. 88/1968 Coll., No. 153/1969 Coll., No. 100/1970 Coll., No. 20/1975 Coll., No. 72/1982 Coll., No. 111/1984 Coll., No. 22/1985 Coll., No. 52/1987 Coll., No. 98/1987 Coll., No. 188/1988 Coll., No. 3/1991 Coll., No. 297/1991 Coll., No. 231/1992 Coll., No. 264/1992 Coll., No. 590/1992 Coll., No. 37/1993 Coll., No. 74/1994 Coll., No. 118/1995 Coll., No. 287/1995 Coll., No. 138/1996 Coll., No. 167/1999 Coll., No. 225/1999 Coll., No. 29/2000 Coll., No. 155/2000 Coll.*, No. 220/2000 Coll., No. 238/2000 Coll., No. 257/2000 Coll., No. 258/2000 Coll. (with the full wording of the Labour Code promulgated in Act No. 85/2001 Coll.), No. 177/2001 Coll.**, No. 6/2002 Coll.**, No. 136/2002 Coll.*, No. 202/2002 Coll.**, No. 218/2002 Coll.*, No. 309/2002 Coll.*, No. 311/2002 Coll.* and No. 312/2002 Coll. Art. 8, this code is not in force.
[631] Labour Code, Art. 6.
[632] Vojtech Lovetinsky, 2017, "Liability for Agents in Czech Tort Law: A Step in the Right Direction," *Common Law Review,* p. 33.
[633] Lenka Dobešová and Jan Hurdík, 2020, p. 67.
[634] Ibid., p. 67.

situations when an associate (or an employee of the employer) causes damage to another employee of the same employer during the course of the work, the employer is obliged to compensate the damage sustained by that another employee, who is in this event the injured party.[635]

To establish the employer's liability, the associate must be in a subordinate position.[636] It is a matter of *de facto* subordination, meaning it must exist in reality, be operational and functional, not just exist as a legal formality.[637]

When the employee causes damage in the capacity of an associate, it should be compensated in line with Art. 250 of the Labour Code. It is a provision on the general liability for damage, and according to Sec. 1, the employee is liable to the employer for damage caused by their fault during the performance of work duties or work-related tasks.[638] For an employee to be held liable for damage, the following prerequisites must be met: misconduct in the performance of work tasks or related activities; damage; a causal relationship between the failure to meet work duties and the damage caused, and the employee's fault that the employer has to prove, though it is sufficient for the employer to prove the employee's negligence.[639]

Furthermore, Art. 265 of the Labour Code regulates the employer's liability for damage caused by their employees in general. Sec. 1 stipulates the employer's liability for damage to their employee who sustained it while conducting tasks.[640] Furthermore, Sec. 2 regulates the employer's liability for damage to their employee caused by another employee who breached statutory obligations while conducting the tasks for the employer.[641] While according to Sec. 3, the employer is not liable for damage sustained by their employee while using the employer's means of transport, tools, equipment, and other things for the performance of work if the employee used them without the consent of the employer.[642] The employer's liability is assessed as strict in these situations, and their fault is not relevant.[643] Nevertheless, Art. 2914 of the Civil Code envisages an exception in the form of an independent subcontractor who is, according to the standpoint of the Supreme Court of the Czech Republic, a person who does

[635] Act No. 262/2006 Coll., Labour Code, Art. 265. Sec. 2, cited in Lenka Dobešová and Jan Hurdík, 2020, p. 68.
[636] Lenka Dobešová and Jan Hurdík, 2020, p. 68.
[637] Ibid., p. 68.
[638] Act No. 262/2006 Coll., Labour Code, Art. 250. Sec. 1.
[639] Lenka Dobešová and Jan Hurdík, 2020, p. 68.
[640] Act No. 262/2006 Coll., Labour Code, Art. 265. Sec. 1.
[641] Act No. 262/2006 Coll., Labour Code, Art. 265. Sec. 2.
[642] Act No. 262/2006 Coll., Labour Code, Art. 265. Sec. 3.
[643] Lenka Dobešová and Jan Hurdík, 2020, p. 69.

not perform work tasks in line with instructions or orders nor under the control of the defendant in this case, but instead acts independently, in their own name and at their own risk.[644] The term independent contractor can also be used for an independent subcontractor. Namely, there are three parties involved in this contractual relationship: the creditor, the debtor, and the debtor's subcontractor. Thus, the debtor is obliged to choose the subcontractor with care (*culpa in eligendo*) and supervise how the subcontractor fulfils their duties (*culpa in custodiendo*).

If the debtor failed to demonstrate due care in appointing and supervising the subcontractor, they shall be liable as a surety for the damage.[645]

This seems unusual without a practical impact because the injured party, according to this solution, could claim from the principal compensation for damage due to a breach of the duty of care under tort law.[646] Thus, this liability is assessed as strict; the Czech concept permits a case-by-case approach where compensation can be mitigated under Art. 2953 of the Civil Code.[647] One factor that the court should especially consider is how the damage was caused.[648]

In addition, if the debtor proves that the choice of and supervision over the subcontractor was appropriate (*culpa in eligendo* and *culpa in custodiendo*), they can release themselves from liability.[649]

It should be noted that the former Czech Civil Code did not explicitly prescribe the possibility of direct claims against agents.[650] Namely, the agent was solely liable to the principal, and in cases where an employee acted with negligence, they were obliged to pay up to 4.5 times they monthly average gross salary as established by the Labour Code[651] except when they acted with intent or under the influence of alcohol or drugs.[652] However, the Civil Code in force, according to the interpretation of legal scholars, does not exclude a claim against the agent.[653]

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[644] Martin Štefko, 2022, "Liability of the Employer for Injury Caused to a Third Party in His or Her Workplace", *Societas et Iurisprudentia*, 3 (10), p. 28.
[645] Lenka Dobešová and Jan Hurdík, 2020, p. 74.
[646] Vojtech Lovetinsky, 2017, p. 35.
[647] This Article prescribes that damages may be reduced for specific, significant reasons. When considering a reduction, factors such as the nature of how the damage occurred, the personal and property relationships of the person liable for the damage, and the circumstances of the injured party will be taken into account. However, it is important to note that damages will not be reduced if it was caused intentionally. Civil Code, Art. 2953.
[648] Vojtech Lovetinsky, 2017, p. 35.
[649] Lenka Dobešová and Jan Hurdík, 2020, p. 74.
[650] The former Czech Civil Code 40/1964 Sb., Art. 420, Sec. 2.
[651] Tichy, L. In Spier, J., p. 60. Cited in Vojtech Lovetinsky, 2017, pp. 35-36.
[652] Act No. 262/2006 Coll., Labour Code, Art. 257. Sec. 2.
[653] Cited in Vojtech Lovetinsky, 2017, p. 36.

Regarding the conditions for establishing the principal's liability, the agent must cause damage in the course of employment.[654] For instance, if an employee steals something from a client of the employer during off-hours or the weekend, it is generally accepted that the employer would not be held liable in such cases.[655]

However, every scenario should be considered on a case-by-case basis because it is possible that cases of intentional damage or even criminal acts can occur within the course of employment.

In addition to the condition that the associate should act in the course of employment, other conditions are the existence of an unlawful act and the fault of the agent. Thus, if the agent is not at fault, the principal will be exonerated from liability. However, this does not apply to the agent's lack of culpability such as in cases where the agent is a minor or mentally incapacitated.[656]

6.2 Liability of a Legal Person for Damage Caused by its Organ

First, the notion of a "legal person" requires clarification, for which the terms "juridical person", or "legal entity" are also used in the literature.[657] It is defined by the Czech Civil Code in Art. 20 Sec. 1 as an organised entity with legal personality, recognised by statute. In addition, it has rights and duties in line with its legal nature, regardless of its scope of activities.[658] The theory of fiction is the basis of the conception of a legal person.

However, this theory further imposes the necessity to define by statute the legal personality of every kind of legal person. The legal person does not have the capacity to act by itself, because it is an empty vessel. For this reason, it acts through its organs or other persons. Its capacity to act is divided into the capacity undertake legal transactions and delictual capacity, which means to be liable for unlawful acts.[659]

[654] Ibid., p. 36.
[655] Koziol, H. p. 356. Cited in Vojtech Lovetinsky, 2017, p. 34.
[656] Vojtech Lovetinsky, 2017, p. 35.
[657] Lenka Dobešová and Jan Hurdík, 2023, *Tort Law in the Czech Republic*, Kluwer Law International B.V., Alphen aan den Rijn, p. 74.
[658] Civil Code, Art. 20, Sec. 1.
[659] Lenka Dobešová and Jan Hurdík, 2023, pp. 74-75.

As previously mentioned, Art. 167 of the Civil Code prescribes that if a member of an elected body, an employee, or a representative commits an unlawful act against a third party while carrying out their duties, the legal person is liable.[660]

According to the wording of this rule, it should be noted that this group of persons comprises 1) the legal persons' organs established by statute or by the memorandum of association and 2) employees acting within the scope of their position and title. Provisions regarding the representation of a legal person by an employee also apply to the representation of a legal person by its member or a member of another organ that is not registered in a public register.

In addition, there are 3) other appointed representatives who are empowered to act on behalf of the organs of legal persons but do not belong to any of the previous two groups.[661]

To establish the liability of the legal person, there should be an unlawful act committed during the conduct of its duties by a member of an elected organ, or an employee or another representative to a third party,[662] and according to the literature, this liability is strict.[663]

6.3 State Liability for Damage Caused by Civil Servants

In the Czech Republic, the first statute which regulated the state's liability was Act No. 58/1969 Coll.[664]

A special act in force which broadly regulates this issue is Act No. 82/1998 Coll., on Liability for Damage Caused during the Exercise of Public Power.[665]

The persons liable for exercising public power are categorised as the state, operating within its state powers, and territorial self-governing units, which carry out public power as delegated by law within their autonomous scope of authority.[666]

To establish the liability of the state, the following conditions must be met: there must be a damage caused by its organs, legal and natural persons, in the exercise of state power or

[660] Civil Code, Art. 167.
[661] Lenka Dobešová and Jan Hurdík, 2023, p. 75.
[662] Ibid., p. 75.
[663] Vojtech Lovetinsky, 2017, p. 35.
[664] Lenka Dobešová and Jan Hurdík, 2023, p. 62.
[665] as amended on 1 January 2025 (amendments: 160/2006 Coll., 41/2009 Coll., 41/2011 Coll., 396/2012 Coll., 105/2013 Coll., 303/2013 Coll., 178/2018 Coll., 118/2020 Coll., 438/2024 Coll.)
[666] Lenka Dobešová and Jan Hurdík, 2023, p. 62.

administration based on a statute (including notaries and bailiffs), organs of territorial self-governing units that exercise state administration tasks. In addition, the damage could be caused by an unlawful decision or an improper administrative procedure.[667]

The procedure for holding the state liable is that the ministries and state organs act on the state's behalf. Furthermore, unlawful decisions need to be annulled or changed. Available remedies must be used. In addition, in cases when someone is taken into custody or to prison, the state is liable. Failing to act when state organs ought to have taken action is another example of improper official procedure.[668]

Claims for damages must be filed before the organ of the state administration. If the injured party is dissatisfied with the decision, they can bring the claim before the court within six months.[669]

Concerning the liability of territorial self-governing units, or other bodies such as ministries or the government the ground for their liability can be found in § 13 of the State Liability Act (Act No. 82/1998 Coll), which prescribes the liability for maladministration that refers to the failure to issue decisions, delayed issuance, other inactivity by a public authority, or a flaw in the way proceedings are administered.[670] In addition, Act No. 82/1998 Coll. provides that the state or territorial self-governing units have a recourse claim in the amount of the compensation paid to the injured party against the official and the territorial self-governing unit with delegated authority.[671] Moreover, there are statutes that also foresee the state's liability as strict. For example, for damage caused by the police, the former Police Act (*zákonno*. 163/1996 *Coll.policii*) prescribes strict state liability.[672] In addition, "the state is liable under the Act on the Liability for Damage Caused in Exercising Public Authority (*zákonno.82/1998 Coll.o odpovednosti za škodu zpu/sobenou pri výkonu verejnémoci rozhodnutím nebo nesprávným úredním postupem*)."[673]

[667] Ibid., p. 62.
[668] Ibid., p. 62.
[669] Ibid., p. 62.
[670] Luboš Tichý in Ken Oliphant (ed.), 2016, *The Liability of Public Authorities in Comparative Perspective*, Intersentia, p. 92.
[671] Ibid., p. 63.
[672] Luboš Tichý in B.A. Koch and H. Koziol (ed.), 2002, p. 82.
[673] Ibid., p. 83.

6.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

As mentioned at the beginning of the chapter on General Considerations regarding the ABGB's influence on the first socialist Czech Civil Code of 1950 and the following code, the same applies regarding the issue of dangerous activities. Namely, from a historical perspective, under the rules of strict liability in § 351 of the former Civil Code, dangerous activities were covered. Precisely those were special dangerous operations or businesses.[674] It prescribed the strict liability of business operators for damage caused by the source of a special danger.[675]

In addition, special laws were adopted on this subject matter. Furthermore, an amendment from 1991 to the later Civil Code of 1964 (the so–called "Large Amendment") established for both types of liability, tortious and contractual, the strict liability principle. That was established as the second general principle (the first is the principle of liability based on fault), but it covered only the liability for damage caused by "operations". However, it should be emphasized that the strict liability regime of the Civil Code of 1964 also covered situations when the damage was caused during the provision of services using instruments (these instruments caused the damage).[676]

According to § 2925 Sec. 1 of the 2012 Civil Code, the operator of a plant or other equipment, which is considered dangerous, shall be liable, even if they exercised due care. The reasons for exculpation are only force majeure, or the actions of the injured party or a third party.[677] Sec. 2 of the same article foresees that if a significant increase in the likelihood of adverse consequences was evident as a result of working, operators can be required to pay a reduced price due to other causes associated with the emerging damage.[678] Lastly, Sec. 3 stipulates that the operations are considered dangerous if, in a factory, explosive or hazardous substances are used during the operations.[679]

Wrongfulness is not required as a precondition to establish strict liability. Rather, the statute foresees a special harmful event due to the existence of the heightened level of risk that

[674] Ibid, p. 76.
[675] Ibid., p. 76.
[676] Luboš Tichý in B.A. Koch and H. Koziol (ed.), 2002, pp. 75-76.
[677] *Zákon ze dne 3. února 2012 občanský zákoník, Sbírka zákonů č*. 89 / 2012 [Civil Code of 2012], § 2925 Sec 1.
[678] Civil Code, § 2925 Sec 2.
[679] Civil Code, § 2925 Sec 3.

exists.[680] In this regard, an elevated level of risk involves risky economic activities. Strict liability concerns a lot of cases founded on a harmful event, such as entrepreneurial activity, and the possession of things, when damage is caused due to the nature of a thing used in conducting some obligations and risky economic activities, such as the operation of a means of transport and others.[681]

The following case demonstrates a situation in which damage was caused during the operation of a means of transport. Namely, it concerns non-material damage sustained by a passenger (injury to health - bodily injuries) during aircraft landing, during a sightseeing flight in an ultralight aircraft.[682] The claim was aimed at compensation because the damage was caused due to the nature of the means of transport. However, the court of second instance annulled the first-instance decision in favour of the plaintiff because it held that an ultralight sightseeing aircraft is not a means of transport within the meaning of the Civil Aviation Act and other regulations, as it is not used for transporting passengers from one place to another; therefore, the defendant was not liable. Further reasons for that judgment were that there was no contractual relationship between the defendant and the plaintiff. Furthermore, the flight was organised at the user's and the pilot's own risk. It involved a different type of aircraft and sports flying equipment, and its use for such a purpose was at their own risk. In this case, the pilot (flight instructor) was an employee hired by the defendant who operated the aircraft and was killed in the crash. The plaintiff filed an appeal against the judgment, and in the further proceedings, it was established that the claim was well-founded. Taking into account that this judgment was rendered during the validity of the former Civil Code, the legal ground of the judgment in favour of the plaintiff was Art. 427, according to which, the court of the second instance established the strict liability of the defendant. Namely, Sec. 1 prescribed the liability of both natural and legal persons for damage caused due to the special nature of the transport operation they are engaged in. In addition, Sec. 2 stipulated that the operators of motor vehicles, motor vessels, and aircraft are liable.[683] Today, this article is substituted by § 2927 of the 2012 Civil Code.[684]

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[680] Ibid., p. 80.
[681] Ibid., p. 80.
[682] Judgment of the Czech Supreme Court No. 25 Cdo 2053/2005, of 28 February 2007.
[683] Ibid.
[684] "(1) Kdo provozuje dopravu, nahradí škodu vyvolanou zvláštní povahou tohoto provozu. Stejnou povinnost má i jiný provozovatel vozidla, plavidla nebo letadla, ledaže je takový dopravní prostředek poháněn lidskou silou. (2) Povinnosti nahradit škodu se nemůže provozovatel zprostit, byla-li škoda způsobena okolnostmi,
které mají původ v provozu. Jinak se zprostí, prokáže-li, že škodě nemohl zabránit ani při vynaložení veškerého úsilí, které lze požadovat." [(1) "A person who operates transportation shall compensate for damage caused by

Following the analysis of the case law, this part is dedicated to the special acts that also prescribe strict liability. For example, the Mining Act (*zákonno*. 44 of 1988 Coll. – *horní zákon*) with amendments, in Art. 36 regulates liability for damage caused by mining (envisaging the strict liability of the organisation operating the mine for the damage caused). Furthermore, Art. 37 regulates compensation for damage and the manner of indemnification.[685] Another example of a special act that regulated the sources of special danger was the former Nuclear Energy Act (*zákonno* 18 of 1997 Coll. –*atomový zákon*). It implemented the Vienna Convention and the Paris Convention.[686] In addition, § 2925 of the Civil Code will be applied to the liability of the operator of a nuclear reactor.[687]

7 Employer's Liability for Damage Caused by an Employee to a Third Party under Polish Law

7.1 General Considerations

The employer's vicarious liability under Polish law is analysed in the literature from both perspectives - labour law and the law of obligations. According to the labour law, Art. 120 Sec. 1 of the Labour Code of 26 June 1974 regulates the employer's liability for damage caused by employees to a third party at work or in work-related situations.[688] A linguistic analysis of this article indicates that the third party has a claim against the employer, [689] but not against the employee.[690] The compensation can be claimed by the third party only from the employer

the special nature of such operation. The same obligation applies to any other operator of a motor vehicle, vessel, or aircraft, unless the means of transport is powered solely by human force.
(2) The operator cannot be relieved of liability for damages if the damage was caused by circumstances originating in the operation of the transport. Otherwise, the operator shall be exempt from liability if they prove that the damage could not have been prevented even by exercising all efforts that could reasonably be required".] Civil Code, § 2927, Sec 1 and 2.
[685] *Zákon č. 44/1988 Sb. Zákon o ochraně a využití nerostného bohatství (horní zákon*), Act no. 44/1988 on the protection and use of mineral resources [the Mining Act], published in the Collection of Laws [*Sbírka zákonů*], Arts. 36-37.
[686] Luboš Tichý in B.A. Koch and H. Koziol (ed.), 2002, p. 82.
[687] Ibid., p. 99.
[688] Kodeks pracy z dnia 26 czerwca 1974 r. (t.j. Dz.U. 2023 poz. 1465), [Labour Code of 26 June 1974], Art. 120.
[689] Dörre-Kolasa in Baran et al., 2016, p. 337. Cited in Ilić Milica, 2025, "Employer's Liability for Damage Caused by the Employee to a Third Party under Polish Law", *Studia Iurisprudentiae Doctorandorum Miskolciensium*, pp. 167-168.
[690] Moras-Olas, 2016, p. 353. Cited in Ilić Milica, 2025, p. 168.

whose employee caused the damage.[691]The third party is not entitled to claim compensation from the employees themselves; nor do they have a direct claim against the employer's insurer, as the employer is solely and directly liable for the damage caused by their employees.[692]

Hence, it can be concluded that labour law protects employees, who are considered the weaker party in the employment relationship.[693] However, a broader understanding of this subject matter requires functional interpretation.[694] This analysis determines that the legal basis for the third party-claim is not specified within this provision of labour law.[695] This matter is governed by the tort provisions of the Civil Code.[696]

Thus, through the lens of the law of obligations, according to the majority opinion, there are two ways of establishing the employer's liability. First, in tort law, the liability is considered strict, but the fault of the tortfeasor or liable person thereof is relevant. Conversely, in contract law, the liability is strict where the fault of the debtor is not legally relevant, except as provided in Art. 474.[697]

The Labour Code of 26 June 1974, in Art. 300 also prescribes that "In matters not provided for in labour law, the provisions of the Civil Code shall apply to an employment relationship unless those provisions are contrary to the requirements of labour law."[698] As a result, a third party may claim damages from the employer if such compensation is justified under civil law.[699] There is a standpoint in the literature and case law that Art. 120 of the Labour Code is not sufficient to establish the basis of the employer's liability to a third party.[700] Namely, in this case, Arts. 416, 417-421, 430, and the aforementioned Art. 474, in connection with Art. 471 of the Civil Code, apply.[701]

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[691] Muszalski and Walczak, 2021. Cited in Ilić Milica, 2025, p. 168.
[692] Ibid., p. 168.
[693] Jasion, 2017, p. 102. Cited in Ilić Milica, 2025, p. 168.
[694] Wolak, 2015, p. 21. Cited in Ilić Milica, 2025, p. 168.
[695] Dörre-Kolasa in Baran et al., 2016, p. 337. Cited in Ilić Milica, 2025, p. 168.
[696] Judgment of the Polish Supreme Court (SN) of 25 March 1987, II CR 48/87, LEX no. 8817. Cited in Dörre-Kolasa in Baran et al., 2016, p. 337.
[697] Ewa Bagińska and Magdalena Tulibacka, 2022, *Tort Law in Poland*, Kluwer Law International, Alphen aan den Rijn, the Netherlands, p. 89.
[698] Act of 26 June 1974 – Labour Code, as amended, Art. 300. The Act of April 23, 1964, Civil Code, Journal of Laws of 2016, Dz. U. 1964 Nr 16 poz. 93 with amendments. This Civil Code "came into effect on January 1, 1965." and replaced „the Code of Obligations (1933), the Code of Commerce (1934), the Law of Property (1946), the Law of Inheritance (1946), the General Provisions of the Civil Law (1950)". Szpunar, 1967, p. 86. Cited in Ilić Milica, 2025, p. 168.
[699] Muszalski and Walczak, 2021, Art. 120. Cited in Ilić Milica, 2025, p. 168.
[700] Badowiec, 2017, p. 10. Similarly, Perdeus in Baran, 2022, Art. 120; Moras-Olas, 2016, p. 353.
[701] Ibid.

Art. 416 prescribes the legal person's liability for damage caused by its organs that were at fault, which will be discussed in a separate subchapter.[702] The subsequent Art. 417 stipulates the liability of the State Treasury, local government units, or other entities exercising public authority for damage caused by an unlawful or omission committed in the performance of such activities,[703] which will also be discussed later. Furthermore, the subsequent Arts. 418-419 also pertain to the state's liability[704] when its functionaries cause damage.[705] Art. 430 of the Civil Code foresees the liability of principals or masters.[706] Provisions of strict liability in Arts. 433–436 of the Civil Code can be interpreted as a legal ground for the employer's liability.[707] In case law, strict liability also pertains to the employer's liability based on the aforementioned Art. 474 of the Civil Code, in situations when a debtor engages someone to fulfil their obligation.[708]

In addition to the fact that Art. 430 of the Civil Code stipulates the liability of the principal or master; the term superior is also used in the literature; thus this article stipulates superiors' liability for damage caused by subordinates, and that their liability is strict according to theoretical interpretation, this interpretation is founded on the principle of risk.[709] It is not legally relevant if the superior was at fault in selecting a subordinate (*culpa in eligendo*). Furthermore, they cannot release themselves from liability by proving that they were not at fault for selecting and supervising the subordinate; thus, based on this approach, the nature of their liability is quasi-absolute.[710]

Concerning the conditions for establishing the superior's liability, the subordinate's fault is one of the prerequisites, according to Art. 415 of the Civil Code. Moreover, based on Art. 361 of the Civil Code an adequate causal link between the damage caused and a subordinate's conduct is not required. Moreover, the relation of subordination must exist. In addition, the unlawful behaviour of the subordinate performed in the course of the entrusted activity is required. It is challenging to determine whether such activity is caused during the performance of the activity or if that activity is merely an occasion for a subordinate to cause the damage.[711] That means

[702] Civil Code, Art. 416.
[703] Civil Code, Art. 417.
[704] Civil Code, Art. 418-419.
[705] Miroslav Nesterowicz and Ewa Bagińska in J. Spier (ed.), 2003, *Unification of Tort Law: Liability for Damage Caused by Others*, Kluwer Law International, The Hague, the Netherlands, p. 185.
[706] Ibid., p. 185.
[707] Renata Badowiec, 2017, "Odpowiedzialność za szkodę wyrządzoną osobie trzeciej przy wykonywaniu obowiązków pracowniczych – uwagi na tle art. 120 k.p." ["Liability for damage caused to a third party in the performance of employee duties – remarks based on Art. 120 of the Labour Code"], *Młody Jurysta*, p. 10.
[708] Ibid.
[709] Jantowski in Balwicka-Szczyrba M, Sylwestrzak A. (eds.), 2023, Art. 430.
[710] Ibid.
[711] Ibid.

that the employment relationship creates an "opportunity" based on which an employee can cause damage.[712] According to this interpretation, a unique category of a new form of tort known as a "labour tort" or "labour law tort" was developed by case law and pertains to situations where an employee causes damage with intent.[713] It should be emphasised that this is an interpretation from a labour law perspective [714] from the beginning of this chapter. In addition, concerning the conditions for establishing the employer's liability from the perspective of labour law, those are that the employer is liable only for a person who qualifies as an employee according to the Labour Code (Art. 2).[715] According to this article, an employee is considered a person hired on various legal bases, such as an employment agreement, appointment, nomination, election, or a cooperative employment agreement.[716]

The subsequent Art. 3 defines the notion of the employer, which is considered an organisational unit that can also be without legal personality. In addition, they can be a natural person if they hire an employee.[717] A legal person is the most common form of entity, such as joint-stock companies, limited liability companies, and foundations. In addition, they can be a general partnership, a professional partnership, or a limited partnership, but these forms of entities are so-called "imperfect legal persons", because they are not full legal persons, although they have legal capacity vested by law to which Art. 33 of the Civil Code applies.[718] Furthermore, an internal organizational unit can be the employer if the right to hire and fire is conferred upon it.[719]

Thus, if someone works for the employer in the status of an independent contractor or in a non-employment relationship, the employer will not be liable according to Art. 120 of the Labour Code.[720]

The employer is liable if damage results from the employee's activities during the performance of their work duties.[721] It is difficult to explain the link between the performance of activities and the act by which the damage was caused.[722] The most common standpoint is that the

[712] Miroslav Nesterowicz and Ewa Bagińska, 2003, p. 190.
[713] Renata Badowiec, 2017, p. 7.
[714] Ibid., p. 7.
[715] Moras-Olas, 2016, p. 352.
[716] Labour Code, Art. 2.
[717] Labour Code, Art. 3.
[718] Zbigniew Hajn and Leszek Mitrus, 2024, *Labour Law in Poland*, Kluwer Law International, The Netherlands, p. 88.
[719] Ibid. pp. 88-89.
[720] Patulski, 2006, p. 52, cited in Moras-Olas, 2016, p. 352.
[721] Moras-Olas, 2016, p. 352.
[722] Machnikowski, 2019, p. 165.

damage "must be caused by an activity intended to achieve some goals set by the principal".[723] Thus, the solution is that it "must be addressed case-by-case".[724]

It should be emphasised that, according to Art. 120 Sec. 2 of the Labour Code, an employee is liable to the employer who compensated a third party for damage.[725]

Thus, according to the first section of this article, the liable person is the employer, but, according to Sec. 2 of the same article, the employer has the right of recourse against the employee, after compensating the third party.[726]The employee is considered liable as if they had caused the damage directly to the employer.[727] However, this provision does not prescribe whether the employee caused damage with intent or unintentionally.[728]

According to one theoretical interpretation, in a situation where an employee causes damage with intent, the rules of tort law apply.[729] In case law, their direct liability is foreseen in that case (when the employee causes damage intentionally).[730]

However, there is also a second view according to which the rules of labour law apply to the employee for both their unintentional and intentional fault. The Supreme Court also took this standpoint.[731] Art. 122 of the Labour Code prescribes that the employee is held liable for the full amount of the damage if it is caused with intent.[732] Other reasons for the direct liability of the employee are the insolvency or underinsurance of the employer, and if the damage did not occur during employment, but "on the occasion" of employment.[733]

The following case pertains to liability based on Art. 430 of the Civil Code, because the employee caused damage to a third party while performing their work duties, and not merely because they had the opportunity to abuse their position.[734] Namely, the facts of the case were that the plaintiff, as a bank's client, entered into a service agreement with a bank, which, in this case, is the defendant. The subject matter of the service agreement was the plaintiff's savings,

[723] Rembielinski, p. 18, p. 138, Szpunar, p. 19, p. 476, cited in Machnikowski, 2019, p. 165.
[724] Machnikowski, 2019, p. 165.
[725] Labour Code, Art. 120, Sect. 2, Journal of Laws of 2016 r., with amendments.
[726] Moras-Olas, 2016, p. 353, Similarly Jasion, 2017, pp. 102-103.
[727] Jasion, 2017, p. 103.
[728] Ibid., p. 103.
[729] Badowiec, 2017, p. 7.
[730] Judgment of the Supreme Court of 28.08.1980, IV PR 252/80, LEX No. 12675, cited in Badowiec, 2017, p. 7.
[731] Resolution of the Supreme Court of October 11, 1977 (IV PZP 5/77), OSNC 1978, no. 4, item 66. Cited in Badowiec, 2017, p. 7.
[732] Ibid.
[733] Ewa Bagińska and Magdalena Tulibacka, 2022, p. 92.
[734] Judgment of the Supreme Court in Poland No. IV CSK 647/15 of June 10, 2016, p. 8.

which he entrusted to the bank for the purpose of continuous growth. He also granted a power of attorney to an employee of the defendant bank, authorising her to perform all legal acts on his behalf, including managing investment accounts, but only on the basis of instructions given by the plaintiff, either by telephone or by fax. However, the bank's employee abused her position and, without the plaintiff's authorisation in the previously mentioned way, unlawfully invested his money and withdrew it from his account, as a result of which the plaintiff sustained damage.[735] In this case, Art. 430 of the Civil Code was applied, and the bank was obliged to compensate the defendant for the damage, as it failed to exercise proper supervision over its employee to whom the performance of official duties had been entrusted, and who acted for the purpose of obtaining personal gain.[736] The bank failed to supervise and monitor the work of its employee during the four-year period during which such unlawful conduct persisted.[737]

7.2 Liability of a Legal Person for Damage Caused by its Organ

As a special type of liability for another's tortious conduct, Art. 416 of the Civil Code envisages this type of vicarious liability[738]: a legal person shall be obliged to redress the damage caused by its organs and for which these organs were at fault.[739] Furthermore, the so-called theory of organs, or the doctrinal organ theory, is chosen by the legislator[740] according to which the legal person is obliged to compensate for the damage caused by its organs with fault.[741] For example, in a situation where the organ acted beyond the limits of its authority and caused damage by concluding a contract, liability lies exclusively with the natural person acting in the capacity of that organ.[742] Namely, a natural person with the authority to act on behalf of a legal person is actually the organ of a legal person.[743]

The actions of the persons who conduct the functions of that organ are considered the legal person's actions themselves, and the legal person will be liable for damage caused by its organ,

[735] Ibid., p. 3.
[736] Ibid., p. 8.
[737] Ibid., p. 8.
[738] Adam Szpunar, 1967, p. 90.
[739] Civil Code, Art. 416.
[740] Machnikowski, 2019, p. 161. Similar in Ilić Milica, 2025, p. 174.
[741] Jantowski in Balwicka-Szczyrba M, Sylwestrzak A. (eds.), 2023, Art. 116.
[742] Ewa Bagińska and Magdalena Tulibacka, 2022, p. 95.
[743] Machnikowski, 2019, p. 161. Similar in Ilić Milica, 2025, p. 176.

no matter what its nature is[744] if the following conditions are met. These are the appointment of a natural person to perform a function of an organ, acting within the scope of any authority they have been given, and refraining from exceeding the scope of their authority.[745]

In a situation involving multiple individuals that an organ comprises, it may be unclear who is liable for the damage caused. According to the interpretations in the legal literature, a legal person can be liable if any of the members cause damage by fault.[746]

In older literature, Professor Adam Szpunar, used the term "agents" for the representatives through which legal entities act.[747] Thus, if they had committed wrongful acts, that would be attributed to that legal entity.

However, today, the term "agent" is not used in Art. 416 of the Civil Code. Namely, the term "organ" is used, which is composed of one or more natural persons, and if only one of them causes damage, that is enough to establish a liability of a legal person. Furthermore, it is required that the damage was caused directly by the organ's activities.[748]

In addition, it should be emphasised that the legal persons' liability can also be based on Art. 429 of the Civil Code for independent contractors.[749] Moreover, their liability can be established for things and for animals. Strict liability is foreseen by Arts. 433–436, and 491.[750] However, the result of these interpretations is that in practice, Art. 416 of the Civil Code is rarely applied.[751]

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[744] "See e.g. J. Kuzmicka-Sulikowska, Principles of liability..., pp. 42-43 and the literature cited there; see also M. Safjan, Tort liability..., pp. 188-189, P. Machnikowski [in] System Prawa Prywatnego, vol. 6, ed. A. Olejniczak, 2009, pp. 372-373." Cited in Jantowski in Balwicka-Szczyrba M, Sylwestrzak A. (eds.), 2023, Art. 116.
[745] Machnikowski, 2019, p. 161.
[746] See "the judgment of the Supreme Court of 5.12.2007, I CSK 304/07, LEX No. 365045"; "see also the judgment of the Supreme Court of 5.11.2010, I CSK 12/10, LEX No. 622195, in which it was explained that "basing the liability of a legal entity on Art. 416 of the Civil Code does not mean recognising that the damage was caused by the culpable behaviour of all members of its body." Cited in Jantowski in Balwicka-Szczyrba M, Sylwestrzak A. (eds.), 2023, Art. 116. Similar in Ilić Milica, 2025, p. 17
[747] Adam Szpunar, 1967, p. 90.
[748] "See e.g. the judgment of the Supreme Court of 5.12.2007, I CSK 304/07, LEX No. 365045; see also the judgment of the Supreme Court of 5.11.2010, I CSK 12/10, LEX No. 622195, in which it was explained that "basing the liability of a legal entity on Art. 416 of the Civil Code does not mean recognising that the damage was caused by the culpable behaviour of all members of its body." Cited in Jantowski, 2023, Art. 116.
[749] Ewa Bagińska and Magdalena Tulibacka, 2022, p. 96.
[750] "Regional Court in Gdansk, 25 Apr. 2001, Rzeczpospolita 26 Apr. 2001", cited in Ewa Bagińska and Magdalena Tulibacka, 2022, p. 96.
[751] Ewa Bagińska and Magdalena Tulibacka, 2022. p. 96.

7.3 State Liability for Damage Caused by Civil Servants

According to the famous Polish writer, Ernest Till: "There can be no true liberty and democracy without liability of the State for the torts committed by its agents in the fulfilment of public duties".[752] Namely, under the Polish legal system, the Constitution of 1921 proclaimed the principle of state liability.[753] Before that time, different legal regimes for state tort liability were prescribed by different legal systems.[754] Nowadays, state liability is introduced by Art. 77 of the Constitution of 1997. It prescribes the right of everyone to compensation for any damage caused to them by the action of a public authority organ contrary to statute.[755] Thus, it can be concluded according to this provision that the liability of the public authority is strict (the principle of strict liability was introduced in the Polish legal system).[756] Furthermore, this is a model of a direct liability of a legal person operating under the rules of public law. This is not vicarious liability because the institution is liable, not the public official, although they are the direct tortfeasor. Namely, in cases the unlawful exercise of public authority, a general rule of liability for damage caused by an unlawful exercise of public authority is foreseen by Art. 417 Sec 1. of the Civil Code.[757] This article prescribes the liability of the State Treasury or an entity, municipality, or other legal person that exercises public authority for damage caused by an illegal act or omission undertaken in the course of exercising public authority.[758]

From a historical perspective, the Third Book of the Civil Code under Title VI (Obligations) defined torts for which the state was liable.[759] Art. 417 Sec. 1 prescribed that "the State Treasury

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[752] "E. TILL, Polskie prawo zobowiazari. Czesc ogolna. Projekt wstedpny z motywami [Polish law of obligations. General part. Preliminary bill with motives] (1923), p. 111-112". Cited in Baginska, 2005, p. 851. and Ilić Milica, 2025, p. 176.

[753] "Art. 12 provided: [E] very citizen has the right to damages for the harm caused to him by a state authority, civil or military, because of an official act which is against the law or the duties of service. The State and the responsible organ are jointly liable for the harm caused; the commencement of an action against the state or public servants does not require the government's consent. In the same way, local government bodies and other autonomous organizations are liable. Special laws will determine the bringing into force of this principle." "English text based on the translation by Wyrwa, Governmental Tort Liability (Law in Eastern Europe no. 17, ed. Barry) 233 (1970)." Cited in Wagner, 1972, pp. 247-248. and Ilić Milica, 2025, p. 177.

[754] These systems are in the East, Russian law, in the South, Austrian law, in the West, Prussian law, and a distinct legal system in Central Poland (they follow the French Civil Code). It varied in areas: state immunity was allowed by Russian law, and the opposite was allowed by Prussian law. "See e.g. Jodlowski, "La responsabilité des dommages causes par l'activité des organes du pouvoir et de l'administration" (Responsibility for Damage caused by Activities of the Organs of Government and the Administration), in Société, de Législation Comparée, Journées Juridiques I (1965) 87, 90." Cited in Wagner, 1972, p. 247. and Ilić Milica, 2025, p. 177.

[755] Ewa Bagińska and Magdalena Tulibacka, 2022, p. 65.

[756] Ibid., p. 66.

[757] Ibid., p. 66.

[758] Civil Code, Art. 417.

[759] Wagner, 1972, pp. 250-251.

is liable for damages occasioned by a servant of the state in carrying out a delegated function".[760]

The term "state agent" was used by Professor Szpunar in interpreting Art. 417, according to which the state was liable for damage caused by its agent in exercising its function.[761] On the other hand, Professor Wagner used the term "servant" which applied to all employees hired by state institutions, as well as to persons appointed in the electoral process, such as judges or prosecutors, soldiers, etc.[762] According to Professor Szpunar "the classification of thousands of State agents into agents and servants is a very complicated matter".[763] However, in practice, the most important thing was to prove that the agent or servant was at fault in order to establish that the state was liable for redressing the damage.[764]

The fault of the servant was necessary for establishing the State Treasury's liability for damage that was caused before 17 October 1997 (this is one of the three periods of the development of this institute).[765]

However, from 17 October 1997 to 1 September 2004, the functionary's fault was not legally relevant for the existence of the State Treasury liability.[766]

The current version of Art. 417 of the Civil Code has been in effect since 2004[767] meaning the liability of the institution is not bound by the fault of the functionary hired by that institution.[768]

It should be noted that the joint and several liability of the State Treasury or the local authority is foreseen in situations when a local authority or other legal person is delegated to exercise tasks falling within the scope of public authority and their liability is strict.[769]

[760] Art. 417, Sec. 1, 2. Cited from Wagner, 1972, p. 250.
[761] Szpunar, 1967, p. 91.
[762] Wagner, p. 251.
[763] Szpunar, 1967, p. 91.
[764] Ibid., p. 91.
[765] Jantowski in Balwicka-Szczyrba Małgorzata, Sylwestrzak (eds.), 2023, Art. 417.
[766] Jantowski in Balwicka-Szczyrba Małgorzata, Sylwestrzak (eds.), 2023, Art. 417.
[767] Jantowski in Balwicka-Szczyrba Małgorzata, Sylwestrzak (eds.), 2023, Art. 417.
[768] Baginska, Cited in Ilić Milica, 2025, p. 179.
[769] Ewa Bagińska and Magdalena Tulibacka, 2022, pp. 66-67.

7.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

In the Polish legal system, strict liability is *prima facie* prescribed by Art. 435 of the Civil Code. According to this article, if forces of nature such as gas, fuel, or electricity that drive the operation of a legal person, if they cause damage to a person or their property, the person who manages that legal person or institution (the same applies) shall be held liable. In addition, they may be released from liability only if the damage was caused by *force majeure* or solely by the fault of the injured party or a third party. According to Sec. 2, if explosives or similar materials are used in their operations, Sec. 1 will also be applied.[770] Thus, this is a form of strict liability, and the practical situations where this provision applies are, for example, if damage occurs on trains, or at their stations, including waiting rooms, restaurants, tracks, and offices, even if they are located outside the train station, the railway will be liable for accidents that occur on their premises.[771]

The Polish Atomic Law of 29 November 2000 with amendments, in Art. 101 stipulates the strict liability of a nuclear operator for damage caused in or related to nuclear facilities, unless the damage was caused by acts of warfare or aggression.[772]

The Maritime Code Act of September 18, 2001, ("*Kodeks Morski*") stipulates the liability of the shipowner for damage caused by pollution from vessels (it involves carrying goods, or dumping waste into the sea).[773] In addition, while general tort rules protect the environment as a whole, sea pollution is subject to this specific strict liability regime.[774]

[770] Civil Code, Art. 435, Sec. 1 and 2.
[771] Miroslaw Nesterowicz and Ewa Baginska in B. A. Koch, H. Koziol (eds.), 2002. p. 259.
[772] Ustawa z dnia 29 listopada 2000 r. – Prawo atomowe, Journal of Laws 2024, item 1277, Art. 101.
[773] Polish Maritime Code [Official Journal of Laws of 4 December 2001] with amendments.
[774] Miroslaw Nesterowicz and Ewa Baginska in B. A. Koch, H. Koziol (eds.) 2002. p. 261.

8 Employer's Liability for Damage Caused by an Employee to a Third Party under Romanian Law

8.1 General Considerations

The Romanian tort law does not explicitly prescribe the employer's liability for unlawful acts of employees; instead, it stipulates a broader principle of a principal's liability for the acts of auxiliaries, which includes employer liability.[775]

This issue is regulated in the first section of Art. 1373 of the Civil Code (*Codul civil al României)*, which prescribes that the principal's obligation to redress the damage caused by their agents whenever their acts are related to their duties or with the functions of the assigned tasks.[776] The rule refers to the term *comitentul*¸which can be translated as "principal", while the term *prepus*, in addition to the term "auxiliary", as previously mentioned, is also translated in the literature as "agent".[777]

The rule is intended to provide the injured party with additional protection in situations where the tortfeasor acted under the direction of someone else, rather than independently.[778]

Art. 1373 Sec. 2 of the Civil Code prescribes that a person is considered principal if they have the authority to direct, supervise, and control someone who performs tasks for their or someone external benefit, either through a contract or by statute[779] thus, there is no unitary statutory definition of an "employer". The employee is defined as a person who carries out specific functions or tasks under the supervision, oversight, and authority of the employer. This relationship signifies that the employee acts in service of the employer's interests. In addition, the old Civil Code of 1865 did not provide a contemporary definition of these persons in contrast to the new Code, and it used outdated terminology such as "masters" and "servants".[780]

In addition, another definition of employee can be found in the literature, but it is used for agents, defined as persons consenting to undertake actions on behalf of another, thereby placing

[775] L. Pop, Tratat de drept civil, p. 382., cited in Laura Toma-D˘auceanu, Ioan Ilies¸ Neamt, 2022, *Tort Law in Romania*, Kluwer Law International B.V., Alphen aan den Rijn, p. 68.
[776] Law Nº 287/2009 on the Civil Code, Art. 1373, Sec. 1.
[777] "Extracts from the New Romanian Civil Code." *Journal of European Tort Law*, vol. 2, no. 1, 2011, p. 113.
[778] Mangu, Ra˘spunderea civila˘ delictuala˘, p.115, cited in Laura Toma-Da˘uceanu, Ioan Ilie Neamts, 2002, p. 68.
[779] Romanian Civil Code, Art. 1373, Sect. 2.
[780] Călina Jugastru, 2013, "Damage in the Context of the Liability for the Actions of Others", *Jurnalul de Studii Juridice*, 3-4/2013, pp. 31-32.

themselves under the latter's direction, supervision, or control.[781] Furthermore, an agent performs functions following the directives and oversight of another party.[782] The basic principle distinguishing the roles of principal and agent lies in a subordinate relationship predicated on an agreement, wherein a natural or legal person assigns a specific task to another. This framework enables the principal to issue instructions and exert control, while the agent is obliged to adhere to those instructions.[783]

Although the concept of subordination is not specifically used in the Labour Code, it can be inferred from the definition of the employment agreement in Art. 10 that the employee is in a position of subordination to the employer.[784] Namely, the employee performs work duties on behalf and "under the authority of an employer".[785] According to Vartolomei's interpretation of the dictionary of the Romanian language, the authority implies "right, power, empowerment of command, to give orders or impose one's listening".[786] Thus, the employee's legal relationship of subordination to the employer is a main characteristic of the employment agreement.[787] The Labour Code also defines the notion of the employer, while the employee is not explicitly defined.[788] Legal theory offers different interpretations of these notions. The terms principal and agent can be found in Art. 1373 of the Civil Code. In the literature, Raluca Dimitriu, on these terms (principal and agent), emphasises that the definitions of principal and agent are intrinsically linked through their mutual relationship. Thus, even though Art. 1373, Sec. 2 offers a definition of the principal, it inherently relates to the agency relationship, as the principal's status is contingent upon the person they supervise.[789]

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[781] M. N. Costin, C.M.Costin, 2007. p. 774, cited in Ioan Ciochină-Barbu, 2015, "The principals' liability for their agents in regulating the New Civil Code", *Acta Universitatis George Bacovia. Juridica* - Volume 4. Issue 2/2015, p. 537.
[782] The Romanian Academy, 1998, p. 835, cited in Ioan Ciochină-Barbu, 2015, p. 537.
[783] C. Stătescu, C. Bîrsan p. 245; I. Ciochină-Barbu, 2012 p. 157., cited in Ioan Ciochină-Barbu, 2015, pp. 537-538.
[784] Brîndușa Vartolomei, 2014, "The Subordination of the Employee to the Employer – the Fundamental Legal Characteristic of the Individual Employment Contract and its Consequences on Labor Law", *Perspectives of Business Law Journal*, p. 209.
[785] Ibid., p. 209.
[786] Dicţionarul explicativ al limbii române, Academia Română, 1998, pp. 279, 1034, 75. Cited in Brîndușa Vartolomei, 2014, p. 209.
[787] Brîndușa Vartolomei, 2014, p. 209.
[788] According to Art. 14 of the Labour Code, the employer is a natural or legal person who employs others based on an employment contract. The term employee is partly defined in Art. 10 through the definition of employment agreement as afore mentioned. Labour Code, The Official Gazette of Romania no 345 of 18 May 2011 with amendments.
[789] R. Dimitriu, 2014, p. 552-553., in M. Uliescu, cited in Ioan Ciochină-Barbu, 2015, p. 538.

Case law emphasises that the agency relationship arises from a mutual agreement of will, in which the principal assigns a specific function to the agent and retains the right to direct, guide, and control the agent's activities within that task.[790]

The new Civil Code introduces several changes concerning this subject matter. It clarifies, as described above, the definition of an employer, which is separated from the definition of the employee, outlines the sources of subordination, and establishes liability not contingent on fault (for both the employer and the employee).[791]

The conditions and grounds for liability remain unchanged. The general conditions are, as it results from Art. 1373 Sec. 1 of the Civil Code, the damage, the employee's wrongful act, and the causal relationship between the wrongful act and the damage.[792]

For a detailed analysis, it is worth noting that while Sec. 1 specifically addresses the entrusted functions, it is important to relate this to Sec. 2, as it highlights that the principal's liability also comes into play when the acts are performed by an employee. The main distinction is whether the activity is conducted on a regular or occasional basis. For instance, an employee typically acts within the scope of their job description, which means within the assigned functions, but they may also receive additional tasks from a principal that occasionally go beyond those duties or assignments. If the employee causes damage while performing any of these tasks, the principal acting as the employer can be held liable. Thus, the principal is liable if the employee causes damage while executing their duties. However, the principal's liability extends further; they are also liable for any acts committed by abuse of authority, even if those acts exceed the employee's designated functions. It is only prescribed that the injured party must not be aware that the employee was acting outside of their assigned role or duties.[793] Thus, this conclusion is in line with Art. 173, Sec. 3, as follows, which prescribes that the "the principal is not liable if proves that the victim knew, or, as the case may be, may have known at the time when the damaging act was committed, that the agent acted without any connection with the duties or functions entrusted to them".[794]

[790] Court of Appeal Bucharest, decision no 1236/2001 in the "Court of appeal Bucharest, 2001-2002, p. 275, cited in Ioan Ciochină-Barbu, 2015, p. 538.
[791] Călina Jugastru, 2013, p. 32.
[792] Ibid., p.32.
[793] Laura Manea, 2018, "Constants of tort liability's", Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law, Vol. 11 (60) No. 2 – 2018, pp. 111-112.
[794] Codul civil, din 17 iulie 2009, Art. 1373, Sec. 3.

According to the principle of *per a contrario*, liability arises when the injured party is unaware of the employee's abusive activities. Good faith is presumed (as stated in Article 14, paragraph 2 of the Civil Code), meaning that the injured party is generally considered unaware that the employee acted outside the scope of their assigned duties. It is the duty of the principal to demonstrate that the injured party had this knowledge.[795]

In addition, the standpoint of the literature is that this concerns strict liability, which is based on the concept of guarantee. This discussion relates solely to non-contractual liability, rather than the fulfilment of obligations arising from a contract. In that case, Art. 1519 of the Civil Code applies, stipulating that unless the parties agree otherwise, the debtor is liable for damage caused by the fault of the person they engage to fulfil their contractual obligations.[796]

Concerning the legal relevance of the fault of the employee, when the former Civil Code was in force, the legal literature was divided as to whether the fulfilment of this condition was required for establishing the employer's liability. The majority opinion holds that the fault of the employee is legally relevant, but there are others who dissent, asserting that fault is not a necessary precondition.[797] Such a stance pertains to the current Civil Code in force[798], more precisely Art. 1373 Sec. 1 of the Civil Code. The literal interpretation of this provision also indicates that the employee's fault is not a prerequisite for establishing the employer's liability.[799] It is enough that the damage was caused by the employee's act in connection with their work or assigned functions.[800] For example, the employer will not be liable for damage caused by one employee to another during the team-building activities.[801] That is demonstrated in one case from judicial practice, where a traffic accident occurred during the team building. Namely, the director of a legal person organized a trip for their employees and rented a vehicle that was driven by one of the employees. During driving, an accident occurred, and another employee sustained a bodily injury. The driver was convicted in a criminal proceeding, while

[795] Laura Manea, 2018, p. 112.
[796] Călina Jugastru, 2013, p. 32.
[797] E. Lipcanu, Law no. 10/1997, p. 26-31; R. Dimitriu, Volume III. Part I Book V About obligations (art. 1164-1649), Juridical Universe Publishing House, Bucharest, 2014, p. 560, cited in Ioan Ciochină-Barbu, 2015, p. 540.
[798] Ioan Ciochină-Barbu, 2015, pp. 540-541.
[799] E. Lipcanu, Some reflections on regulation principals' liability for the agents in the new Romanian Civil Code, the Law no.1 / 2010, p.35-37; L.R. Boila, Objective substantiation of the principal liability in the new Civil Code, the Law no. 2 / 2010, p.52-54; L. Pop, I. F. Popa, S.I. Vidu Elementary treaty of civil law. Obligations. Under the new Civil Code, Juridical Universe Publishing House, Bucharest, 2012, p.477-478., cited in Ioan Ciochină-Barbu, 2015, p. 541.
[800] Barbu, 2015, p. 541.
[801] "C.A. Bucharest – S. II pen, Dec. No 786/A/18 June 2014 (www.rolii.ro)." Cited in Răzvan Anghel, 2023, "Considerations Regarding the Inclusion in Working Time of Periods During Which the Worker Participates in Team Building Activities", *Revista de Drept Social*, p. 5.

the employer's civil liability was dismissed by the court. This was because the damage was not caused in the course of duties entrusted to the employee, as both the employee and another injured employee were enjoying their free time in an activity unrelated to work functions, although it was organised by the employer.[802]

However, there were situations in which the injured party sued both the employee and the employer.[803] In situations where the employer pays damages, they have a right to recourse against the employee if the employee caused the damage with intent. Furthermore, the employer will be obliged to prove the employee's fault because they are liable for their own fault.[804] Art. 1384 Sec. 1 of the Civil Code, which stipulates this right will be applied.[805] It further means that if the employee acted outside their work duties, they will be liable. Otherwise, they will not be liable.[806] In situations where damage is caused partly by acting beyond given instructions and partly by following those instructions of the employer, both the employer and the employee may be held liable, with liability apportioned according to the employee's degree of fault.

In addition, if multiple employees cause damage under the instructions of different employers, the employer who compensated for the damage can seek reimbursement from the employees who contributed to the happening of the damage and from their respective employers.[807]

It should be noted that in addition to legal theory, there is an economic theory. The idea is to find a middle solution in the sense that between the employee and the employer should be a "win-win" relationship, not "win-lose". Taking into account that the employee is in an economically dependent position related to the employer, by virtue of their economic advantage, the employer should to consult with the employee. The reason is that the employee has a creative role during the performance of work duties that is higher than mere monetary

[802] Ibid, p. 5.
[803] Laura Toma-D˘auceanu, Ioan Ilies¸Neamt, 2022, p. 72.
[804] I.I. Neamt¸and L.T. Da˘uceanu, 163, L. Pop, Decision No. 3595/2003 in V. Terzea. Cited in Laura Toma-D˘auceanu, Ioan Ilies¸Neamt, 2022, p. 72.
[805] "Cel care răspunde pentru fapta altuia se poate întoarce împotriva aceluia care a cauzat prejudiciul, cu excepţia cazului în care acesta din urmă nu este răspunzător pentru prejudiciul cauzat" ["A person held liable for the acts of another shall have a right of recourse against the person who caused the damage, unless that person is not legally liable for the damage caused"], Art. 1384, Sec. 1. of the Civil Code.
[806] Laura Toma-D˘auceanu, Ioan Ilies¸Neamt, 2022, p. 72.
[807] Laura Toma-D˘auceanu, Ioan Ilies¸Neamt, 2022, p. 73.

value.[808] However, the employee's legal subordination is necessary due to its role in social labour efficiency.[809]

8.2 Liability of a Legal Person for Damage Caused by its Organ

There are various forms of legal persons, such as corporations, associations, companies, and foundations, but what they all have in common is their abstract nature. It means that they are an intangible intellectual creation without a physical form. Their existence depends solely on statutory recognition, so they are created by the law.[810] In addition, legal persons cannot make decisions or take actions on their own; instead, they express their intentions, exercise their rights, and fulfil their obligations through their organs in line with Art. 209 of the Civil Code.[811]

In terms of relationships with third parties, there is no distinction between legal persons and their organs. The decisions made by the organs are considered the decisions of the legal person itself.[812]

This is the reason for establishing the legal person's liability, because if these decisions or acts of the organs cause damage to a third party, the legal person is liable as for its own acts. Consequently, the acts of the organs are considered the legal person's own.[813] This standpoint stems from Art. 219, Sec. 1 of the Civil Code, specifying that the lawful or unlawful acts of the organs oblige the legal person itself, as long as they are related to the purpose of the organ's functions.[814]

There is no unanimity in the legal theory as to the conditions required for establishing liability.

However, one point is generally accepted: the injured party has to prove the resulting damage, the unlawful act and the causal relationship between them.[815]

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[808] Brînduşa Vartolomei, 2014, p. 210.
[809] Ibid., p. 210.
[810] Laura Toma-D˘aucean and, Ioan Ilies¸Neamt, 2022, p. 74.
[811] Ibid., pp. 74-75.
[812] Ibid., p. 75.
[813] Neamt¸ and L.T. Da˘uceanu, 144–145; L. Pop, 338; L. Pop, 458–460; L. Pop, 359; P. Vasilescu, 633; C. Sta˘tescu and C. Bîrsan, 211;F.I. Mangu, 274. Cited in Laura Toma-D˘aucean and Ioan Ilies¸Neamt, 2022, p. 75.
[814] Codul civil, din 17 iulie 2009, Art. 219, Sec. 1.
[815] Neamt¸ and L.T. Da˘uceanu, 144–145; L. Pop, 338–339; L. Pop, 460; L. Pop, 359. Cited in Laura Toma-D˘aucean and Ioan Ilies¸Neamt, 2022, p. 75.

The prevailing view in legal theory is that the legal person's liability is strict, although some legal scholars argue that it is fault-based.[816]

In addition, Art. 219, Sec. 2 of the Civil Code provides for joint and several liability for persons who commit unlawful acts, and liability may arise both towards the legal person and third parties.[817] The persons who act in the capacity of organs of a legal person include the administrator, the censor, the executive officer, and other persons may also act in the capacity of members of the organs of a legal person.[818]

8.3 State Liability for Damage Caused by Civil Servants

From a historical perspective, in the pre-socialist period until 1948, everyone who had suffered damage caused by the state or its servants had the opportunity to claim damages from the state according to the first Constitution of 1866.[819] The general principle of civil liability was the legal basis. Namely, § 998 of the Civil Code provided that the person who caused damage by fault to another was obliged to pay compensation. In addition, § 1000 of the Civil Code regulated the liability of the person liable for another person who caused damage. Case law applied these rules to the state, as well.

The formal constitutional provision concerning public authority liability is Art. 52, Sec. 1 of the effective Constitution, stipulating that everyone has the right to compensation if a public authority fails to issue an administrative act or omits to do so within the legal time limit, as well as the right to the annulment of that act.[820]

Organic statutes[821] determine the limitations of that right according to Sec. 2,[822] while Sec. 3 specifies that the state is also liable for judicial errors. Furthermore, organic laws determine the

[816] Laura Toma-D˘aucean and Ioan Ilies¸ Neamt, 2022, pp. 76-77.
[817] Civil Code, Art. 219, Sec. 2.
[818] Civil Code, Art. 220, Sec. 1.
[819] Virgil Veniamin in Barry, Donald D.; et al., 1970, *Governmental Tort Liability in the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland, Romania and Yugoslavia*, p. 259.
[820] Constituția României [the Constitution of Romania], Official Gazette Nos. 233/1991, 767/2003, Art. 52, Sec. 1.
[821] According to Art. 73 of the Romanian Constitution, organic laws regulate: the electoral system, political organisations, the government organisation and national defence, public order, property and inheritance, education, labour and social policy, culture, and other fields for which the Constitution envisage the enactment of organic laws…The Constitution of Romania, Art. 73.
[822] The Constitution of Romania, Art. 52, Sec. 2.

state's liability for judicial acts, as well as the liability of judges in cases of negligence and abuse of their official position.[823]

In addition, the judicial review of administrative acts is guaranteed, except for those related to parliamentary affairs or military actions. Specialised administrative courts have the authority to decide on claims for damages caused by government ordinances or legal provisions that have been declared unconstitutional based on Art. 126 Sec. 3.[824] The Administrative Litigation Law No. 554/2004 (*Legea contenciosului administrativ*) is the general act which applies to the Romanian administration.[825] Everyone has the right to file a lawsuit before the competent administrative court if they consider that an administrative act has violated their rights or legitimate interests, seeking the annulment of that act, the recognition of the right, and damage compensation.[826] Art. 18 Sec. 3 clarifies that when the court decides on a claim for the annulment of an administrative act, it shall also decide on the claim for damages, if such a claim has been submitted.[827] In addition, it is possible to file a separate claim for damages in a distinct procedure, but no later than one year from the date the applicant became aware of the occurrence of the damage. The applicant is required to prove their personal legal interest. In addition, the conditions for a successful claim are the existence of an illegal administrative act, the fact that the applicant must have sustained damage, and the existence of a causal link between the act and the damage. General principles allow an exemption from liability in situations like *force majeure* or a fortuitous event.[828]

In the literature, the state liability is considered strict. The justification for such a standpoint lies in the interpretation of Law No. 29/1990 on the judicial review of the administration, which was the first post-communist general act, and Law No. 554/2004, now in force, neither of which addresses the issue of fault of the administration as a condition for liability.[829] However, theory supports an interpretation of administrative fault for an unlawful act, a refusal to issue the act,

[823] The Constitution of Romania, Art. 52, Sec. 3.
[824] The Constitution of Romania, Art. 126, Sec. 3.
[825] Lege nr. 554 din 2 decembrie 2004 [Law No. 554 of December 2, 2004], Official Gazette No.1154 of December 7, 2004.
[826] Act 554/2004, Art. 1 (the title of this article was amended by Law no. 262 of July 19, 2007, Official Gazette no. 510 of July 30, 2007)
[827] Act 554/2004, Art. 18.
[828] Hamangiu, 2009, 620–31; Tofan, 2009, G Bogasiu, 2011. Cited in Roxana Vornicu, 2020, p. 70.
[829] Roxana Vornicu, 2020, p. 70.

or the silence of the administration.[830] In case law, the public authority's fault is needed to establish its liability only in the event of the annulment of an unlawful administrative act.[831]

In accordance with Art. 16 of Law No. 554/2004, pertaining to judicial review, everyone can claim damages from the public organ liable for issuing or declining to issue an act. The claims can be filed against the civil servant involved in the decision-making process related to the issuance or refusal of the act. Consequently, both the public organ and the civil servant may be held liable in the same legal proceedings.[832]

Particularly, the civil liability of civil servants is regulated under the Romanian Administrative Code.[833] It is prescribed in Art. 490, titled "Disciplinary Sanctions and Liability of Civil Servants."[834] However, regarding liability to third parties, Art. 499, of the Administrative Code provides that in situations when the public authority or institution pays damages to the third party as the main debtor, based on a final court decision, the civil servant's liability is triggered.[835]

8.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

According to Art. 1376 Sec. 1 of the Civil Code, strict liability is prescribed for the legal guardian of a thing for damage caused by it without fault,[836] whereby it is irrelevant whether the thing is material or immaterial, or movable or immovable (for example, electricity is included under this notion).[837] The concept of legal guardianship is prescribed in Art. 1377 of the Civil Code. Namely, the owner, or someone who, by statute, or contract, or by fact, exercises independent control and supervision over the thing or animal for their own benefit, has custody of it.[838] Furthermore, a usufructuary, a fiduciary or a retentor[839] can be the right

[830] IA Iorgovan, 1998, 303. Cited in Roxana Vornicu, 2020, pp. 70-71.
[831] Decision 2132/2016 of the Supreme Court. Cited in Roxana Vornicu, 2020, p. 70.
[832] Roxana Vornicu, 2020, p. 70.
[833] Emergency Ordinance 57/2019 on the Administrative Code, published in the Official Gazette of Romania no. 555/05.07.2019.
[834] Administrative Code, Art. 490.
[835] Administrative Code, Art. 499.
[836] Law Nº 287/2009 on the Civil Code, Art. 1376, Sec. 1.
[837] High Court of Cassation and Justice, Decision No. 2725/2003, in V. Terzea, 376. Cited in Laura Toma-D ̆aucean and Ioan Ilies ̧Neamt, 2022, p. 86.
[838] Law Nº 287/2009 on the Civil Code, Art. 1377.
[839] L. Pop, 498; P. Vasilescu, 679. Cited in Laura Toma-D ̆aucean and Ioan Ilies ̧Neamt, 2022, p. 86.

holders in addition to an illegal possessor. To establish liability, the following conditions must be met: an act that caused damage, the damage, the causation, and the fact that the thing was under someone's guardianship.[840] As prescribed by Art. 1377, fault is not a condition for establishing liability because this is a hypothesis of strict liability.[841]

Regarding special acts that prescribe strict liability for dangerous activities, for example, Law No. 703 of 3 December 2001, (on Civil Liability for Nuclear Damage), in Art. 4, foresees the strict liability of nuclear plant operators.[842]

9 Employer's Liability for Damage Caused by an Employee to a Third Party under Bulgarian Law

9.1 General Considerations

In accordance with Art. 49 of the Bulgarian Act on Obligations and Contracts, when a person assigns a task to another, they are liable for the damage caused by that another person during the performance of that task or related to it.[843] The person who delegates the performance of a task to another person is referred to as the Bulgarian term *възложител* (in Latin script: "vъzložitel"), which corresponds to the English term "principal". While the Labour Code uses the term "employer", for example, in the first article, which is titled on the subject and purpose of the labour law, it uses the terms *работник* (in Latin script: "rabotnik") for an employer and the term *служител* (in Latin script: "služitel") for an employee. (It prescribes that this Act regulates the employment relationship (*работодател*) (in Latin script: "rabotodatel" between them.)[844] In the legal literature, the employer is defined more broadly as either a natural or legal person. The former is required to possess civil legal capacity, while the latter acquires it at the

[840] Laura Toma-D˘aucean and Ioan Ilies¸, Neamt, 2022, p. 87.
[841] Ibid., p. 88.
[842] LEGEA nr. 703 din 3 decembrie 2001 *privind răspunderea civilă pentru daune nucleare* [Civil Liability for Nuclear Damage], Official Gazette no. 818 of December 19, 2001, Art. 4.
[843] "Този, който е възложил на друго лице някаква работа, отговаря за вредите, причинени от него при или по повод изпълнението на тази работа." Art. 49 of the Bulgarian Obligations Act. (Закон за задълженията и договорите, abreviated ЗЗД) ["A person who has assigned certain work to another shall be liable for the damage caused by that person during or in connection with the performance of that work."]Official Gazette, (*Държавен вестник*), No. 275/22.11.1950. with ammendments.
[844] "Този кодекс урежда трудовите отношения между работника или служителя и работодателя, както и други отношения, непосредствено свързани с тях." ["This Code governs the employment relationships between the employee and the employer, as well as other relationships directly related to them."] *Кодекс на труда* [Labour Code] State Gazette No. 26/1.04.1986 and No. 27/4.04.1986, with ammendments, Art. 1.

time of its establishment.[845] A legal person must be organised as a separate entity, maintaining its own balance sheet, separate finances and bank account. In addition, it must have its own field of activity, or at least a part of it. Another characteristic of the employer is that they have the authority to hire and dismiss personnel (labour force). On the other hand, another person acts in the capacity of the employee in order to perform the employer's activities, which can be public, private or combined.[846]

Thus, after this terminological delineation, it is required to determine the conditions for the application of Art. 49 of the Act on Obligations and Contracts. Firstly, there must be an entrusted task. Second, the perpetrator of that entrusted task must be at fault, and finally, the damage must be caused during the conduct of the entrusted task.[847]

It is up to the injured party to bring the action in joint civil proceedings against both the tortfeasor and the principal.[848] The action in that situation is based on Art. 45 Sec. 1[849] (pertaining to the tortfeasor) and Art. 49[850] (against the principal) of the Act on Obligations and Contracts. If the action is brought based on Art. 49, the principal has a legal interest in involving the employee in the proceedings due to their right of recourse against the employee. In theory, their liability is treated as an imputed (quasi) joint liability.[851] In that situation, if the civil proceeding is commenced only against the employer as mentioned above, besides the fact that the tortfeasor is involved in the dispute based on Art 45 Sec. 1, the employer can also independently join the employee to the proceedings in the capacity of an intervenor.[852]

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[845] V. Tadjer, 82–84. Cited in Vassil Mrachkov, 2020, *Labour Law in Bulgaria*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, p. 252.
[846] Vassil Mrachkov, 2020, p. 252.
[847] Silvia Tsoneva, 2019, "Отговорността на възложителя на работа, по английското и българското деликтно право" ["Damage Caused by Another in the Course of his Employment under the English and Bulgarian Tort Law"], *Годишник на департамент „Право*" на НБУ, pp. 322-323.
[848] Ibid., p. 323.
[849] "Всеки е длъжен да поправи вредите, които виновно е причинил другиму. Във всички случаи на непозволено увреждане вината се предполага до доказване на противното." ["Every person is obliged to compensate for the damage they have culpably caused to another. In all cases of tort, fault shall be presumed unless proven otherwise".], Art. 45 Sec 1 of the Act on Obligations and Contracts.
[850] "Този, който е възложил на друго лице някаква работа, отговаря за вредите, причинени от него при или по повод изпълнението на тази работа." ["A person who has entrusted another person with the performance of a task shall be liable for the damage caused by that person in the course of or in connection with the performance of that task."], Art. 49 of the Act on Obligations and Contracts.
[851] Silvia Tsoneva, 2019, p. 323.
[852] Ibid., p. 323.

9.2 Liability of a Legal Person for Damage Caused by its Organ

Under Bulgarian law, this issue is not specifically regulated by the Act on Obligations and Contracts. Instead, legal scholarship and case law have addressed it through the application of Arts. 45 and 49 of the Act on Obligations and Contracts.[853] Namely, a Resolution of the Supreme Court in Sofia, No. 60292 of 21 February 2022, provides an interpretation of these Arts. 45 and 49 of the Obligations Act and answers the question of who is liable - the principal, the perpetrator, the direct perpetrator or all of them together (joint and several liability) for the damage that a third party sustained.[854] The subject matter concerned a legal person who was sued, specifically a client who engaged another legal person for security services on the client's business premises. The court held the perpetrator liable on their own based on the Art. 45 of the Act on Obligations and Contracts, which states that personal liability exists in a situation where the damage is caused by personal conduct that is unlawful and culpable, and when there is a causal link between such conduct and the occurrence of the damage. On the other hand, the interpretation of Art. 49 of the Act on Obligations and Contracts is as follows: when damage occurs as a result of the conduct of another person in connection with the performance of a certain task or during its performance, liability is borne by the person who entrusted that task. In legal literature, entrustment is understood to mean that a person separates their own task and has it carried out in practice through another person. In other words, a third party is engaged to perform the task in the interest of the principal. The performance of the task may be factual (practical acts) or legal (the undertaking of legal acts). Furthermore, the court cited other decisions[855] which stated that this is vicarious liability, which includes acts or omissions. It is a form of strict liability, meaning that it is not based on the fault of the principal, but rather has a protective and guarantee function, and is fundamentally derived from the fault of the person to whom the task was entrusted. Thus, the perpetrator is directly liable for damage caused by their fault, while the principal is liable because they failed to exercise due care in selecting the

[853] Waltschin Daskalov, 2016, "Liability Of The Members Of The Managing Bodies Of The Commercial Entities for Damages Done to Third Parties", [Collection of Papers from the Jubilee Scientific Conference, Organised on the Occasion of the 25th Anniversary of the Faculty of Law of UNWE, Volume I: Private Law], pp. 84-86.

[854] Resolution of the Supreme Court in Sofia, № 60292 of 21.02.2022. [*Съдебен акт Решение*, № 60292, гр. *София*, 21.02.2022 г. *Върховният касационен съд*].

[855] See "ППВС №7/1958 г., ППВС №4/1961 г., ППВС №9/1966 г., ППВС №4/1975 г., ТР №59/1974 г. на ОСГК, реш. № 465/28.12.2012 г. по гр.д. №1157/2011 г.,IV г.о., реш. №142/05.06.2013 г. по гр.д. №419/2012 г.,IV г.о., реш. № 503/21.07.2010 г. по гр.д. № 1069/2009 г., III г.о., реш. № 141/08.01.2021 г. по гр. д. № 3052/2019 г., IV г.о., реш. № 63/ 01.03.2016 г. по гр.д. № 4885/2015 г., IV г.о. e.tc." cited in Resolution of the Supreme Court in Sofia, № 60292 of 21.02.2022.

proper perpetrator for a certain task. If the perpetrator is not at fault, or if the damage occurred outside the scope of the entrusted task, the principal may be released from liability.

However, what is peculiar in these circumstances is that the principal's liability is not excluded by agreement if even when the perpetrator further entrusts the task to a subcontractor.[856] In such cases, their liability can also be joint and several.[857] For the latter situation, Arts. 121[858]–127[859] of the Act on Obligations and Contracts apply. The injured party, as previously stated, has a wide range of options, including the right to claim damages from all parties together in one or in separate proceedings. In a situation where the perpetrator pays damages, in line with Art. 54[860] of the Act on Obligations and Contracts, they have a recourse right against the principal because their rights and obligations are regulated by the contract for services. In this case, it was a security services contract. The court examined this contract and assessed that the principal's liability for damage was not excluded; therefore, it applied Art. 49 of the Act on Obligations and Contracts. Namely, the factual situation was that the defendant was the owner of a bar/club where the plaintiff sustained bodily injuries (a fractured heel) inflicted by the security staff when a misunderstanding arose between the plaintiff and the waiter regarding the payment of the bill. The security staff was hired by another legal person which concluded the security services contract with the defendant, in which the defendant (principal) entrusted the security of their premises (bar/club) to the latter. The case files also contained a security plan.

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[856] Judgements Nos. 465/28.12.2012, 1157/2011. cited in Resolution of the Supreme Court in Sofia, № 60292 of 21.02.2022.

[857] 3 PPVS br. 17/1963, cited in Resolution of the Supreme Court in Sofia, № 60292 of 21.02.2022.

[858] "Освен в определените от закона случаи солидарност между двама или повече длъжници възниква само когато е уговорена" ["Except in cases provided for by law, joint and several liability between two or more debtors arises only where it has been agreed upon"]. "(Ал. 2, отм. - ДВ, бр. 12 от 1993 г.)" Art. 121 of the Act on Obligations and Contracts.

[859] "Доколкото не следва друго от отношенията между солидарните длъжници, това, което е платено на кредитора, трябва да се понесе от тях по равно. Всеки солидарен длъжник, който е изпълнил повече от своята част, има иск срещу останалите съдлъжници за разликата. Ако някой от последните се окаже неплатежоспособен, загубата се разпределя съразмерно между другите съдлъжници, включително и този, който е изпълнил. В случай че изпълнилият солидарен длъжник не е противопоставил на кредитора някое общо възражение или не е уведомил своите съдлъжници за изпълнението, той отговаря спрямо тях за причинените вреди." ["Unless otherwise provided by the relationship between the joint and several debtors, the amount paid to the creditor shall be borne by them in equal shares. Any joint and several debtor who has performed more than his or her share shall have a claim against the other co-debtors for the difference. If any of the latter proves to be insolvent, the loss shall be apportioned proportionately among the other co-debtors, including the debtor who has made the payment. If the joint and several debtor who has performed the obligation failed to raise against the creditor any common defence or failed to notify the other co-debtors of the performance, he or she shall be liable to them for the damage caused."], Art. 127 of the Act on Obligations and Contracts.

[860] "Лицето, което отговаря за вреди, причинени виновно от другиго, има иск против него за това, което е платил." ["A person who is liable for damage caused by another person through fault has a right of recourse against that person for the amount he or she has paid".], Art. 54 of the Act on Obligations and Contracts.

Based on the assessment of both documents, the court determined that the security services contract was concluded during the validity of the Law on Private Security Activities, under which the principal provides instructions and rules for the organization of security (imperative norms). The same conclusion was drawn from both the security services contract and the security plan. Although the defendant and the legal person that hired the security staff (personnel), jointly supervised and monitored them (security personnel), the court rendered a judgment holding the principal (the defendant) liable under Art. 49 of the Act on Obligations and Contracts, as they had direct control over the security personnel in their premises at all times.[861]

9.3 State Liability for Damage Caused by Civil Servants

The state's liability for damage caused to its citizens is regulated under the State and Municipal Liability Act of 1989.[862] Art. 1 Sec. 1 stipulates that the state and municipalities are liable for damage caused to citizens and legal persons by unlawful acts or omissions of their organs and civil servants in the course of administrative activities, in addition to damage caused by by-laws that have been annulled as unlawful or declared void.[863] Sec. 2 prescribes the state's liability for pecuniary and non-pecuniary damage caused by the failure to issue documents in accordance with the Administrative Procedure Act.[864] In addition, the claim will be filed in line with the rules of administrative procedure.[865]

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[861] Resolution of the Supreme Court in Sofia, № 60292 of 21.02.2022. [*Съдебен акт Решение*, № 60292, гр. *София*, 21.02.2022 г. *Върховният касационен съд*].

[862] Закон за отговорността на държавата и общините за вреди [State and Municipal Liability Act, with ammendments of 11.04.2006. and 12.07.2006.]

[863] "Държавата и общините отговарят за вредите, причинени на граждани и юридически лица от незаконосъобразни актове, действия или бездействия на техни органи и длъжностни лица при или по повод изпълнение на административна дейност, както и за вредите, причинени от действието на отменени като незаконосъобразни или обявени за нищожни подзаконови нормативни актове." Art. 1, par. 1 of the State and Municipal Liability Act.

[864] "Държавата отговаря за имуществени и неимуществени вреди, причинени на граждани и юридически лица от неиздаване на документ в срока по чл. 174 от Административнопроцесуалния кодекс." ["The State and municipalities shall be liable for damage caused to individuals and legal entities by unlawful acts, actions, or omissions of their bodies and officials in or in connection with the performance of administrative activities, as well as for damage caused by the operation of subordinate legislation that has been annulled as unlawful or declared null and void"], Art. 1, par. 2 of the State and Municipal Liability Act.

[865] "Исковете по ал. 1 и 2 се разглеждат по реда, установен в Административнопроцесуалния кодекс, като местната подсъдност се определя по чл. 7, ал. 1." ["The claims under paragraphs 1 and 2 shall be examined in accordance with the procedure established by the Administrative Procedure Code, with territorial jurisdiction being determined pursuant to Art. 7, paragraph 1."] Art. 1, par. 3 of the State and Municipal Liability Act.

The Constitution of Bulgaria, in Art. 7, foresees the state's liability for damage caused by illegal acts or activities of its organs and civil servants.[866] Furthermore, Art. 5 Sec. 2 stipulates the direct effect of the Constitution, meaning that no special statute is required to regulate legal relationships in detail.[867]

However, in the event that such special statutes exist, they should be applied in the interests of the injured party.[868] Namely, Art. 45 of the Act on Obligations and Contracts is a general rule prescribing the obligation of every person who causes damage by fault to pay damages to the injured party. The presumption of fault applies until proven otherwise.[869] Furthermore, Art. 49 of the Act on Obligations and Contracts prescribes the liability of the principal for damage caused by the person they entrusted with a task.[870] Namely, although the State and Municipal Liability Act of 1989 is *lex specialis* regarding this subject matter, the standpoint of the Supreme Court of Cassation is different. Namely, the court held that the liability of the state and municipalities is a special form of guarantor-compensatory (vicarious) liability pursuant to Art. 49 of the Act on Obligations and Contracts.[871] In addition, the state's liability for damage is non-contractual and strict according to legal theory, which means it does not depend on the fault of officials performing public functions.[872] It falls under the definition of "public liability" since the damage arises from the illegal exercise of state power, which means an unequal relationship between the parties.[873] Furthermore, in theory, this liability is a so-called "administrative tort" because it occurs during administrative activity.[874]

[866] Bulgarian Constitution, Prom. SG 56/13 JUL 1991, Amend. SG 85/26 SEP 2003, SG 18/25 FEB 2005, SG 27/31 MAR 2006, SG 78/26 SEP 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 FEB 2007, SG 100/18 DEC 2015.
[867] Constitution, Art. 5, Sec. 2.
[868] Borislav Belazelkov, 2025, "Искове по закона за отговорността на държавата и общините за вреди" ["Claims under the law on liability of the state and municipalities for damages"], *Адвокатски преглед*.
[869] Act on Obligations and Contracts, Art. 45.
[870] Act on Obligations and Contracts, Art. 49.
[871] Resolution of the Bulgarian Supreme Court of Cassation No. 738 of 21 November 2006. (subject No. 348/06).
[872] Veselina Kanatova-Buchkova, 2020, "The liability of the state for damage claims result of violation of the European Union Law", *Economics & Law*, Vol. II, Issue: II, p. 71.
[873] Elenkov, Lazarov, Kandeva, 2007. Cited in Veselina Kanatova-Buchkova, 2020, p. 72.
[874] Veselina Kanatova-Buchkova, 2020, p. 72.

9.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

The Act on Obligations and Contracts in Art. 50 prescribes the joint and several liability of the owner of and the person supervising a thing that caused the damage.[875] However, it does not specifically prescribe liability for damage caused by dangerous activities. Furthermore, it also does not prescribe the employer's liability for damage caused by an employee to a third party using a dangerous thing or performing a dangerous activity.

However, in the following case, the European Court of Human Rights cited decisions of the Supreme Court of Bulgaria, according to which Art. 50 applies to legal persons, in addition to Art. 49 of the Act on Obligations and Contracts.[876]

Namely, the applicant lodged an application against the State of Bulgaria before the European Court of Human Rights in Strasbourg, claiming compensation for the damage he suffered as a result of a serious injury caused by the lack of safety measures at a transformer station. The claim was based on the fact that the Bulgarian judicial system had failed to identify the employees and legal persons liable for the incident.

Furthermore, the facts of the case were that the plaintiff was eleven years old when he suffered an electric shock while entering a building that housed a transformer. He argued that, under the law in force at the time, the ownership of the power plants was held by the state. The same law stipulated that power plants and state organs were liable for the safety of those installations. The fact is that the transformer station in which the plaintiff was injured was not locked due to the negligence of the staff and organs who were liable for supervising that installation, as this activity was dangerous as prescribed by the Law on Electrical Energy of 1975.[877]

Namely, until 16 July 1999, the Electricity Act of 1975 was in force, and according to Sec. 2, the State was the owner of electricity power stations, installations and networks. In addition, the Energy Agency had the authority to authorise the acquisition of these electrical facilities (other organisations could acquire them).[878]

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[875] Act on Obligations and Contracts, Art. 50.
[876] Case of Iliya Petrov vs Bulgaria, Application No. 19202/03, final decision, Strasbourg, April 24, 2012.
[877] Ibid.
[878] The Electricity Act of 1975, Regulations on its implementation of 1976, cited in Ilinovi v. Bulgaria Decision, Application no. 23590/06, p. 4.

The court found that a criminal investigation was initiated after the incident and that the prosecutor's office brought charges against an employee working in the transformer station for causing the injury to the plaintiff negligently. However, during the criminal proceedings, the charges against the employee were dismissed because it was established that the transformer station did not belong to the electricity supply company. The court concluded that the investigation was not effective because the owner of the transformer station was not identified, which prevented the applicant from bringing a new lawsuit. However, the plaintiff failed to submit medical documentation as evidence for his claim that the State should pay him compensation for head surgery, and the court rejected that claim. However, the court awarded him EUR 15,000 for non-pecuniary damage for a violation of Art. 2 of the Convention on Human Rights.[879]

10 Employer's Liability for Damage Caused by an Employee to a Third Party under Slovenian Law

10.1 General Considerations

In Slovenia, Art. 147 Sec. 1 of the Obligations Act stipulates that a legal or natural person who employs an employee is liable for damage caused by that employee to a third party at work or in work-related situations, unless they can prove that the employee acted as required under the given circumstances.[880]

Being a form of vicarious liability, the employer's liability arises from the actions of another person, and as a result, the employee's actions toward third parties are considered to be the actions of the employer.[881]

The employer cannot be held liable for the actions of an employee merely due to his or her fault in the hiring process (*culpa in eligendo*) or in supervising the employee's performance of duties (*culpa in custodiendo*), or through wrongful instructions given to an employee (*culpa in*

[879] Case of Iliya Petrov vs Bulgaria.
[880] Obligacijski zakonik [Obligations Act], Official Gazette of the RS, Nos. 83/01, 32/04, 28/06, 40/07, 97/07– official consolidated text, 64/16 and 20/18.
[881] Samec, N. Berghaus, A. Bitrakov Drnovšek, K., 2024, *Tort Law in Slovenia*, Kluwer Law International, Alphen aan den Rijn, the Netherlands, p. 71.

instruendo).[882] According to Cigoj's opinion, the Obligations Act establishes strict liability for both legal and natural persons (referred to as employers) regarding their employees. This stipulation indicates that employers are held liable even when they can demonstrate that they have conducted proper employee selection, provided adequate supervision, and delivered appropriate training. Even when an employer diligently fulfils all duties and adheres to best practices, resulting in no fault attributable to them, they assume the risk for the actions of their employees.[883]

The employees carry out their duties on behalf of the employer, for the employer's interest and account. Thus, it is essential to shift the risks associated with the employees' activities to the employer. The employer is liable for establishing the employment relationship with the employee, and the employee is the employer's extended arm. This perspective seems most just, particularly from the viewpoint of the injured party who suffered damage. If the employer were permitted to demonstrate their lack of fault, the injured party would frequently end up without compensation, especially in cases of significant damage, as it could be challenging to redress it from a financially weaker employee. The principle of strict liability of the employers for their employees is also the standpoint of case law.[884]

Thus, the employer is liable instead of the employee for damage caused related to their work, because the employee acted for the benefit of the employer. This liability arises from the legal doctrine known as respondeat superior, which asserts that the employer is the higher subject in this relationship.[885]

In that hierarchical relationship of subordination and authority lies the fundamental aspect of defining the legal terms "employee" and "employer". The Obligations Act includes both natural and legal persons in the term "employer";[886] however, the definition of these terms is provided by the Employment Relationships Act. Namely, as defined, the employee is a natural person engaged in an employment relationship based on an employment contract.[887] While the term

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[882] Jadek Pensa, 836 cited in Samec, N. Berghaus, A. Bitrakov Drnovšek, K., 2024, p. 71.
[883] Cigoj, 629. Cited in Špela Mežnar, 2004, "Odgovornost delodajalcev v obligacijskem pravu" ["Employer Liability in the Law of Obligations"], *Pravnik, Ljubljana*, p. 55.
[884] Špela Mežnar, 2004, p. 55.
[885] Dunja Jadek Pensa, 2004, "Odškodninska odgovornost delodajalcev za delavce" ["Employer's Liability for Employees"], *Delavci in delodajalci,* 2-3/IV, p. 292.
[886] *Jadek Pensa, D., 2003a, '*4. odsek: Odgovornost za delavce' in Juhart, M., Plavšak, N. (eds.) Obligacijski zakonik (OZ) (splošni del) s komentarjem, Ljubljana: GV Založba, p. 837.
[887] Zakon o delovnih razmerjih (ZDR-1), Uradni list RS, št. 21/13, 78/13 – popr., 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17 – odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, 119/21 – ZČmIS-A, 202/21 – odl. US, 15/22, 54/22 – ZUPŠ-1, 114/23 in 136/23 – ZIUZDS, Art. 5, Sec. 1.

"employer" refers to a legal or natural person, as well as other subjects, including state authorities, local government units, branch offices, foreign companies, and diplomatic or consular missions that employ employees based on an employment contract.[888] In addition, another reason why the employer is held liable instead of the employee is the intention to encourage the employee to act on their own initiative, without constantly risking personal liability for actions undertaken in the interest of the employer.[889] Nevertheless, the employer's liability is not absolute, as it is reflected in their right to seek recourse from the employee.[890] This right is stipulated in Art. 147 Sec. 2 of the Obligations Act, but as mentioned above, this Act uses the term employer to refer to natural and legal persons (only the title of the Art. 147 uses the term employer) and stipulates that any person who pays compensation for damage caused intentionally or with gross negligence to the injured party by an employee is entitled to full recourse against the employee.[891] This right expires six months following the date on which compensation was given.[892]

In order to establish the employer's liability, in addition to the general rules, some other prerequisites must be met, under Art. 131 Sec. 1 of the Obligations Act, which encompass unlawful conduct, damage, causation and fault (culpability); thus, additional conditions are the existence of an employee-employer relationship and that the damage was caused by the employee at work or related to work, according to Art. 147, Sec. 1 of the Obligations Act.[893]

The legal basis of the employee-employer relationship is an employment contract or the existence of the employment relationship's elements.[894] Namely, according to Art. 18 of the Employments Act, these elements of the employment relationship are subject to evaluation in the event of a dispute over whether an employment relationship exists between the employer and employee.[895] An employment relationship exists in the event of the voluntary engagement of the employee in the work process of the employer, acting under their supervision and control in exchange for a salary.[896] This relationship also includes other cases of the subordinate position of every natural person who undertakes work under the control of the employer, where

[888] Employment Relationship Act, Art. 5, Sec. 2.
[889] Jadek Pensa, D., 2003a, p. 836.
[890] Ibid., p. 837.
[891] Obligations Act, Art. 147, Sec. 3.
[892] Obligations Act, Art. 147, Sec. 4.
[893] Dunja Jadek Pensa 2004, pp. 291-292.
[894] Samec, N. et al., p. 71
[895] Zakon o delovnih razmerjih [the Act on employment relationships], Official Gazette of the RS, Nos. 21/13, 78/13, 47/15, 33/16, 52/16, 15/17, 22/19, 81/19, 203/20, 119/21, 202/21, 15/22, 54/22, 114/23 and 136/23.
[896] Samec, N. et al., 2024, p. 71.

the legal ground and duration of that relationship are not legally relevant. It is only relevant that the work is done for another's interest, in person rather than with the help of an intermediary.[897] Neither risk nor profit is attributed to a person acting on behalf of another.[898]

Damage must emerge during work or in connection with work duties. It should be noted that an employee's conduct during work or related to work that causes damage to a third party is considered a damaging event (*škodni dogodek*). It is considered that the damaging act was committed at work if the employee caused it during working hours, at the workplace, and within the scope of their functions.[899] The existence of a functional connection is of essential importance because if the employee caused damage merely in the course of performing their duties, the employer will not be held liable.[900] However, an opposite standpoint can also be found in the case law, where the possibility that damage occurs outside working hours and the workplace is not excluded, but in such a case, as mentioned, it is essential that there is a connection between the employer's business activity and the employee's act that caused the damage. As explained in the judgment, the case involved a police officer who brought a weapon into the canteen after working hours, which accidentally discharged. The employer was not held liable because the officer's conduct was not functionally connected to their duties.[901] Another case in which the employer was not held liable concerns a telephone operator who stole a watch while at work, either from another employee or from a third party, as the act was not committed in the capacity of an employee. The situation would be different, for instance, if a security guard responded inappropriately to verbal abuse from a guest while performing their duties as an employee. Namely, in such professions, a higher level of tolerance is required. Moreover, Art. 16 of the Obligations Act was also infringed, which imposes a general duty that everyone is obliged to refrain from actions that cause harm to others.[902]

In addition, the most common case when an employee causes damage outside of the workplace and working hours, but related to tasks assigned to them in the course of the employer's work activities, involves the use of a company vehicle. In such circumstances, the damage is

[897] Ibid., p. 71.
[898] Ibid., p. 71.
[899] Dunja Jadek Pensa, 2004, p. 294.
[900] Špela Mežnar, 2004, p. 58.
[901] VSS II Ips 295/99, 2001, 124. Cited in Dunja Jadek Pensa, 2004, p. 295.
[902] VSS II Ips 679/95, 1997. Cited in Dunja Jadek Pensa 2004, pp. 295-296.

considered work-related and the employer shall be held liable even if the driver permitted another person to drive the vehicle and that person caused the damage.[903]

10.2 Liability of a Legal Person for Damage Caused by its Organ

Art. 148 of the Obligations Act contains a special rule on the liability of a legal person for damage caused by its organs during the performance of their functions or in relation thereto.[904]

The Slovenian literature also emphasises that, as an artificial creation, a legal person expresses its will through its organs consisting of natural persons. In legal matters, the intentions of these organs are considered the intentions of the legal person itself. Therefore, the legal person is liable for any damage caused to third parties by its organs while performing their duties or related to them. This does not constitute vicarious liability, because the organ is a part of the legal person; thus, this is the liability for one's own actions. A legal person is liable under the general rules on liability for damage, unless the statute prescribes strict liability.[905]

Consequently, the legal person can be released from liability for damage if it demonstrates that the members of the organ acted with the due diligence expected in completing that specific type of transaction or related activity.[906] It should be emphasised that in any instance, diligence is assessed based on the standards applicable to legal persons; however, if a specific issue pertains to the profit-making activities of a legal person, the members of its organs must exercise a higher level of diligence (that of a competent professional)[907], which encompasses adherence to professional standards and customary practices.[908]

10.3 State Liability for Damage Caused by Civil servants

The right to seek compensation for damage caused by the unlawful acts of civil servants, government organs, municipalities, or other public authorities is guaranteed to everyone under

[903] VGS Slo 448/66, 71; Cigoj, 441. Cited in Špela Mežnar, 2004, p. 58.
[904] Obligations Act, Art 148, Sec. 1.
[905] Samec, N. et. al., 2024, p. 76.
[906] Ibid.
[907] Part I, Ch. 1, §§ 2 and 3. Cited in Samec, N. et. al., 2024, p. 76.
[908] Obligations Act, Art. 6.

the Slovenian Constitution.[909] Furthermore, according to Art. 26, Sec. 2 of the Constitution, the injured party may claim damages directly from the tortfeasor under the conditions prescribed by other statutes.[910]

As the rules stipulated by the Constitution are insufficient for this broad issue, the general rules of the law of obligations apply.[911] First, the provisions regarding the employer's liability for damage caused by an employee to a third party at work or in work-related situations (Art. 147 of the Obligations Act) and the legal person's liability for damage caused by its organs (Art. 148 of the Obligations Act) are applied to the state.[912]

10.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

The Slovenian legal literature points out, that although it is not forbidden to possess dangerous things or perform dangerous activities, it carries a risk of causing damage.[913] There is a certain degree of tolerance by society for the increased risk of causing the damage, but not for the damage itself.[914] In addition, Art. 10 of the Obligations Act in prohibits causing damage to others.[915] Fault-based liability for unlawful conduct is not the most suitable ground for establishing liability, because the focus is on the risk of causing damage and its allocation.[916]

As far as this topic is concerned, as already explained in the first chapter, Art. 147 Sec. 1 of the Obligations Act envisages the liability of a legal or natural person for damage caused by an employee to a third party, unless it is proven that the employee acted as required.[917] Sec. 5 of the same article foresees that Sec. 1 does not preclude liability if the damage is caused by dangerous things or dangerous activities.[918] Art. 131 Sec. 2 of the Obligations Act applies to

[909] Ustava Republike Slovenije [Constitution of the Republic of Slovenia], Official Gazette RS, Nos. 33/91-I, 42/97, 66/00, 24/03, 47, 68, 69/04, 69/04, 69/04, 68/06, 140, 143, 47/13, 47/13 75/16 and 92/21, Art. 26. Sec. 1.
[910] Constitution of the Republic of Slovenia, Art. 26 Sec. 2.
[911] Samec, Berghaus, Bitrakov and Drnovšek, 2024, 64.
[912] Samec et al., 2024, p. 64. Obligations Act, Art. 147 and 148.
[913] D. Jadek Pensa in Miha Juhart, Nina Plavšak (eds), 2003, *Obligacijski zakonik* (OZ) (splošni del) s komentajrem, 1. knjiga (1 do 189. člen), Založba, Ljubljana, p. 848.
[914] Ibid., p. 848.
[915] Obligations Act, Art. 10.
[916] D. Jadek Pensa 2003, p. 848.
[917] Obligations Act, Art. 147, Sec. 1.
[918] "Določba prvega odstavka tega člena ne posega v pravila o odgovornosti za škodo, ki izvira od nevarne stvari ali nevarne dejavnosti." ["The provision in the first paragraph of this article does not affect the rules on liability for damage arising from a dangerous thing or dangerous activity"], Obligations Act, Art. 147, Sec. 5.

the employer, pertaining to the fact that their liability is strict.[919] Furthermore, the employer could also be in the position of an owner of a dangerous thing or a person who performs dangerous activities on their own or through the employee.[920] The employer cannot release themselves from liability for the reason prescribed in Art. 147 Sec. 1 because the liability in this event is based on causation, not on the behaviour of the employee.[921] Thus, causation is presumed; it originates from a dangerous thing or activity, and the employer will not be liable only if they prove that the dangerous thing or activity was not the cause.[922]

11 Employer's Liability for Damage Caused by an Employee to a Third Party under Croatian Law

11.1 General Considerations

Under Croatian law, Art. 1061, Sec. 1 of the Obligations Act prescribes that the employer shall be held liable for damage caused by an employee to a third party at work or in work-related situations, unless they prove that there are grounds for excluding the employee's liability.[923] This is a form of vicarious liability where the legal relationship involves three parties: the employee as the actual tortfeasor, the employer as the presumed tortfeasor and liable party, and the third party as the injured party.[924]

The injured party may seek compensation for the damage from the employer, not from the employee who caused it. However, if the employee intentionally caused the damage, as an exception, the injured party can opt to claim damages directly from them.[925] This right is

[919] D. Jadek Pensa, 2003, p. 840.
[920] Ibid., p. 840.
[921] Ibid., p. 840.
[922] "Za škodo, nastalo v zvezi z nevarno stvarjo oziroma nevarno dejavnostjo, se šteje, da izvira iz te stvari oziroma te dejavnosti, razen če se dokaže, da ta ni bila vzrok." ["Damage arising in connection with a dangerous thing or dangerous activity shall be deemed to have originated from that thing or activity, unless it is proven that it was not the cause."] Obligations Act, Art. 149.
[923] Zakon o obveznim odnosima [Obligations Act], Official Gazette of RC Nos. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22 and 155/23.
[924] V. Gorenc, L. Belanić, H. Momčinović, A. Perkušić, A. Pešutić, Z. Slakoper, M. Vukelić, B. Vukmir, 2014, *Komentar zakona o obveznim odnosima*, Narodne novine, Zagreb, p. 1744.
[925] Petar Klarić and Martin Vedriš, 2009, *Građansko pravo*, Narodne novine d. d., Zagreb, p. 624.

stipulated by Art. 1061, Sec. 2 of the Obligations Act[926]. If the employee caused damage only with gross negligence, the injured party does not have the possibility to bring a direct claim.[927]

Furthermore, both Art. 1061 Sec. 3 of the Obligations Act[928] and Art. 109 of the Employment Act stipulate that the employer who has compensated a third party for damage caused by an employee with intent or gross negligence has a recourse claim against the employee.[929] This right is subject to a six-month statute of limitations, which begins from the moment of redress.[930]

In civil litigation, the employee may raise objections concerning the validity of the claim filed by the third party who received compensation from the employer, such as whether the claim is time-barred or the amount is unfounded, as well as objections regarding the employee's liability or a reduction of that liability.[931] However, if the employee has the status of an intervener in the civil proceedings on the employer's side, they may file all claims as a party to the proceedings as long as there is no conflict of interest.[932] At that point, the procedural effect of intervention (intervention effect) takes place, whereby the employee loses the possibility, in a recourse action brought by the employer against them, of asserting the same objections that were adjudicated in the previous proceedings in which they were an intervener.[933]

However, since Art. 109 does not regulate the issue of recourse claims differently from Obligations Act, it cannot be considered a *lex specialis*.[934]

The injured party, or rather the third party, is every legal person who differs from the employer or every natural person which also includes another employee of the same employer with whom the injured party is also employed.[935] Thus, this leads to the question of who can be liable for damage. Namely, the existence of a party liable for damage is one of the conditions for establishing liability for damage caused by an employee to a third party; thus, there must be a

[926] Obligations Act, Art. 1061, Sec. 2.
[927] Valentino Kuželj, 2024, p. 12.
[928] Obligations Act, Art. 1061, Sec. 3.
[929] Zakon o radu [Employment Act], Official Gazette of RC Nos. 93/14, 127/17, 98/19, 151/22, 46/23 and 64/23.
[930] Obligations Act, Art. 1061, Sec. 4.
[931] Magud Mirjana and Horvat Mataić Vlasta, 2016, "Problematika naknade štete na radu i u vezi sa radom" *Pravosudna akademija* Zagreb, p. 20.
[932] Art. 208, Zakon o parničnom postupku [Civil Procedure Act], Official Gazette of RC Nos. SL SFRJ 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, i NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22 and 155/23
[933] Magud Mirjana and Horvat Mataić Vlasta, 2016, p. 21.
[934] Valentino Kuželj, 2024, "Odgovornost radnika za štetu nastalu na radu ili u vezi s radom (poslodavcu i trećoj osobi)", *Pravo i porezi*, p. 17.
[935] Petar Klarić and Martin Vedriš, 2009, p. 624.

party liable for the damage, the employee's harmful act, the existence of damage, a causal relationship, and illegality.[936]

The parties are the employer and employee, as defined by the Employment Act.[937] In addition, they must be in a legally relevant relationship, established by a labour agreement concluded between them.[938]

Art. 4 provides a broad understanding of the term "employee". Namely, it encompasses categories such as "worker", "employed person", "staff member", "civil servant", and similar, and all of them are referred to as an employee. The definition is that the employee is a natural person who conducts the tasks for an employer within an employment relationship.[939] They can also be a member of the management board or an executive director, or a natural person who, in another capacity, as well as under a specific statute, is authorised to conduct the employer's business, as an employee[940] but in these situations, the provisions of the Employment Act regarding employment contracts, fixed-term employment, termination, notice periods, and severance pay does not apply.[941] Thus, the aforementioned specific statutes which regulate some issues regarding damage compensation in employment relationships are the Companies Act,[942] the Occupational Health and Safety Act,[943] and the Anti-Discrimination Act.[944] In addition, it should be noted that Croatia has ratified numerous international conventions of the International Labour Organisation, which constitute part of the internal legal order, as well as the duties based on the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and their Member States, and the Treaty on Accession of the Republic of Croatia to the European to the European Union.[945] Based on these acts, it was necessary to harmonise national legislation with the legislation of the European Union and to specifically regulate the liability for damage arising from an employment relationship.[946]

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[936] Sandra Laleta, 2003, Odgovornost za štetu koju prouzroči radnik na radu i u vezi s radom trećim osobama (usporedba s njemačkim, austrijskim i europskim pravom), Sveučilište u Rijeci, Pravni fakultet, p. 59.
[937] Employment Act
[938] V. Gorenc, et al., 2014, p. 1744.
[939] Employment Act, Art. 4, Sec. 1.
[940] Employment Act, Art. 4, Sec. 3.
[941] Employment Act, Art. 4, Sec. 3.
[942] Zakon o trgovačkim društvima, Official Gazette of RC, Nos. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23 and 136/24.
[943] Zakon o zaštiti na radu, Official Gazette of RC, Nos. 71/14, 118/14, 154/14, 94/18 and 96/18.
[944] Zakon o suzbijanju diskriminacije, Official Gazette of RC, Nos. 85/08 and 112/12.
[945] Croatia has been a member of the ILO since June 30, 1992. In Trpimir Perkušić, 2021, "Odgovornost za štete kod privremenog zapošljavanja", *Zbornik radova Pravnog fakulteta u Splitu*, pp. 634-635.
[946] Ibid., p. 635.

If a comparison is made between English and Croatian terminology regarding the terms "employee" and "worker", Croatian law does not distinguish between these terms as English labour law terminology does; thus, the conclusion is that "employee" and "worker" have the same meaning under both Acts – Obligations and Employment.[947]

However, twenty years ago, different terms were used. The archaic term worker was used in Art. 170 of the previous Obligations Act, that being the 1978 federal Obligations Act; whereas the term "employee" is used in Art. 1061 of the Obligations Act in force. The case law defined further the term "work": a legal question was raised before the Supreme Court of Croatia, as to whether an employer is liable for damage caused to a third party by a person performing a one-time job, and whether such damage is considered that have been caused at work or in work-related situations. The Supreme Court gave an opinion that the tortfeasor was not the worker hired by the employer, because the real worker in that case was the waiter who assigned that person to temporarily replace him behind the bar due to a holiday rush on New Year's Eve, having coincidentally come across him at the restaurant. The person who was engaged for momentary assistance reacted inappropriately to an intoxicated guest; he hit him and inflicted serious bodily injuries on him.

In this case, the employer was held liable for their worker, who failed to properly supervise the premises and assigned an unqualified person for assistance. The worker did not act as required under the given circumstances, which constitutes the reason for the employer's liability for the damage caused to third parties by the worker during the performance of his work duties.[948] Thus, the conclusion is that the employer's liability for their employees is based on a formal requirement, namely the employment contract.[949] This opens the issue of liability when a temporary agency employee causes damage to a third party.[950] This case of liability for damage is regulated by Art. 51 Sec. 1 of the Employment Act.[951]

Namely, with the amendments to the Employment Act of 1995, temporary employment through employment agencies was introduced.[952] In addition, Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work was

[947] Valentino Kuželj, 2024, p. 17.
[948] Judgment of the Supreme Court of the RC, Rev 714/05-2 of February 21, 2006. Cited in Valentino Kuželj, 2024, p. 18.
[949] Valentino Kuželj, 2024, p. 18.
[950] Ibid., p. 18.
[951] Employment Act, Art. 51, Sec. 1.
[952] Trpimir Perkušić, 2021, p. 636.

implemented into Croatian law,[953] and the requirements of the 1997 ILO Convention on Private Employment Agencies have also been accepted.[954] This is a tripartite relationship, according to the Employment Act: on one side is the temporary employment agency, on the other is the user to whom the agency assigns an employee for temporary work, and the third party is the assigned employee. Thus, this form of employment provides advantages for employers by eliminating the need to conclude an employment contract, and it also offers the benefit of reducing unemployment and enhancing the mobility and flexibility of employees.[955] Namely, only the user and the agency conclude a contract on the assignment of an employee, while the agency and the employee conclude an employment contract for temporary work; thus, a contract between the user and the employee is not envisaged.[956]

As mentioned before, the Employment Act regulates this issue, according to which the user is obliged to compensate the damage caused by the assigned employee to a third party at work or connected to work, while regarding recourse liability, the user is considered the employer of the assigned employee.[957] Thus, although a special statute (Employment Act) regulates this issue, it lacks clarity regarding the nature and criteria of liability, therefore the provision of the Obligations Act about the employer's liability for damage caused by the employee is also applied and both Acts should be taken into consideration when assessing the prerequisites for establishing this kind of liability.[958]

When comparing the solutions provided by these two Acts, the difference lies in the fact that this form of employment is based on an employee assignment contract concluded between the agency and the user, and on an employment contract for temporary work concluded between the agency and the employee. In addition, although the formal employer is the agency, it shall not be considered as the liable party. The liable party is the user, as they give instructions and supervise the work of the employee, while the agency does not influence the circumstances that may lead to damage caused to third parties by the employee. This is precisely where the justification lies for the existence of a specific provision on the liability of the user under Art. 51 Sec. 1 of the Employment Act.[959] In a situation where the employee causes damage to the

[953] Employment Act, Art. 2, Sec. 1.
[954] Trpimir Perkušić, 2021, p. 637.
[955] Ibid., p. 637.
[956] Ibid., p. 637.
[957] Employment Act, Art. 51, Sec. 1.
[958] Trpimir Perkušić, 2021, p. 641.
[959] Ibid., p. 643.

user, the agency is liable under the general rules of obligations law, according to Art. 51 Sec. 2 of the Employment Act.[960]

11.2 Liability of a Legal Person for Damage Caused by its Organ

Art. 1062 of the Obligations Act envisages the liability of a legal person for any damage caused by its body (organ) to a third party in the performance of, or in connection with the performance of, its functions.[961] If the damage was caused intentionally or with gross negligence, the legal person has a recourse claim against the tortfeasor.[962] This claim is subject to a statute of limitation with a duration of six months from the date when the legal person redress the damage caused to the third party.[963]

Namely, a legal person is represented by its bodies in accordance with Art. 18 Sec. 5 of the Obligations Act.[964] In legal transactions, they act in the capacity of a legal person, and not as representatives or employees. In relation to third parties, the body is not separate from the legal person, but rather an integral part of it.[965]

According to Sec. 1, the damage must have been caused in the performance, or in connection with the performance of the functions of the body, which is determined on a case-by-case basis.[966]

The qualification as liability for another depends on the provision concerning the right of recourse. This provision emphasises that ultimately, a natural person is liable for the compensation for damage repair costs, even though the damage originated from a collective organ. It establishes the basis of the liability of a legal person for the actions of another. In the absence of a recourse mechanism against a specific person, the situation would not constitute liability for another; rather, it would simply reflect the liability of the legal person itself. Legally, the actions taken by an organ, such as a committee, are ascribed to the legal person as a whole. In addition, since these organs do not qualify as separate legal subjects, any damage

[960] Employment Act, Art. 51, Sec. 2.
[961] Obligations Act, Art. 1062, Sect. 1.
[962] Obligations Act, Art. 1062, Sect. 2.
[963] Obligations Act, Art. 1062, Sect. 2.
[964] Obligations Act, Art. 18, Sect. 5.
[965] V. Gorenc, et. al., 2014, p. 1747.
[966] Ibid., p. 1747.

they cause cannot be directly attributed to them but rather to the overarching legal person to which they are affiliated. A genuine case of liability for another requires that the other party involved is recognised as a distinct legal person.[967]

The existence of fault on the part of the legal person itself, as a prerequisite for liability, is assessed based on the fault of a member of the legal person's organ.[968] The minority in legal theory supports that this is strict liability because the statute does not provide the possibility to prove the absence of fault.[969] However, the majority claims that it is a presumed fault-based liability of a legal person because it is liable for the damage caused by its organs as for its own acts.[970] In addition, if the damage is caused by a dangerous thing or a dangerous activity, the liability is strict according to the general rule of the law of obligations. The interpretation for this standpoint is that the legal person's body appears as the legal person itself in legal transactions, not as an employee or legal person's representative. A legal person can commit a tort only through its body because it expresses its will through them and bears liability for their acts as if they were its own. Thus, general rules of the law of obligations apply to the exemption of a legal person from liability, and that is the reason why the injured party cannot claim damages directly from the persons acting as the organ.[971] However, in line with the aforementioned, if the tortfeasor caused damage intentionally or with gross negligence, the legal person has a recourse claim.[972]

11.3 State Liability for Damage Caused by Civil Servants

According to the Act on the State Administration System of 2011, the state's liability for damage was interpreted widely because "the state is liable regardless of who caused the damage".[973] It prescribed the liability of the Republic of Croatia for damage sustained by a natural or legal person as a consequence of unlawful or improper acts on the part of state

[967] Petar Klarić and Martin Vedriš, 2009, p. 625.
[968] VSRH, Rev 1996/1982 of 11/02/1987, PSP-34/81, cited in V. Gorenc, et. al., 2014, p. 1748.
[969] Đorđević- Stanković, 417.; Vizner, 730. does not explicitly support strict liability, but rather claim that the presumption of fault cannot be rebutted, and that means the liability is strict. Cited in Silvija Petrić, 1991, p. 103.
[970] Silvija Petrić, 1991, p. 103.
[971] Ibid., p. 103.
[972] Obligations Act, Art. 1062, Sect. 2.
[973] Frane Staničić, 2016, "Odgovornost države za štetu nastalu nezakonitim ili nepravilnim radom - problemi u praksi", *Hrvatska pravna revija*, 16 (1), p. 35.

administrative bodies, municipalities, or other public-law legal persons..[974] However, the new Act on the State Administration System of 2019 limited this liability in Art. 14.[975] Namely, based on this Act, the state is liable for damage caused by the irregularities of state administration where the liable party is the state, the organ is the tortfeasor of the state administration, and the real tortfeasors are civil servants and public officials (the employees hired in the state's organs. Legal persons of public law and municipalities are liable on their own.[976]

Particularly, the Act on Civil Servants and Employees in Local (regional) Self-Government prescribes the liability of municipalities.[977] Art. 71 Sec. 1 stipulates the civil servant's liability to the municipality for damage caused intentionally or as a result of gross negligence.[978]

Sec. 2 of the same article clarifies that such damage encompasses amounts paid by the municipality as compensation to a natural or legal person for damage caused by the employee's intentional conduct or gross negligence. Art. 73 further provides that, where a civil servant refuses to compensate the damage voluntarily, the general rules governing obligations shall apply.[979] A civil servant shall not be liable for damage caused in the performance of an order issued by a superior, provided that he or she has previously warned the superior of the possibility of damage.[980]

The conditions required for establishing state liability are as follows: an unlawful or improper act of the state administration, the resulting damage, and a causal relationship between the damage and these acts.[981]

The tortfeasors are civil servants and employees to whom the Act on Civil Servants applies.[982] A claim cannot be addressed against them in civil litigation, not even in cases of intentional damage, as state liability is vicarious, rendering the state directly and primarily liable.[983]

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[974] Zakon o sustavu državne uprave [Act on the State Administration System], Official Gazette of RC, Nos. 150/11, 12/13, 93/16 and 104/16, Art. 14. This is the former Act on the State Administration System.
[975] Act on the State Administration System
[976] Jelušić, D., "Novo normativno rješenje pitanja državne odgovornosti za naknadu štete pričinjene u obavljanju poslova državne uprave", *Hrvatska pravna revija*, 2020, pp. 12.
[977] Zakon o službenicima i namještenicima u lokalnoj i područnoj (regionalnoj) samoupravi [Act on Civil Servants and Employees in Local and Regional Sef Government], Official Gazette of RC, Nos. 86/08, 61/11, 04/18, 112/19 and 17/25.
[978] Act on Civil Servants and Employees in local and (Regional) Self-government, Art. 71, Sec. 1.
[979] Act on Civil Servants and Employees in local and Regional) Self-government, Art. 73.
[980] Act on Civil Servants and Employees in local and (Regional) Self-government, Art. 77.
[981] Frane Staničić, 2016, p. 36.
[982] Zakon o državnim službenicima [Act on Civil Servants], Official Gazette of RC, Nos. 155/23 and 85/24.
[983] Jug and Orlić Zaninović, 2020, pp. 8-9.

However, earlier interpretations of the 1978 Obligations Act suggested a different approach, allowing injured parties to bring direct lawsuits against civil servants based on Art. 170 Sec. 2.[984] Currently, Art. 1061 regulates the employer's liability for damage inflicted by an employee upon a third party.[985] Within this context, the literature has categorised employer liability as fault-based; however, it fundamentally hinges on the fault of the employee.[986]

In addition, according to the opinion of legal scholars, Art. 1062 of the Obligations Act, pertaining to the legal persons' liability for the actions of their organs, also applies to the liability of the state for damage caused to third parties by public officials.[987]

11.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Under Croatian law, the Obligations Act does not define the notions of dangerous things and dangerous activities. Rather, it is up to the case law and literature to determine what is considered as such.[988] During the application of the Art. 173 of the previous Obligations Act of 1991 (actually the previous federal Obligations Act of 1978), the courts supported the standpoint that a thing is considered dangerous (regardless whether it is movable or immovable) if its existence and position as well as its utilisation and characteristics, create an increased risk of causing damage. In addition, it is required that such a thing be subject to special supervision and use.[989] The same applies to dangerous activities. According to case law, a dangerous activity is one which, by the very nature of the manner in which it is performed, poses an increased risk to human health and property. A person who performs a dangerous activity must exercise a higher degree of care.[990] According to the standpoint of the Constitutional Court, the general rules of strict liability apply to all damage caused by the dangerous thing or dangerous activities which ordinary courts assess as dangerous.[991] The

[984] Jelena Čuveljak, 2001, pp. 129-130.
[985] Veljko Gorenc, 2014, p. 1743.
[986] Baretić in Josipović ed., 2014, p. 173.
[987] Armando Demark, 2023, p. 73.
[988] Ivica Crnić, 2018, *Zakon obveznim odnosima sa izmjenama iz 2018. i dodatnom sudskom praksom*, Organizator, Opsežna sudska praksa, napomene i komentari, detaljno abecedno kazalo pojmova, Zagreb, p. 1571.
[989] Decisions of the Supreme Court Revr-730/12 of 16. 4. 2014, Rev-1243/07 of 1.4. 2008., Revr-574/04 of 30.11.2004., Rev-190/07 of 27.3.2007., Rev-845/83 od 3.11.1983. Basic Court in Zagreb Gžr-3276/03 of 27.1.2004., Constitutional Court U-III-1428/2005 of 22.12.2005. Cited in Ivica Crnić 2018, p. 1571.
[990] Decisions of the Supreme Court Revr. 1779/10 of 30. 6. 2015., Revr-96/08 of 15.4.2008. Rev-208/88 of 13.10. 1988. PSP-43/76. Cited in Ivica Crnić 2018, p. 1571.
[991] Decision of the Constitutional Court U-II-1062/2005 of 15.11.2007. Cited in Ivica Crnić 2018, p. 1571.

injured party is not obliged to prove a causal link due to the presumption that the damage was caused by dangerous things or dangerous activity.[992] For example, firefighting activities pose an increased risk to the surrounding environment.[993] The liability of the fire brigade unit is vicarious.[994] In addition, the fire brigade can be considered both an employer and a legal person that is liable for its employee who is a firefighter based on Arts. 1061 or 1062 of the Obligations Act. However, in situations when the damage is caused by using a dangerous thing or activity, the liability of the fire brigade is strict.[995]

12 Employer's Liability for Damage Caused by an Employee to a Third Party under the Law of North Macedonia

12.1 General Considerations

In the legal system of North Macedonia, Art. 157 of the Obligations Act of 2001 addresses the employer's liability for damage caused by an employee to a third party.[996] Sec. 1 prescribes that the employer who employed the employee who caused the damage to a third party during the conduct of work duties or in work-related situations will be liable unless the employer can prove that the employee acted as it was required under the given circumstances at the moment when the damage was caused.[997] The presumption of fault is rebuttable[998] and liability is not

[992] Maja Bukovac Puvača, Zvonimir Slakoper and Loris Belanić, 2015, *Obvezno pravo Posebni dio II. Izvanugovorno obvezni odnosi*, Novi Informator, Zagreb, p. 85.
[993] Marin Kundić, 2021, "Odgovornost za štetu nastalu u obavljanju vatrogasne djelatnosti", *Sigurnost* 63 (3), p. 319.
[994] Ibid., p. 318.
[995] Ibid., p. 318.
[996] Закон за облигационите односи [Obligations Act] (Official Gazette of NM, Nos. 18/2001, 4/2002, 5/2003, 84/2008, 85/2008, 81/2009, 161/2009, 148/2011, 123/2013, 10/2015, 150/2015, 58/2016, 89/2020, 156/2020, 215/2021, 42/2023 and 154/2023, Art. 157.
[997] "(1) За штета што работникот во работата или во врска со работата ќе му ја причини на трето лице одговара работодавецот кај кој работел работникот во моментот на причинувањето на штетата, освен ако докаже дека работникот во дадените околности постапувал онака како што требало." ["For damage caused by an employee to a third party in the course of or in connection with their work, the employer for whom the employee was working at the time the damage was caused shall be liable, unless the employer proves that, under the circumstances, the employee acted as they should have."], Art. 157 Sec. 1 of the Obligations Act.
[998] Gale Galev and Dabovik Anastasovska, 2008, 629. Cited in Marija Radevska, 2009, "Облигациони односи настанати со причинување штета во македонското право", *Yearbook*, Faculty of Law, Goce Delcev University – Stip, p. 245.

absolute. Thus, this represents a form of the employee's fault-based liability.[999] The employer's liability is strict, according to the legal literature.[1000]

In addition, Art. 156 Sec. 5 of the Labour Act of 2005 correlates to Art. 157 of the Obligations Act.[1001] Art. 157 stipulates the employee's liability for damage, while Sec. 4 of the same article prescribes that the employer who paid damages to the injured third party gains a right of recourse against the employee, if he or she caused the damage intentionally or with gross negligence. However, at the same time, the employee is obliged to pay damages to the employer for that in line with Art. 156 Sec. 5 of the Labour Relations Act.[1002] These articles aim to protect the third party who sustained damage through prompt compensation.[1003] Art. 157 Sec. 4 also stipulates the employer's recourse right for the damages paid, if the employee causes damage with intent or gross negligence.[1004] A six-month limitation period shall apply to this right upon payment of the damage.[1005] In addition, if the damage is caused with intent by the employee, the third party can claim damages directly from them according to Art. 157 Sec. 2 of the Obligations Act.[1006]

There is a judgment of the Supreme Court of the Republic of Macedonia where it was established in the proceedings that although the defendant, while driving a motor vehicle for official purposes, caused a traffic accident due to a failure to adjust their speed to the prevailing weather and road conditions (a wet and slippery surface), and was subsequently convicted by

[999] Marija Ampovska and Vojo Belovski, 2015, p. 413. Similarly, Marija Radevska, 2009, p. 245.
[1000] Marija Ampovska and Vojo Belovski, 2015, p. 413.
[1001] Marija Ampovska and Vojo Belovski, 2015, "The Meaning of the Employers' Liability Provisions for Raising the Level of Workers' Safety", *International Journal of Sciences: Basic and Applied Research (IJSBAR)* Vol. 19, No. 1, p. 413.
[1002] "(5) Ако работникот на работа или во врска со работата намерно или од крајно невнимание му предизвика штета на трето лице, работодавачот е должен на тоа лице да му ја надомести штетата, а работникот е должен да ја надомести штетата на работодавачот." ["If an employee, in the course of or in connection with their work, intentionally or through gross negligence causes damage to a third party, the employer shall be obliged to compensate the third party for the damage, while the employee shall be obliged to reimburse the employer for the damage."] Закон за работните односи [Labour Relations Act] Official Gazette of NM, Nos. 80/2003 with ammendments.
[1003] Marija Ampovska and Vojo Belovski, 2015, p. 413.
[1004] "(4) Работодавецот кој на оштетениот ќе му ја надомести штетата што работникот ја причинил намерно или со крајно невнимание, има право од тој работник да бара надомест на платениот износ." ["An employer who compensates an injured party for damage intentionally or through gross negligence caused by an employee shall have the right to seek reimbursement from that employee for the amount paid."], Art. 157, Sec. 4 of the Obligations Act.
[1005] Art. 157, Sec. 5 of the Obligations Act.
[1006] "(2) Оштетениот има право да бара надомест на штетата и непосредно од работникот ако штетата ја причинил намерно." ["The injured party shall also have the right to seek compensation directly from the employee where the damage was caused intentionally."], Art. 157 Sec. 2 of the Obligations Act.

a final judgment of a criminal offence committed through negligence, this fact alone does not give rise to a recourse obligation toward the employer.

Given that the damage was not caused intentionally or with gross negligence, but rather as a result of ordinary negligence, the statutory requirements for a recourse claim were not fulfilled. Accordingly, the defendant employee was not obliged to reimburse the amount claimed in the present dispute.[1007]

A third party may be any natural or legal person who is not employed by the employer.[1008] However, in the legal literature, as a third party is also considered a person hired by the employer who sustained damage outside of work duties or outside of work-related situations.[1009] Following the parties to a labour relationship, it should be noted that regarding the subjects in Macedonian labour law, a clear distinction is made between the subjects of labour law and the subjects of labour relationships.[1010] The former are entitled to regulate and enforce the rights and obligations of the latter.[1011] According to the legal literature, the classification of subjects of labour law is made into individual, collective, active, and passive subjects. Between individual entities (natural and legal persons) a labour relationship is established, and they can be both active and passive subjects of labour law, depending on their role in the given circumstances.[1012] On the other hand, collective subjects are collegial organs such as the management board, the board of directors, trade unions, and international organisations i. e.[1013]

12.2 Liability of a Legal Person for Damage Caused by its Organ

The statutory wording of this article reads as follows: "A legal person shall be liable for damage caused to a third party by its organ in the course of, or in connection with, the performance of

[1007] Decision of the Supreme Court of the Republic of Macedonia in Review No. 1459/2010 of 2011. Cited in Marija Ampovska and Vojo Belovski: 2015. p. 413.
[1008] Vojo Belovski, 2014, "Damage Compensation: Employee's Responsibility of the Damage and Employer's Responsibility", *Balkan Social Science Review*, Vol. 4, p. 134.
[1009] Osman Cadriu, 1992. Cited in Vojo Belovski: 2014, p. 134.
[1010] Andon Majhošev and Vojo Belovski, 2012, *Трудово право* [*Labour Law*], Универзитет "Гоце Делчев"-Штип Правен факултет, University Goce Delčev, Štip, Faculty of law, p. 10.
[1011] Ibid., p. 10.
[1012] Ibid., p. 10.
[1013] Ibid. p. 11.

its functions".[1014] In the legal literature, this refers to a special form of liability of a legal person or its organ for damage caused by an employee to a third party during the performance of work or functions, or in connection with work.[1015] While the majority of legal scholars think that this is vicarious liability, it is a special form of liability due to its peculiarities related to the damage caused, fault, and the parties.[1016] (In addition, according to Grozdanovska and Efremovski, both natural and legal persons can be vicariously liable due to a failure to exercise due supervision, which is based for example, on a contract or some other decisions of the authorities).[1017]

In this legal relationship, there are two parties: the tortfeasor and the party who sustained the damage, and acting as the third (injured) party.[1018] The real tortfeasors are the employee and the legal person's organ, and they are characterized by possessing legal capacity, contractual (business) capacity, and delictual (tort) liability capacity.[1019] However, the legally considered tortfeasor, and the only one who is actually liable, is the legal person. In reality, a legal person is a fiction and an artificial creation with its tort liability capacity derived from the tort liability capacity of the employee and the organs of the legal person.[1020] However, if the employee causes damage with intent, they can assume the role of the tortfeasor together with the legal person for example, in a traffic accident, when a driver employed by a legal person causes damage to a third party. In that situation, the legal person is liable because the driver was conducting work duties on its behalf. Conversely, if it is proven that the driver caused the damage with intent, the driver will also be held liable.[1021]

[1014] "Правно лице одговара за штета што ќе му ја причини негов орган на трето лице во вршењето или во врска со вршењето на своите функции." ["A legal person shall be liable for damage caused to a third party by its organ in the performance of its functions or in connection with the exercise of those functions."], Art. 158, Sec. 1 of the Obligations Act.
[1015] Gale Galev and Jadranka Dabovik Anastasovska, 2021, *Obligaciono pravo*, Univerzitet Sv. Kiril i Metodij, Skopje, p. 581.
[1016] Jakšić S., Veselin M., 1960, 324. Cited in Ivana Sazdovska, 2017, "Одговорност на правното лице и на неговите органи за штета причинета на трето лице – правна уреденост во македонското право и однос со трудовото право" ["Liability of a Legal Person and Its Organs for Damage Caused to a Third Party – Regulation under Macedonian Law and Its Relationship with Labour Law"], Štip, p. 8.
[1017] Marija Grozdanovska and Ivan Efremovski: Obligations, Skopje, 2022. p. 134.
[1018] Ivana Sazdovska, 2017, p. 12.
[1019] Ibid. p. 12.
[1020] Ibid., p. 12.
[1021] The judgment of the Supreme Court of the Republic of Macedonia, Rev. 576/92 of 29.12.1992. Cited in Ivana Sazdovska, 217, p. 13.

12.3 State Liability for Damage Caused by Civil Servants

The state's liability for damage caused by civil servants in North Macedonia's legal system is not envisaged at the constitutional level. Art. 8 of the Constitution foresees the basic human rights and principles of the rule of law.[1022] Compensation for damage is provided by Art. 13 regarding the unlawful deprivation of liberty, detention, or conviction according to a specific statute.[1023] Namely, the general rules of tort law apply to this subject matter.[1024] Those articles are 141, 142 and 158 of the Obligations Act.[1025]

Art. 141 imposes an obligation on any person who through fault causes damage to a third party to provide compensation, unless they can establish the absence of fault on their part.[1026]

12.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Regarding dangerous things and dangerous activities, Art. 159 of the Obligations Act prescribes a presumption that damage originates from a thing, whether movable or immovable, that poses an increased risk of causing damage due to its properties, position, or mere existence. Furthermore, in continuation of the same provision, it is also presumed that the damage originates from an activity whose performance poses a risk of causing damage, unless it emerged due to *force majeure*, or the cause lies with a third party or the injured party.[1027]

The liable person is the possessor of a dangerous thing or the person who performs the dangerous activity.[1028] They can release themselves from liability if the damage was caused by

[1022] Устав на Република Македонија [Constitution of North Macedonia], Official Gazette of NM, Nos. 52/1991, 1/1992, 31/1998, 91/2001, 84/2003, 107/2005, 3/2009, 49/2011 and 6/2019.
[1023] Constitution of North Macedonia, Art. 13.
[1024] Babunska, B., 2019, Effective judicial protection and State liability in EU law. Implications for the Macedonian Judiciary.
[1025] Закон за облигационите односи [Obligations Act] (Official Gazette of NM, Nos. 18/2001, 4/2002, 5/2003, 84/2008, 85/2008, 81/2009, 161/2009, 148/2011, 123/2013, 10/2015, 150/2015, 58/2016, 89/2020, 156/2020, 215/2021, 42/2023 and 154/2023.
[1026] Obligations Act. Art. 141.
[1027] "За штетата настаната во врска со предмет, подвижен или недвижен, чија положба, употреба, особина или самото негово постоење претставуваат зголемена опасност од настанување штета за околината (опасен предмет) или дејноста чие вршење претставува зголемена опасност од настанување штета за околината (опасна дејност), се претпоставува дека потекнува од тој предмет, односно таа дејност, освен ако се докаже дека причината е на страната на оштетениот или трето лице, односно настанала поради виша сила." Obligations Act, Art. 159.
[1028] Obligations Act, Art. 160.

factors unrelated to the thing, which cannot be predicted, avoided, or eliminated,[1029] or if the damage was caused by the acts of the injured party or a third party.[1030]

The following case demonstrates a situation where all legal remedies have been exhausted within a country, rendering it necessary to lodge an application before the European Court of Human Rights in Strasbourg.[1031] The facts were that the applicant was a waiter in a Macedonian restaurant. As a guest of the restaurant, instead of being on duty at the police station, an off-duty police officer who was dressed in uniform and in possession of his service firearm was under the influence of alcohol and fired a shot at the waiter. It struck him in the chest. The injuries he sustained left permanent consequences. In the criminal proceedings, the police officer was convicted of a criminal offence classified as a serious crime against public safety and was sentenced to two years in prison (four years on probation). While in civil proceedings, it was determined that the applicant had sustained damage caused by the acts of the police officer, but since the lawsuit was filed against the Ministry of Foreign Affairs, the court dismissed the lawsuit because it was not to be addressed against the Ministry as a defendant. The court absolved the state of liability under Art. 162 Sec. 2 of the Obligations Act, as the owner of the service firearm. The reason for the acquittal was that the court considered that the damage was caused exclusively by an unforeseeable act of a police officer whose consequences could neither have been predicted nor prevented, even though they were acting on behalf of the state. In the appeal proceedings, the courts upheld the first-instance decision that there was no causal link between the act and the official duties of the police officer because he did not use the weapon in connection with the performance of his duties, but rather as a guest of the restaurant. However, the court, in addition to the provisions of international law, also assessed the relevant aforementioned domestic law – Arts. 160, 163 Sec 2 of this subject matter. It concluded that the harmful act of the police officer in the restaurant had to be attributed to the defendant state and ordered the state to pay EUR 3.390 for material damages and EUR 12.000 for non-material damages.

[1029] Obligations Act, 162, Sec. 1.
[1030] Obligations Act, 162, Sec. 2.
[1031] Application No. 49382/06, Sase of Sašo Gorgiev v. the former Yugoslav Republic of Macedonia, judgment Strasbourg, 19 April 2012, Final 19/07/2012.

13 Employer's Liability for Damage Caused by an Employee to a Third Party under Montenegrin Law

13.1 General Considerations

The employer's liability for damage caused by the employee to a third party under Montenegrin Law is regulated by the Obligations Act of 2008.[1032] Namely, it is placed under Chapter 4 of this statute titled "Liability of a legal person and other legal persons toward third parties".[1033] Art. 164 prescribes the liability of a legal person or an entrepreneur (the employer) for damage caused by an employee at work or in work-related situations, unless they can prove that the employee conducted work as they should have under the given circumstances.[1034] However, if the employee caused damage with intent, the injured party can claim damages directly from them.[1035] In addition to damage caused intentionally, the employer has a recourse right against the employee if they caused damage with negligence.[1036] That right shall be subject to a limitation period of six months from the date the damage occurred.[1037] The subsequent Art. 165 stipulates that this rules apply to other employers as well.[1038]

The following case illustrates the application of Arts. 164 and 165 of the Obligations Act, in addition to the general rule of tort law in Art 148 of the Obligations Act.[1039] The peculiarities of this case are that, although the subject matter is damage compensation, family law is involved in the procedure, which renders this case unique.

Namely, the plaintiff was a child from a court-divorced marriage, who, according to the court's decision, was placed in the custody of the mother.[1040] The child's father was obliged by the same judgment to pay child support (alimony) monthly. The established amount was 25% of his income.

[1032] Obligations Act, Art. 164-166.
[1033] Obligations Act, Chapter 4.
[1034] Obligations Act, Art. 164, Sec. 1.
[1035] Obligations Act, Art. 164, Sec. 2.
[1036] Obligations Act, Art. 164, Sec. 4.
[1037] Obligations Act, Art. 164, Sec. 5.
[1038] Obligations Act, Art. 165, Sec. 1.
[1039] Obligations Act, Art. 148 prescribes the duty of every person to make compensation for damage caused to another due to their fault.
[1040] Judgment of the Basic Court in Podgorica, Case No. P. 9312/99, 28.12.1999. (final and binding), cited in Vesna Begović in Dušanka Radović (ed.), 2016, Vrhovni sud Crne Gore/the Supreme Court of Montenegro, Bilten / Bulletin 2/2015, Podgorica, p. 221.

The child support was paid by an authorised employee of the legal person employing the child's father, in this case, the legal person itself being the defendant. However, in addition to the basic salary, the child's father received an additional allowance in his capacity as a member of two legal persons, which the authorised employee failed to account for when disbursing the child support. Consequently, the plaintiff sustained damage (a financial expert assessed the extent of the damage). Namely, the employee of the legal person failed to act in accordance with the judgment, as well as the order for the enforcement of this judgment[1041], which is considered an unlawful act by the authorised person. Thus, the court rendered a judgment obliging the legal person to pay damages pursuant to Arts. 148, 164 and 165 of the Obligations Act. Based on all the facts set forth herein, the Supreme Court concluded that the lower court ruled and correctly interpreted the provisions of family law.[1042] Those are Arts. 272 and 273 of the Family Act that set the criteria for determining child support, meaning that all of the obligor's income is included in the alimony.[1043]

Another case pertains to Art. 164 Sec. 1 of the Obligations Act. The court held the employer liable because they failed to prove that the employee had acted as they should have.[1044] In concrete terms, the employer was liable for damage caused to a third party by their employee through the unauthorised withdrawal of money from a third party's current account. The employee was a front desk clerk (counter clerk) who unauthorisedly withdrew a total amount of EUR 21,531.62 from the plaintiff’s current account in a period of four years. The plaintiff held that account with the defendant. For this act, the employee was convicted in criminal proceedings for a criminal offense “abuse of official position in business activities”.[1045] In addition, she was obliged by the same judgment to pay damages to the third party in the amount of EUR 16.777,62 (claim for patrimonial rights), while for the rest of the compensation, amounting to EUR 4.754,00, she was directed to initiate civil proceedings (during that period the criminal offence in question was not yet criminalised). In the civil proceedings, she claimed

[1041] Rešenje o izvršenju I. No. 3404/06 of 27.11.2006. [Order for enforcement of the judgment], cited in Bulletin 2/2015: 2016, p. 221.
[1042] Judgement of the Supreme Court of Montenegro, Rev. No. 913/15 of 03.11.2015. Cited in Bulletin 2/2015: 2016, p. 221.
[1043] Family Act, Official Gazette RCG, No. 1/2007 and Official Gazette CG, Nos. 53/2016 and 76/2020, Arts. 272-273.
[1044] Judgement of the Supreme Court of Montenegro, Rev. No. 629/15 od 09.06.2015. in Dušanka Radović, 2015, pp. 107-108.
[1045] This criminal offence (Art. 272, paragraph 1 of the Criminal Code of Montenegro) was codified through the amendments to the Criminal Code of Montenegro, promulgated on May 5, 2010. The employee was convicted based on the final judgment of the Basic Court in Pljevlja, case no. K.br.152/13, dated February 7, 2014. In Dušanka Radović, 2015, p. 107.

the total amount of damage compensation. The court found that all statutory conditions of the employer's liability pursuant to Art. 164 Sec. 1 were met. Those were the existence of damage sustained by a third party, causally linked to the performance of work by an employee of the legal person. In addition, the Supreme Court pointed out to the appellant that, in order to be released from liability, they must prove that the employee acted as they should have.[1046]

13.2 Liability of a Legal Person for Damage Caused by its Organ

Art. 166, Sec. 1 of the Obligations Act prescribes the liability of a legal person for damage caused by its organ towards the third party during the performance of its functions or in connection to them.[1047] Pursuant to Art. 166 Sec. 2, if the tortfeasor caused the damage with intent or negligence, the legal person has the right of recourse against them within six months.[1048] However, although the direct liability of the organ is not prescribed by the Obligations Act, the following case demonstrates that a legal person can be released from liability, based on *lex specialis* if the organ acted with intent.[1049] The facts of the case were that the bankruptcy administrator acted without the prior authorisation of the bankruptcy panel (chamber) and the bankruptcy judge, selling land that belonged to a third party. Namely, in the bankruptcy proceedings, the claimant's predecessor purchased land from the bankruptcy debtor. Later, it was established that the bankruptcy debtor was not the owner of the land, which was, in fact, owned by third parties. The court of first instance dismissed the claim for damages for legal defects of the purchased land due to the one-year statute of limitations. The court of second instance set aside this judgment but also dismissed the claim. However, its reasons differed from those of the first instance court.[1050] Namely, the court of second instance determined that the bankruptcy panel had given consent to the bankruptcy administrator for the sale of an explosives storage facility located on the land, but not the permission to sell the land itself. The court dismissed the claim because it should not have been brought against the defendant. Furthermore, the Art. 166, Sec. 1 applies in connection with Art. 61 Sec. 2 of the Act on Compulsory Settlement, Bankruptcy and Liquidation. Based on the former Art. 61, Sec.

[1046] Dušanka Radović, 2015, pp. 107-108.
[1047] Obligations Act, Art. 166, Sec. 1.
[1048] Obligations Act, Art. 166, Sec. 2. and 3.
[1049] Judgement of the Supreme Court of Montenegro, Rev. I P. No. 209/18 of 6. February 2019, cited in Dušanka Radović et al. (ed.), 2019, Bulletin 1/2019, the Supreme Court of Montenegro, Podgorica, p. 365.
[1050] Ibid., p. 365.

2, if the bankruptcy administrator causes damage with intent or gross negligence, they are directly liable to each participant in the bankruptcy proceedings.[1051] Although the plaintiff argued in the proceedings upon request to review that the defendant's liability is strict because they did not exercise control over the bankruptcy administrator, the Supreme Court dismissed the revision. This was because the bankruptcy administrator was not given instructions to sell third-party land by the bankruptcy panel (chamber) and the bankruptcy judge. Thus, the legal person cannot be held liable under Art. 166 Sec. 1 for damage caused by its organ to a third party.[1052]

13.3 State Liability for Damage Caused by Civil Servants

Art. 8 of the Act on State Administration provides for state liability for damage caused by the unlawful or irregular acts of its administrative organs.[1053]

The Act on Civil Servants and State Employees in Art. 114 Sec. 2. foresees the state's liability for damage caused to third parties by civil servants or state employees at work or in work-related situations.[1054] It should be emphasised, following the previous chapter, that the state may be liable for damage caused by its organ based on Art. 166 Sec. 1 of the Obligations Act, which is analysed above.

This provision was applied in the case law to the state's liability for damage caused by its organ.[1055] The Constitutional Court of Montenegro adjudicated the case. The facts were that the applicant in the constitutional appeal argued that the bankruptcy judge of the Commercial Court had wrongly instructed him to initiate civil litigation, after which he incurred EUR 14,400.00 in litigation costs. That instruction was unlawful and unnecessary and caused him damage. The Commercial Court dismissed the claim, finding that the instruction of the bankruptcy judge had also been wrongful. In addition, the Basic Court in Podgorica dismissed the claim for damages,[1056] while the High Court in Podgorica upheld the judgment of the first

[1051] Ibid., pp. 365-366.
[1052] Ibid., p. 367.
[1053] Zakon o državnoj upravi [Act on State Administration], Official Gazzete of MN, Nos. 78/2018, 70/2021 and 52/2022, Art. 8.
[1054] Zakon o državnim službenicima i namještenicima [Act on Civil Servants and State Employees], Official Gazette of RMN, Nos. 2/2018, 34/2019 and 8/2021, Art. 114, Sec. 2.
[1055] Decision of the Constitutional Court of Montenegro, U-III br. 957/25 of 29 September, 2025, p. 3.
[1056] Judgement of the Basic Court in Podgorica, P. br. 3823/19, of 10 March 2022. Cited in U-III br. 957/25, p. 2.

instance and dismissed the appeal as unfounded.[1057] Namely, the appellant, as a bankruptcy creditor, had his claim disputed by the bankruptcy administrator and was referred to initiate proceedings before the Commercial Court. The Commercial Court dismissed the claim, stating that the bankruptcy creditor had been incorrectly referred to initiate litigation instead of the bankruptcy administrator, and that the error was obvious. The Appellate Court remanded the case for a retrial, after which the bankruptcy creditor withdrew the lawsuit. The court ordered the bankruptcy creditor to pay the defendant EUR 6,534.00 in costs of the proceedings. In the end, it was decided that each party shall pay its own costs of the proceedings.

Namely, regarding the interpretation of Art. 166 Sec. 1, the lower-instance courts held that the plaintiff did not prove the intent or negligence of the bankruptcy judge (as a state organ) to cause him damage. The High Court confirmed this standpoint. However, the Constitutional Court did not confirm this standpoint because the intent and negligence of a tortfeasor are relevant only for the legal person's recourse right against the person who caused the damage intentionally or with gross negligence. For a legal person to be held liable, the intent or negligence of its organ is not of legal relevance. In addition, the Constitutional Court held the standpoint that the courts arbitrarily interpreted the law and "added" intent and negligence as additional conditions for establishing the liability of a legal person for damage caused by its organ in the performance of, or in connection with, the performance of its functions to a third party, although the lawmaker did not prescribe that.[1058]

13.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

Chapter 5 of the Obligations Act concerns liability for damage caused by using a dangerous thing or performing a dangerous activity. Art. 169 prescribes the liability of the possessor of the dangerous thing and the person who conducts dangerous activities.[1059] Art. 167 of the Obligations Act defines dangerous things as movable or immovable, things which, by their characteristics or use, pose an increased risk of damage.[1060] In the case law, for example, the

[1057] Judgement of the High Court in Podgorica Gž. br. 4472/22-19, of 4. October 2022, cited in U-III br. 957/25, p. 2.
[1058] U-III br. 957/25, pp. 7-8.
[1059] Obligations Act, Art. 169.
[1060] Obligations Act, Art. 167.

court classified the boards that fell off a protective fence as a dangerous thing.[1061] The defendant was a contractor performing construction work on a residential building. The subject matter of the dispute was a compensation for non-pecuniary damage caused by a board falling from a metal fence onto the plaintiff, while she was passing by the building, on which occasion she sustained bodily injuries. The defendant was held accountable under strict liability as a possessor of a dangerous thing. It failed to prove that the damage was caused by an external cause or by the actions of the plaintiff herself.[1062] Namely, Art. 172 prescribes the grounds for exemption from liability.[1063] First, as already mentioned, it may be a cause the effect of which stems from outside the thing, which is at the same time as unpredictable, unavoidable or unpreventable.[1064] Secondly, the possessor may be exempted from liability if it succeeds in proving that the damage was caused by an act of the injured party or a third party. This means that their act could not have been foreseen, avoided, or prevented.[1065] Partial relief from liability may be granted if the injured party has partially contributed to the damage.[1066]

If a third party contributed to the damage only partially, they will be jointly and severally liable with the possessor of the thing and will compensate for the damage proportionally to their contribution.[1067] A third party is not considered to be someone whom the possessor relied on in using the object.[1068]

[1061] Judgement of the Supreme Court of Montenegro, Rev. No. 186/15 od 18.03.2015. Cited in Vesna Begović in Dušanka Radović (ed.), 2015, Vrhovni sud Crne Gore / the Supreme Court of Montenegro, Bilten / Bulletin 1/2015, p. 106.
[1062] Ibid., p. 106.
[1063] Obligations Act, Art. 172.
[1064] Obligations Act, Art. 172, Sec. 1.
[1065] Obligations Act, Art. 172, Sec. 2.
[1066] Obligations Act, Art. 172, Sec. 3.
[1067] Obligations Act, Art. 172, Sec. 4.
[1068] Obligations Act, Art. 172, Sec. 5.

14 Employer's Liability for Damage Caused by an Employee to a Third Party under Serbian Law

14.1 General Considerations

Under Serbian law, the Obligations Act in Arts. 170 and 171 regulates the employer's liability for damage caused by an employee ("zaposleni", "radnik") to a third party at work or in work-related situations.[1069] An employer ("poslodavac") may not be released from liability merely by demonstrating the absence of its fault.[1070] It assumes liability due to its status as an employer. The justification for the employer's liability lies in the fact that the injured party would, in most cases, be unable to claim compensation from the employee directly, and proving its fault would be difficult as well.[1071]

However, the Employment Act in Art. 163 Sec. 7 stipulates that if the employer compensates damage caused by the employee to a third party at work or in work-related situations, either intentionally or with gross negligence, the employee has a duty to reimburse the employer for the full amount paid.[1072] Thus, according to this provision, the relationship between the employer and employee after the payment of damages by the employer is regulated by the Employment Act.[1073]

The employer may be a natural person (including entrepreneurs) or a legal person (including state institutions), while the employees are always natural persons.[1074] The Employment Act provides definitions for both, and Art. 5 Sec. 2 prescribes that the employer is a domestic or foreign natural or legal person who employs other persons or they can also be engaged in work

[1069] Zakon o obligacionim odnosima [Obligations Act], Službeni list SFRJ [Official Gazette of the Socialist Federative Republic of Yugoslavia], Nos. 29/78, 39/85, 45/89 – the decision of the Constitutional Court of Yugoslavia and 57/89, Službeni list SRJ [Official Gazette of the Federative Republic of Yugoslavia], No. 31/93, Službeni list SCG [Official Gazette of the State Union of Serbia and Montenegro], No. 1/2003 – Constitutional Charter and Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 18/2020).
[1070] Ilija Babić, 2015, "Odgovornost radnika i poslodavca za štetu koju radnik prouzrokuje trećem licu", *Pravna riječ*, No. 43/2015, Year XII, p. 45.
[1071] Ibid., p. 53.
[1072] Zakon o radu [Employment Act], Službeni glasnik RS [Official Gazette of the Republic of Serbia], Nos. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 and 95/18.
[1073] Leposava Karamarković, 2004, p. 141.
[1074] Karanikić Mirić Marija, 2023, *Tort law in Serbia,* Kluwer Law International B.V., Alphen aan den Rijn, p. 78.

by the employer.[1075] Sec. 1 defines an employee as a natural person employed by an employer (an employee is in an employment relationship with the employer).[1076]

The employer is liable for the damage caused by their employees, whereby it is legally irrelevant whether they are engaged based on full-time or part-time employment, or on a fixed-term or indefinite duration basis. In addition, it is not relevant whether a contract of any kind was concluded between the injured party and the employer.[1077]

The liability of a legal person is twofold: it encompasses liability for damage caused by an employee to a third party and by its organs.[1078] Regarding damage caused by an employee, it applies to the enterprise and other employers that are liable for the damage caused by an employee to a third party.[1079] However, they can be released from liability if they prove that the employee acted as they should have.[1080] The legal standard of whether the employee acted as they should have serves as a clarification of the general rule that everyone is obliged to compensate for the damage caused by them to another, unless they can prove that the damage was caused without their fault.[1081] This means that if there is no fault on the part of the employee who is directly liable, the employer, who bears indirect liability, is automatically considered not to be at fault either. This situation thus falls within the scope of fault-based liability.[1082]

For example, such a situation would arise during a robbery of a legal person, when the perpetrator (robber) sustained damage, such as torn clothes and a broken wristwatch, caused by a person providing physical security (security guard) for the legal person while resisting the robbery. In this scenario, the legal person would not be held liable for the material damage sustained. However, if the security guard were to use a weapon and kill the robber in this situation, the third injured party, there would be both criminal liability for the offence of murder and civil liability, since the security guard would have failed to act as they should under the given circumstances. Then, they will bear individual liability for either exceeding the bounds of lawful self-defence or for acting with negligence while the legal person, as the liable party, is obliged to pay compensation for the damage. However, if it is established that the security guard killed the robber with intent due to a prior acquaintance with them and an existing

[1075] Employment Act, Art. 5, Sec. 2.
[1076] Employment Act, Art. 5, Sec. 1.
[1077] Karanikić Mirić Marija, 2023, p. 78.
[1078] Oliver Antić, 2011, *Obligaciono pravo*, Pravni fakultet Beograd, p. 490.
[1079] Obligations Act, Art. 170, Sec. 1 and Art. 171, Sec. 1.
[1080] Obligations Act, Art. 170, Sec. 1.
[1081] Obligations Act, Art. 154, Sec. 1, cited in Oliver Antić, p. 490.
[1082] Oliver Antić, 2011, p. 490.

conflict between them, the injured party would have the right to seek compensation from both, the legal person and the security guard. If a legal person pays damages, and the damage was caused by the guard with intent or negligence, the legal person has the right of recourse against the employee (guard).[1083]

Therefore, the fault of the employee constitutes a condition for establishing the employer's liability, and it is presumed to exist to an increased degree.[1084] But the fault of another is only the condition, not the legal ground for establishing the vicarious liability. Therefore, in those situations, the liability cannot be fault-based. The ground of fault-based liability is only personal fault.[1085]

In a situation where the employer rebuts the presumption of the existence of the employee's fault by arguing that the employee acted as required, it must prove that there was no professional fault (they complied with the high professional standards) because it is not sufficient to establish that the employee's conduct was reasonable and with due diligence.[1086] The fault of the employer, for establishing its liability, is, however, legally irrelevant.[1087] These rules lead further in various literary interpretations, of which Cvetković summarised four.[1088]

The first interpretation is that the employer's liability is fault-based, according to some scholars and court decisions interpreted by Cvetković.[1089]

According to this understanding only liability for dangerous things and dangerous activities is strict.[1090] The employee is at fault if they did not act as they should have, and in that way, the employee's fault is attributed to the employer.

The employer may be exempted from liability if it proves that the employee acted as they should have. In this case, the fault of the employee and the fault of the employer are considered equal.[1091] The employer is liable because they made a mistake when they chose an employee

[1083] Ibid., p. 490.
[1084] Marija Karanikić Mirić, 2016, *Objektivna odgovornost za štetu*, Službeni glasnik, p. 11.
[1085] L. Bach, 1977, 27, cited in Karanikić Mirić, 2016, p. 11.
[1086] Karanikić Mirić, 2016, p. 11.
[1087] Ibid., p. 11.
[1088] Mihajlo Cvetković, 2018, "Osnov neugovorne odgovornosti poslodavca za štetu koju radnik prouzrokuje trećem licu", *Pravo i privreda,* 56(7-9), p. 473.
[1089] the Judgment of the Appellate Court in Niš, No. Gž. 1960/2015 of 24 May 2015, Judgment of the Appellate Court in Belgrade, No. Gž 12342/2010 of 11 April 2012, and the Judgement of the Supreme Court of Serbia, No. Rev. 1900/2005 of 5 October 2005. Cited in Cvetković, 2018, p. 480. Similar in Ilić Milica, Dudás Attila, 2023, "Employer's Liability for Damage Caused by the Employee to a Third Party under Serbian Law", *Acta Universitatis Sapientiae Legal Studies*, 2/2023, p. 64.
[1090] Georgijev, 1980, 486. Cited in Mihajlo Cvetković, 2018, p. 480.
[1091] Georgijev, 1980, 521-522. Cited in Mihajlo Cvetković, 2018, p. 480.

(*culpa in eligendo*), or when they gave them instructions (*culpa in instruendo*), or failed to supervise them (*culpa in vigilando*).[1092]

The second interpretation considers the employer's liability strict.[1093] They can exempt themselves in cases of *force majeure*, acts of a third party or acts of the injured party, but cannot be released from liability by proving that they were not at fault in the selection and supervision of the employee, nor in giving instructions (*culpa in eligendo*, *culpa in instruendo*, *culpa in vigilando).* The fault of the employee is legally relevant, while the employer's fault is not. The employer may be exempted from liability if it proves that the employee is not at fault.

The third interpretation shifts from strict to fault-based liability. As vicarious liability, it is strict; however, the employer may release itself from liability if it proves that the employee acted as required. In that case, if there is no direct fault of the employee, the employer's indirect liability is also excluded. It can be concluded that this interpretation also indicates that it is a matter of fault-based liability.[1094] According to Jakov Radišić, the employer is continuously exposed to the risk of damage caused by employees; that is the reason why liability is considered strict. Nevertheless, the act of causing the damage constitutes a matter of fault-based liability.[1095]

The fourth interpretation given by Cigoj is strict liability of the employer for the conduct of their employee, while the act causing the damage event is fault-based. For the hiring of the employee, the employer's liability is strict, while for causing the damage by the employee, the employer is liable based on its own fault.[1096] Cvetković considers this interpretation to be confusing.[1097]

It should be noted that at the time when the Obligations Act was enacted in 1978, the term "organisation of associated labour" was used for the employer.[1098] The majority opinion was that the liability of such organisations was strict because they assumed the risk of damage being

[1092] Mihajlo Cvetković, 2018, p. 480.
[1093] G. Obradović, 63. Cited in Mihajlo Cvetković, 2018, p. 481.
[1094] O. Antić, 2008, 479. Cited in Mihajlo Cvetković, 2018, p. 481.
[1095] Radišić, 2004, 242. Cited in Mihajlo Cvetković, 2018, p. 481.
[1096] Mihajlo Cvetković, 2018, p. 481.
[1097] Ibid. p.482.
[1098] Slobodan Perović and Dragoljub Stojanović, 1978, *Komentar zakona o obligacionim odnosima*, Kulturni centar Gornji Milanovac, Pravni fakultet Kragujevac, p. 519.

caused by their employees, but for the mere occurrence of the damage caused by an employee, the liability of the organisations was considered fault-based.[1099]

Furthermore, in addition to the condition that the employer must prove that an employee acted as it was required, the employer must prove, to exempt itself from liability that the damage did not occur at work or in work-related situations. It must convince the court that the harmful act is not connected to the employer's business activities. The court considers that damage is caused at work if it occurs during working hours and while performing tasks assigned to the employee by the employer. In the past, in the case law of Yugoslavia, the employer was not liable if its employee caused damage to a third party at the workplace (on the employer's premises) if the harmful act was not within the scope of the employee's work duties. However, if the employee used tools or equipment of the employer, there was a sufficient connection between the harmful act and the employer's scope of work. Such a solution should be taken into consideration only if the injured party reasonably believed the tortfeasor was acting in the capacity of an employee. If the employer enables the employee to act under the guise of authority, the employer should also bear liability for the employee's actions.[1100]

The employer gains economic profit from the employee's work; it is aware of the risks involved in the work process and is the one who directs and supervises the employee's conduct. The employer also establishes protocols to minimise the risk of damage.[1101] However, when a work tool qualifies as a dangerous thing, the employer is liable for the damage caused by such a thing in the capacity of a mere possessor ("detentor"), regardless of whether the conditions for establishing the employer's liability for damage caused by its employee are met.[1102] Art. 170 Sec. 3 of the Obligations Act explicitly prescribes this rule.[1103] In this event, the general rules of strict liability apply.

If the employee intentionally caused the damage, a third party (the injured party) can make a direct claim against the employee for damages if the employee caused the damage at work or in a work-related situation.[1104] When this occurs, the employee's direct liability exists alongside the employer's liability. It does not matter if the employer has been held liable for the injuries

[1099] Cigoj, 1978, 441, Cited in Jakov Radišić, 1982, *Obligaciono pravo*, opšti deo, Savremena administracija, p. 221.
[1100] Marija Karanikić Mirić, 2024, *Obligaciono pravo*, Službeni glasnik, p. 567.
[1101] Ibid., p. 568.
[1102] Ibid., p. 569.
[1103] Obligations Act, Art. 170, Sec. 3.
[1104] Obligations Act, Art. 170, Sec. 2.

incurred by the employee or whether the injured party has requested compensation from the employer.[1105] This is the only situation in which gross negligence does not qualify as intent in tort law (principle of *culpa lata dolo equiparatur* - gross negligence ordinarily entails the same legal consequences as intentional conduct).[1106]

In addition, a natural person, as a legal person's organ, may be directly liable, if the damage was caused with intent, and may exceptionally be economically stronger than the employer. Then, the third party may have an interest in claiming damages directly from the natural person. This is the literature's interpretation because, in this case, the statute does not foresee the possibility of a direct claim.[1107]

14.2 Liability of a Legal Person for Damage Caused by its Organ

The organs of legal persons are considered as natural persons through which legal persons conduct their functions and manage their legal affairs.[1108] An organ can be single-member (sole) or collegial the latter involving two or more members (natural or legal persons).[1109] Since the actions of an organ are considered to be the actions of the legal person itself, the legal person is held liable for damage caused to a third party by its organs while performing their functions. This is why legal persons manifest their will through their organs. The individuals who will perform the functions of an organ are designated in the articles of incorporation, memorandum of association, or bylaws, while the process of registering a legal person is carried out according to the Act on the Registration Procedure with the Serbian Business Registers Agency which maintains the register of legal persons.[1110] However, some legal scholars such as Živomir Đorđević and Vladan Stanković argue that this type of legal liability of a legal person is vicarious liability.[1111] The justification for this assertion is, firstly, that vicarious liability is a traditional approach to this sort of liability. Secondly, a legal person, as one person, is liable for the damage caused by an organ, which is another subject, and a legal relationship exists between them. Therefore, they conclude that this is a form of strict liability

[1105] M. Karanikić Mirić, 2013, 223. Cited in Bojan Pajtić, Sanja Radovanović, Atila Dudaš, 2018, p. 504.
[1106] Bojan Pajtić, Sanja Radovanović, Atila Dudaš, 2018, p. 504.
[1107] Ž. Đorđević, V. Stanković (1987), 417. Cited in Bojan Pajtić, Sanja Radovanović, Atila Dudaš, 2018, p. 506.
[1108] Ilija Babić, 2016, *Gradjansko pravo*, Knjiga 4 – *Obligaciono pravo* – opšti deo. Službeni glasnik, p. 336.
[1109] Marija Karanikić Mirić, 2024, p. 570.
[1110] Ilija Babić, 2016, p. 336.
[1111] Živomir Đorđević, Vladan Stanković, 1987, *Obligaciono pravo*, opšti deo, Naučna knjiga Beograd, p. 416.

of a legal person[1112] because the statute does not foresee any specific exceptions to liability, such as those in Art. 170 Sec. 1, where the employer can prove that the employee acted as they should have. However, if general grounds for exemption from liability exist, such as *force majeure* or other general grounds, they will also apply in this case.[1113]

Namely, Art. 172 Sec. 1 of the Obligations Act envisages a legal person's liability for damage caused by its organs to third parties.[1114] In line with the *ultra vires* theory, the liability of a legal person is in general limited by its legal capacity and capacity to act, except for its delictual liability. A legal person is liable when its organ commits an unlawful act in conducting its duties or related to that, regardless of whether the organ caused the damage intentionally or with negligence. The injured party cannot claim damages from the natural person who acts in the capacity of an organ or an employee. In addition, the legal person is liable for its organs regardless of fault for damage caused by dangerous things or dangerous activities.[1115]

If the legal person has paid compensation to the injured party, it has a recourse claim against the person who caused the damage with intent or gross negligence.[1116] In addition, for damage caused by a collegial organ, the liability of each member of the organ is determined separately.[1117]

This right is time-barred after six months from the day when the damages are paid to the third party.[1118]

14.3 State Liability for Damage Caused by Civil Servants

In Serbian law, two main statutes pertain to the conditions of establishing state liability: the Act on State Administration and the Act on Public Servants. The former, in Art. 5 Sec. 1 stipulates the state's liability for damage caused by its organs to natural or legal persons as a result of unlawful or improper acts.[1119] Sec. 2 pertains to the liability of an entity exercising public

[1112] Ibid., p. 417.
[1113] Oliver Antić, 2011, p. 491.
[1114] Obligations Act, Art. 172, Sec. 1.
[1115] Ilija Babić, 2016, p. 336.
[1116] Obligations Act, Art. 172, Sec. 2.
[1117] Ilija Babić, 2016, p. 336.
[1118] Obligations Act, Art. 172, Sec. 3.
[1119] Zakon o državnoj upravi [Act on State Administration], Official Gazette of RS, No. 79/05, 101/2007, 95/2010, 99/2014, 47/2018 and 30/2018, Art. 5. Sec. 1.

authority for damage caused by unlawful or improper acts to natural or legal persons in the performance of delegated administrative functions.[1120]

Furthermore, Art. 124 Sec. 1 of the Act on Public Servants regulates the liability of the Republic of Serbia for damage caused to third parties by civil servants through unlawful or improper conduct in the course of the performance of their duties.[1121] Under Sec. 2 of the same article is provided that if a civil servant caused damage intentionally, the injured party may claim damages directly from them.[1122] In addition, Sec. 3 stipulates the state's recourse right against a civil servant who has caused damage intentionally or with gross negligence.[1123]

This Act regulates the situations where the organs of the Republic of Serbia hire civil servants. Moreover, the Act on the Employees of the Autonomous Provinces and Local Self-Government applies to civil servants employed at lower levels of the state organisation.[1124]

It should be noted that there are various specific statutes which regulate this issue. For instance, the Law on Judges stipulates the state's liability for damage caused by a judge's unlawful or improper actions.[1125] The Law on Public Prosecution regulates the liability of the Republic of Serbia for damage caused by the unlawful or improper conduct of a public prosecutor.[1126]

These specific statutes hold priority over general legislative provisions, (the principle of *lex specialis derogat legi generali)*. The prerequisites for state liability are the unlawful or improper acts of civil servants alongside the existence of damage and a causal link between the civil servant's conduct, whether by act or omission.[1127]

However, these conditions fall within the general rules of liability in tort law particularly Art. 172 of the Obligations Act, which prescribes the liability of legal persons for damage caused by their organs, and involves legal persons of public law[1128] as well as the rules on employer's

[1120] Act on the State Administration, Art. 5, Sec. 2.
[1121] Zakon o državnim službenicima [Act on Civil Servants], Official Gazette of RS, No. 79/05, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020, 142/2022 and 13/25., Art. 124. Sec. 1.
[1122] Act on Public Servants, Art. 124, Sec. 2.
[1123] Act on Public Servants, Art. 124, Sec. 3.
[1124] Zakon o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave [Act on the Employees of the Autonomous Provinces and Local Self-governments], Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 21/2016, 113/2017, 95/2018, 114/2021, 113/2017, 95/2018, 86/2019, 157/2020 and 123/2021.
[1125] Zakon o sudijama [Act on Judges], Official Gazette No. 10/2023, Art. 7.
[1126] Zakon o javnom tužilaštvu [Act on Public Prosecution], Official Gazette, No. 10/2023, Art. 58.
[1127] Prica, M., 2012, "The state's liability in damages for wrongful administrative action", *Facta Universitatis, Law and Politics*, Vol. 10, No. 1, p. 66.
[1128] Karanikić Mirić Marija, 2023, p. 82.

liability for the damage caused by an employee to third parties, as there is no difference between employees employed by the state or by private employers.[1129]

14.4 Employer's Liability for Damage Caused by an Employee to a Third Party Using a Dangerous Thing or Performing a Dangerous Activity

The Obligations Act of 1978 does not define the concept of dangerous things and dangerous activities.[1130] As early as 1969, Mihajlo Konstantinović, a professor of civil law, in his proposal for the Obligations Act, titled "Obligations and Contracts – Draft for Code of Contracts and Obligations", set out the criteria for what is considered a dangerous thing.[1131] Based on this, Art. 136 of the "Draft" prescribes, through the liability of the possessor of a movable or immovable thing, that they will be liable for damage caused by that thing, which position, attributes, or use generate an increased risk of damage.[1132] Art. 173 of the Obligations Act prescribes, in general, strict liability for damage caused by dangerous things or dangerous activities, unless it is proven that the damage was not caused by them.[1133] The subsequent Art. 174 foresees the liability of the possessor of the dangerous thing and the liability of the person who performs dangerous activities.[1134] Concerning the situations when the employee causes damage while using a dangerous thing or conducting a dangerous activity during work duties, their fault is not of legal relevance. In those situations, the employer's liability is strict.[1135] Thus, in this regard, when strict liability is applied to the employer's liability for others, the employer may release themselves from liability only for specific reasons prescribed by statute and in their capacity as the proprietor of the dangerous thing.[1136] Statutory reasons based on Art. 177 Sec. 1 of the Obligations Act are that the damage is caused by external causes to the dangerous things or dangerous activities that could not be prevented or avoided.[1137] The

[1129] Cigoj in Commentary of the Obligations Act (ed. Slobodan Perović), 1995, p. 392.
[1130] Milica Ilić, Attila Dudás, 2025, "Employer's Liability for Damage Caused by the Employee to a Third Party Using a Hazardous Thing or Performing a Hazardous Activity under Serbian Law – Case Study", *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, Tomus XLIII/1, 2025, p. 182.
[1131] Ibid., p. 182.
[1132] Mihailo Konstantinović, 1969, *Obligacije i ugovori – Skica za Zakonik o obligacijama i ugovorima* ["Obligations and Contracts – Draft for a Code on Obligations and Contracts"]. Reprinted in the series *Klasici jugoslovenskog prava,* Službeni list, Beograd, [Art. 136 Sec. 1], 81.
[1133] Obligations Act, Art. 173.
[1134] Obligations Act, Art. 174.
[1135] Milica Ilić, Attila Dudás, 2025, p. 187.
[1136] Antić: op. cit. 2012, 498.
[1137] Obligations Act, Art. 177, Sec. 1.

following Sec. 2 of the Art. 177 foresees the reason that the damage can be attributed to the injured party's or a third party's contribution to the damage.[1138] Furthermore, they may be partially released from liability if the injured party partially contributed to the damage.[1139] For the partial contribution of a third party, both are jointly and severally liable.[1140] In addition, *force majeure* and casus are also exculpatory grounds depending on certain facts under given circumstances.[1141]

CONCLUSIONS

A general principle common to all human beings is that everyone is liable for their own fault, but is it always true? The dominant position in the literature is that this approach applies in criminal and administrative law, for example. However, in terms of civil law, the legal solution is different from the solutions applied in criminal or administrative law. Furthermore, it must be emphasized that statutes cannot predict the legal rule for every situation that can happen in reality. This research demonstrates that in the field of labour relationships, although it is common that damage arises as a consequence of working processes, the statute also cannot prescribe all the circumstances under which it arises. Therefore, legal literature and case law exist to provide answers to what can furthermore happen both in and outside the workplace and how to find the best justly solution for every situation.

The author explored the legal systems of nineteen countries (some were not analysed in all relevant aspects due to a lack of available literature in English and language barriers, and for them, a general overview was provided), with reference to Roman law, without which this endeavour to scrutinise law cannot reach its completeness. What is specific is that the notion of the employer implies natural and legal persons, where the legal person is actually a legal fiction because it does not have its own will as a natural person. But it has its organs, which are also human beings who represent the legal person and act on its behalf. Furthermore, the employer can also be the state, for example. The chapters were structured accordingly: the first subchapter provided a general overview of the topic, while the second analysed the liability of

[1138] Obligations Act, Art. 177, Sec. 2.
[1139] Obligations Act, Art. 177, Sec. 3.
[1140] Obligations Act, Art. 177, Sec. 4.
[1141] Milica Ilić, Attila Dudás, 2025, pp. 188-189.

a legal person for damage caused by its organ to a third party. The third dealt with the issue of the state's liability for damage caused by civil servants. The last considered employer's liability for damage caused by the employee to a third party using a dangerous thing or performing a dangerous activity. The liability is always strict for these activities due to the elevated risk of causing damage that emerges from performing them.

Namely, this topic deals with vicarious liability. It refers to being held liable for a wrongdoing of another person, i.e., the theory of vicarious liability allows someone to be held liable for an act that was not committed by them. For practical reasons, the employer-employee connection is the most significant of these. Only actions taken "in the course of the employee's employment" are subject to employer liability. Consequently, the employee must do something wrong while working; if the employee is not liable, neither is the employer.

In the legal literature, various reasons are provided for why an employer should be liable for damage caused by an employee to a third party or their property while performing work tasks. According to Paula Giliker, the rule of vicarious liability means that someone is liable even though they themselves did nothing wrong, thus explaining why someone is held liable. But in theory, there is also an interpretation that the employer can be liable for its own fault.

English law is only mentioned at the beginning of this thesis, solely for the purpose of distinguishing which countries adhere to the theoretical concept of strict liability. Those are the English and Romanic legal systems, including the former Yugoslav states. On the other hand, fault-based liability is prescribed by statute in Germany, but this does not reflect the actual situation in the case law. That is the reason why this thesis begins with the two most prominent continental legal systems, in Germany and France, in order to demonstrate the most significant differences in accepting or rejecting the hypothesis of whether employer liability is strict or fault-based. It should be emphasised that the phrase "at work or related to work situations" from the thesis title represents a boundary to the employer's strict liability in most legal jurisdictions. Another significance of the study was an endeavour to find the appropriate terms regarding the parties to an employment relationship. Namely, through the years and the development of this legal institute, various notions of the contemporary terms "employer" and "employee" were used in the statutes and legal theory. As started from the first representative country, § 831 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) uses the term "principal" and the term "servant" for the employee. In the literature, the terms of "superior" and "subordinate" are also used. In France, these are masters (referred to as *maîtres or*

commettants) and *préposé* for an employee. In the Italian Civil Code, both terms of masters and employers, and servants and employees are used concurrently in the same provision on this subject matter. In Romania, it is the principal's liability for the acts of their auxiliaries. In Romanian, the terms are "comitentul" and "prepus", words with a similar root as in French. In Bulgaria, the provision that regulates the employer's liability for damage caused by an employee is interpreted in the English language literature in a general way, as a person who assigns a task to another person. In Bulgarian, that is the term "възложител", which can be translated as "principal". In the Czech Republic, the employer is "zaměstnavatel". In Austria, the principal is liable for the acts of their assistant (*Erfüllungsgehilfen*). In Serbia, Croatia, and Bosnia and Herzegovina, the employer is "poslodavac", while the employee is "zaposleni" or "radnik". In addition, it should be noted that, in contrast to the previously mentioned countries where this issue is regulated by the Civil Code, in Bulgaria, as well as in the former Yugoslav countries, the Obligations Act, as a special act, provides this kind of liability. It should be noted that in Bulgaria the title of the special statute governing obligations is the Act on Obligations and Contracts, whereas in Serbia it is referred to simply as the Obligations Act.

In addition, these terms are usually defined by the Employment Act rather than the Civil Code. Moreover, the peculiarity of these examined various legal systems is that this topic is regulated not only in civil codes, but also by the obligations acts. As mentioned above, Germany was chosen as a starting point. The reason was to highlight that in this legal system, the employer's vicarious liability is fault-based and prescribed by statute. That seems unusual, because it is usually the case in theory that there are various interpretations of various legal scholars as to whether this liability is fault-based or strict. However, *culpa* (*culpa in eligendo, culpa in instruendo and culpa in vigilando*) has its origin in the Pandectist School of Law. Namely, in the Germanic legal family, the principle "no liability without fault" was a moral basis in tort law, and according to Gemeines Recht, it had to be applied to vicarious liability as well. Although the German Civil Code accepted this doctrine as a rule incorporated in provision § 831, the literature does not share this view and leaves space for special laws to prescribe strict liability. But a verbatim reading of § 831, especially the second sentence, implies a reason for exoneration from liability if the employer can prove that they provided the necessary tools for conducting the work, exercised due care in the selection process of the employee, and supervised them. Another reason is that even with the exercise of such reasonable care, the damage could not be avoided. Thus, in Germany, what is peculiar compared to other legal jurisdictions is that the employer's liability is based on the employer's own fault with respect

to an inappropriate selection or supervision of their employees. However, it constitutes a variant and is not absolute, because the standpoint of the literature is that an employer's liability is strict for damage caused by an employee whose fault is legally relevant. Here lies the reason why this liability is considered indirect (vicarious); because the employer is liable for the employee's fault, which, in fact, the employee attributed (transferred) to the employer. Moreover, in comparative law, such as in the Hungarian legal system, according to the interpretation of the former Civil Code of 1959, if the principal could prove that they did not negligently select, instruct, and supervise the agent, they could exempt themselves from liability. Namely, this rule was a characteristic of the socialist model of organising society where the principal and agent acted in the capacity of socialist organisations. However, today this rule is also prescribed by law in § 6:542 of the Hungarian Civil Code in force, on the joint and several liability of the principal and agent to a third party if the agent caused the damage in that capacity. In the second sentence, it is prescribed that the principal can be released from liability if they prove that they were not at fault for selecting, instructing, and supervising the agent. However, although this traditional principle of *culpa in eligendo vel in vigilando* exists in the form of the presumed fault of the employer, it can be concluded that it is no longer the predominant prerequisite of liability.

Furthermore, in the German legal system, in the case law, there were situations when the employee was directly liable because the employer was insolvent, or they caused the damage with intent or negligence. However, some legal scholars such as Denecke thought that only when an employee causes damage with intent or gross negligence should they be directly liable, and that was the justification for applying the general constitutional provision (Art. 34 of the German Constitution), which refers to the liability of employees employed in the public sphere, also to the employees employed in the private sector. In addition, the employer and the employee can be jointly and severally liable. Both have a recourse claim proportionate to the extent of their liability. The rules of internal damage settlement apply to their mutual claims. In the Slovak legal literature, this issue of the direct liability of an employee remains open. This is because the general provision in Art. 420 regulating it in paragraph 2 is interpreted together with the first and third paragraphs, and therefore, no final standpoint by the legal scholars has been taken. Sec. 1 is about the liability of everyone who causes damage, while Sec. 3 stipulates the right to be released from liability if evidence exists. Specifically, there is an interpretation in the legal theory that if one of the conditions for establishing the employer's liability is

missing, the employee will be directly liable; however, the above-mentioned has opened the door to broad interpretation.

Regarding French law, what is specific in terms of Art. 1242 Sec. 5 of the Civil Code (the main provision of this subject matter), in addition to that it prescribes employers' or masters' liability for damage caused by their employees or servants to a third party, "in the functions for which they have been employed" is its application to various situations which are not grounded on an employer-employee relationship. These situations can involve gratuitous or friendly services given to others. An employment agreement between the employee and the employer is not required. To establish the employer's liability, the fault of the employee is relevant, and the damage was caused "in the functions for which they have been employed", while in Germany, the damage should be caused when the employee acts within the "course of employment". Furthermore, in French law, the fault of the employer is irrelevant. However, in theory, Art. 1240 on the general tort regime can be applied to the employer's liability, if they do not give proper instructions to the employee or fail to supervise them, as in German law. Another similarity with the German law is the possibility for injured parties to opt from whom to claim damages from. However, if the claim is addressed against the employee, they do not have the right of recourse against the employer. In Germany, the employee has this right. Thus, this solution requiring the French employee to pay the full amount of damages is unfair, according to many authors. In addition, according to theory and jurisprudence, it is unfair that a third party bears the consequences of an employee's financial inability to compensate for damage because the strict liability regime is a concept of guarantee.

In Austria, the liability of the principal is strict when the person who caused the damage is incompetent, while it is fault-based if they are aware that they engaged a person who acts in a dangerous way.

The fault of the assistant is a precondition for the principal's liability, and their fault is considered as the principal's own fault. The injured party may choose whether to sue the employer or the employee. If the employer compensates for the damage, they have a right of recourse against the employee for the full amount of the damage if it was caused intentionally, while in cases of negligence, the amount may be reduced. If the employee caused the damage by slight negligence, they may be fully exempt from liability to pay compensation. This is stipulated under a special law, the *Dienstnehmerhaftpflichtgesetz* (DHG; Employee Liability Act).

In Italian law, there are conflicting views regarding the employer liability as to whether it is fault-based or strict. Some authors think that this liability is fault-based, as in Germany, grounded in *culpa in vigilando, culpa in eligendo* and *culpa in instruendo.*

Others argue that the employer's liability is independent of fault, while a third group considers it strict. What is specific is that the organs of a legal person, such as directors, can be directly liable for damage caused with both intent and negligence, based on Art. 2395 of the Civil Code. In addition, the legal person will also be liable. The same applies to aiders and abettors according to the rules on liability for negligence, which means joint and several liability.

In Romanian law, the employee's fault is not a prerequisite for establishing the employer's liability according to legal theory. The condition is that the damage was caused by the employee's act connected with work duties or assigned functions. However, if the employee caused the damage with intent, the employer has the right to recourse against them if the employer paid damages. Moreover, the employer is obliged to prove the employee's fault. In the case law, it can be found that the injured party sued both the employee and the employer.

In Bulgaria, the employer has the possibility to involve the employee in the proceedings in the capacity of an intervenor. That is, in situations when the civil proceeding is commenced only against the employer, because in judicial practice, the injured party can claim damages against both the employer and the employee. In the Czech Republic, according to the former Czech Civil Code, direct claims against agents were not prescribed. If the agent acted with negligence, they were obliged to pay up to 4.5 times their average monthly gross salary to the principal, except in situations when they acted with intent or under the influence of alcohol or drugs. Legal theory interprets that, based on the Civil Code in force, a direct claim against the agent by the injured party is possible.

Concerning the successor states of the former Yugoslavia, as mentioned above, the Obligations Act of 1978 is their common historical legacy that foresaw this subject matter. What is common for all of these countries is that their Obligations Acts in force prescribe employer's liability for damage caused by an employee to a third party at work or in work-related situations, unless they can prove that the employee acted as was required.

The prevailing opinion in the literature is that the employer's liability is strict, and the employer's fault is not legally relevant, while the employee's is.

The employer is economically stronger than the employee, enabling the injured party to secure better compensation for damage. However, in the event where the employee acted with intent, the injured party may claim damages directly from them. This is a notable exception to the principle *culpa lata dolo equiparatur* in the Serbian tort law tradition, in which gross negligence is not equated with intent. In addition, it should be noted that in Serbia there are also some authors, such as Cvetković, who support the rule that the employer is liable for the inappropriate selection of an employee (*culpa in eligendo*), wrongful instructions (*culpa in instruendo*), or wrongful supervision (*culpa in vigilando*). However, according to the second theoretical interpretation, the employer cannot release themselves from liability if they prove these conditions. The employer's liability is considered strict, and only if they prove *force majeure*, acts of a third party, or the injured party can they be exempted from liability.

Furthermore, the employer's liability is also strict based on a third interpretation, under which they are obliged to prove that the employee acted as required in order to be released from liability. Slovenian professor Cigoj gave a fourth interpretation. Namely, in Slovenia, it is also not relevant if the employer manages to prove that they are not at fault for *culpa in eligendo, custodiendo*, and *inspeciendo*. Cigoj's interpretation of the employer's vicarious liability for their employees is strict because they bear the risk associated with the acts of their employees. However, regarding the liability of the legal person for its organs, it is not vicarious liability. Namely, the organ is considered part of a legal person, and liability should be established for one's own acts because a legal person expresses its will through its organs. However, if a member of the organ acted with due diligence, and if the legal person proves it, it can be released from liability; thus, this rule is analogous to the rule on the employer's liability for the employee. Moreover, it should be emphasised that in North Macedonia, the liability of a legal person or its organ is a special form of liability for damage caused by an employee to a third party, and the majority of scholars take the standpoint that it is vicarious liability.

The state can also be in the role of the employer and liable for damage caused by its civil servants (public officials). The focus was on the fact that the damage was caused by their unlawful or irregular acts. Furthermore, administrative law and tort law are both applied and cannot exist independently, because as regards public officials, administrative law is applied; however, since the final goal is compensation for damage, it falls under tort law. Moreover, it should be emphasized that the Constitution is the foundational and initial legal act that regulates this issue. In the legal literature, the state's liability is strict. Strict liability is also foreseen for the employer's liability for damage caused by the employee to a third party using a dangerous

thing or performing a dangerous activity because there exists an elevated risk of causing damage by these activities. In addition, dangerous things, by their very existence and position, also create an elevated risk of causing damage.

In addition, it is worth mentioning that various theories are incorporated in this thesis. For example, in Germany the "result theory" (*Erfolgstheorie*) and the "conduct theory" (*Handlungstheorie*) emerged in the interpretation of § 831 BGB. As the title of the former theory suggests, what can be expected from the "result theory", that is the result. Thus, the result is unlawfulness (*Rechtswidrigkeit*), a violation of a protected right. The latter, "conduct theory", means that proper conduct is violated. In Romanian law, various legal theories also exist, including economic theory. The designation itself suggests the economic dependence of the employee on the employer. Furthermore, similar to German and French law, the employer shall not be liable if they can prove that the injured party knew that the acts of the employee that caused damage to them were not connected with the duties or functions entrusted to them. In addition, it should be emphasised that in Romania, the employee's fault is not a prerequisite for establishing the employer's liability.

In the end, the author is expected to propose de *lege ferenda* solutions. Thus, the Draft Common Frame of Reference (DCFR) is a good example to express a personal opinion. Taking into account that we live in an age of new technologies that erase borders between states in the virtual sense, this draft represents an attempt to erase those borders in the legal system of all European states as well. In addition, DCFR presents an attempt to first harmonise legal terminology (given the example of the term "accountability" concerning this topic, which uses the term "liability"). Moreover, the internet has provided equal opportunities for everyone to find a job; thus nowadays, there are many platform workers who work from home. It is particularly challenging when they live in one country and work in another. Therefore, the existence of uniform law is necessary in order to eliminate all legal uncertainties that arise in the interpretation of the law, particularly regarding this topic when damage occurs. If all European countries were to adopt these provisions into their legal systems, it would be much easier to reach a constructive solution.

Let us consider, by way of example, institutes from Roman law that still bear Latin names and remain in use today. Do the solutions proposed in this Draft represent a modern analogy to Roman law? After this, does history repeat itself?

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Statement

In accordance with the provisions of the Regulation on the Use of Artificial Intelligence of the University of Miskolc and the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, I, the undersigned ...Milica Ilić..... (name), declare that I **have used** / have not used artificial intelligence in my doctoral dissertation and thesis booklets.

In the case of the use of artificial intelligence (hereinafter: AI), I declare the following:
1. The name of the AI tool used: Grammarly and ChatGPT
2. The URL and the version number of the AI tool used: https://chatgpt.com/?utm_source=chatgpt.com,GPT-5.3-mini; https://coda.grammarly.com/d/Untitled-doc_d7zNKCu5diR/Untitled-page_suAiR2EH#_luHlJiq8
3. The exact date of production of the generated content (year, month, day): From October 2023 to September 2026.
4. The purpose and extent of use (describing in detail which part of the dissertation and to what extent the use of AI affects, and for which sub-task the AI was used):
I used artificial intelligence to check the language correctness, proofread text, and assist with translation. In addition, some sources, such as articles and judgments, were located with the help of ChatGPT, including: Kärt Meri: 2024, Tööandja deliktiõiguslik vastutus töötaja põhjustatud kahju eest, Kask Annika: Ülesande andja vastutus toimingu tegija delikti eest, Tartu ülikool õigusteaduskond, Eraõiguse osakond, Tallinn, 2024; the Case of Iliya Petrov vs Bulgaria, Application No. 19202/03, and the Judgement of the Supreme Court of Poland No. IV CSK 647/15 of June 10, 2016. Furthermore, I used ChatGPT to assist in translating source literature from foreign languages, including: Estonian, Lithuanian, Latvian, Bulgarian, Slovakian and Hungarian.

I acknowledge that according to the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, „*The use of AI is prohibited for the formulation of theses, research results, conclusions, inferences and analyses. Any thesis or paper prepared in this way is not admissible*."

Miskolc, 2026.10.02.

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