European Integration Studies, Volume 13, Number 1 (2017), pp. 19–33.

ASSUMPTION OF RISK AND EXPRESS CONSENT FROM THE VIEWPOINT OF LIABILITY FOR HIGHLY DANGEROUS ACTIVITIES*

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1. Introduction

The contributory negligence and the apportionment of the damages were dealt with in our last essay,[1] putting both the latest Hungarian judicial practice and the legal doctrinal traditions into the focus. We alleged that the risk-allocating aspect has more and more effect on the approach to the delictual liability law nowadays, especially in the field of strict liability. Furthermore, we could observe the increasing protection of interests of the injured persons in the judicial practice, which means an increasing encumbrance upon the individuals, who carry out dangerous activities (operators) and are obliged to have compulsory insurance or other covering for compensation. On the other scale of the balance, there is the appropriate risk-assessment that can be expected from injured or endangered persons, and the assumption of the well-known risk too, which factors have detrimental effect on the interests for compensation.

The research of the phenomena and the relating issues cannot be ended here. In this paper, we have to examine the conduct of the injured person – especially the intentional conducts, the consent to the injury and the assumption of risk – and further, their effect upon the compensation duty.

It is worth to examine the core concept of *volenti non fit iniuria* and its special meaning, which could be revealed in the context of liability for highly dangerous activities. It is also worth to examine what the consent of plaintiff means as a justification (a ground of exclusion of the wrongfulness) in Hungarian legal literature. The consent statement can be done explicitly or impliedly and it is also governed by validity rules as any other legal statement. We must also pay attention to the fact

* "The work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled *Public Service Development Establishing Good Governance* in István Egyed Postdoctoral Program."

1 PUSZTAHELYI R.: A veszélyes üzemi felelősség mint objektív felelősségi tényállás és a károsulti közrehatás. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, Vol. 35, 2017, 409–424.

that the liability for highly dangerous activities, with the exception of the damage to property, cannot be eliminated or restricted by exculpatory clauses. The general policy of the intended higher protection of important values such as life, body and soul integrity, and health is carried out in this imperative rule, which is to be kept in mind examining not only these exculpatory clauses or unilateral notices, but also the consent announcements.

We must examine the notion of "acting at one's own risk" within the scope of voluntary assumption of the well-known risk and its relation to the contributory fault. We observed a relatively new opinion in the Hungarian judicial practice, which extends the concept of the operator. However, we dispute its suitability. According to the fact that the injured person could be reckoned as operator, as another person carrying out dangerous activity.[2]

The necessity of the examination of the concept of consent is supported by the following tendency emphasized by *Zimmermann*. "In the modern law, the opinion tends to prevail that the crucial issue is one of wrongfulness, not of fault: as long as the rule of the game are not infringed, participants in any form of contact sport do not act unlawfully if they injure each other."[3]

The conduct of the injured person and his resignation of his claim is regulated diversely in each national laws of liability and their elements become relevant in different ways resulting from the differences of the regulations of the liability for damages. However, we can draw a lesson from the legal answers to the problems occurring in Hungary quite the same way.

Finally, we should mention the fundamental issue that the new Hungarian Civil Code (hereinafter HCC) intends to draw a line between the two regimes of the contractual and delictual liability for damages. But the justifications, i.e. the causes eliminating the wrongfulness of the tortious act are enlisted only in a part of the code dealing with the delictual liability[4] and the contractual norm referring to certain delictual liability provisions to be applied does not cover this issue.[5] In our opinion, the consent of the injured or endangered person (volenti non fit iniuria) is more inclusive issue than it could be restricted to the field of delictual liability, but the changed method of regulation put the interrelation between the provisions in another light.

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2 Court Decision No. BDT 2010.2358.

3 ZIMMERMANN, R.: *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford. 1996, 1013, footnote 92.

4 Section 6:520. HCC "[Unlawfulness] All torts shall be considered unlawful, unless the tortfeasor has committed the tort: a) with the consent of the aggrieved party; b) against the assailant in order to prevent an unlawful assault or a threat suggesting an unlawful direct assault, if the tortfeasor did not use excessive measures to avert the assault; c) in an emergency, to the extent deemed proportionate; or d) by way of a lawful conduct, and such conduct does not violate the legally protected interests of others, or if the tortfeasor is required by law to provide compensation."

5 We thank *László Leszkoven* for calling our attention to this issue.

2. Some cases in Hungarian judicial practice to be examined

The necessity to deliberate the above-mentioned issues is to be demonstrated with the following Hungarian judicial cases. We have to mention that these cases were decided on the basis of the old Hungarian Civil Code (hereinafter old HCC) from 1959.

In the first case, the statement of facts established by the decision was that the plaintiff pursued the sport of wall-climbing in a wall-climbing hall with his friend, when the safety rope was loosened from the carabiner of the seat harness at the height of 12 meters. The wall face at this high was negative, therefore the plaintiff had to hang here unaided, without lifeline, so as his strength gave up, he fell onto the ground and suffered serious injuries. The plaintiff sued the defendant (the keeper of this climbing centre) for pecuniary and non-pecuniary damages. He stated that certain points of the general terms and conditions of the contract are null and void because of unfairness. The court stated that these conditions are invalid because of their unfairness. The decision established that the plaintiff's activity also shall be deemed also as pursuing highly dangerous activity, therefore the court applied the provision on the collision of two dangerous activities[6] and intended to ascertain the party, to whom the malfunction (of the carabiner) could be attributable. After all, the court shared the damages between the parties.[7]

In the second case one of the defendants (a sport club) concluded a contract with the plaintiff to teach him the basic technical and tactical skills and rules of paragliding and to prepare him for the exam, in order to getting the "A" category licence. The plaintiff noted in the contract that he assumed the risk occurring with this sport activity and he took over the damages suffered in the course of training. He waived the right to compensation from anybody. The other defendant was the agent of the sport club and the tutor of the plaintiff. The plaintiff suffered serious spinal injuries in the course of the training, when he failed to land correctly. He stated that the exculpatory clauses and his waiver were null and void. The court stated that the student had to bear the risk arising from the sport activity applying the sporting device, which is extra hazardous even by itself; he had not got any claim for compensation. The court stated that these contract terms are null and void but the assumption of risk had even effect on the part of the person threatened by

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6 Section 6:539. § [Interaction of hazardous operation and relationship of operators in liability for torts committed jointly] subsections (1–3): (1) Where damage is caused by one hazardous operation to another, the operators shall be liable to provide compensation as commensurate according to attributability. If the damage is caused by a person other than the operator, the operator shall be liable to provide compensation as commensurate according to the attributability of the de facto tortfeasor. (2) If the cause of damage is not attributable to either party, compensation shall be provided by the party whose highly dangerous activity is responsible for the malfunction that contributed to causing the damage. (3) If the cause of mutual damage is a malfunction that occurred in the scope of both parties' highly dangerous activity, or if such malfunction cannot be attributed to one of the parties, each party shall, where individual responsibility cannot be established, bear liability for his own loss.

7 Court Decision No. BDT 2010.2358.

the significant risk. He signified his acquiescence to the possibility of being injured by his concludent conduct, he assumed the risk and the injuries resulting generally from the paragliding.[8]

In the third case the plaintiff was involved in a planned and preconcerted road accident with his car built up from pieces of two other cars and without appropriate licenses. The driver of the other involved car admitted his fault, but during the litigation it was proven that there was no real "accident", the only aim of the involved parties was to deceive the insurance company in order to get compensation on the base of compulsory liability insurance. The court held that the justification of the consent from the injured person ruled out the wrongfulness, one of the elements of liability, since the conduct of the tortfeasor did not trigger the responsibility of the insurer.[9]

In the fourth case the father of the injured persons died with his fellow-worker together in the store-pit of wine-smash, when they were trying to scratch the jammed matter out of the bottom hole with a pitchfork. The pitchfork was too short so he jumped into the store-pit heedlessly. His fellow-worker came running and tried to help him but both of them suffocated because of breathing carbon dioxide gas.[10]

3. Consent of the injured person as a ground for justification

Under Section 6:520 of HCC, all torts shall be considered unlawful, unless the tortfeasor has committed the tort with the consent of the aggrieved party; (... etc.).

Tamás Lábady emphasized the sport games among the cases of consent, and reported its well-formed, fixed judicial practice. He referred to a case published in 1977, according to that a sportsman made a consent to the risk occurring ordinarily from the sport activity. The unlawful quality of the tortious conduct or injuring conduct is only excluded, if the injury, which realized during the activity, remains under the scope of the types of injuries accompanying the game. He mentioned one of the general requirements of consent, which materializes in the invalidity provisions against certain exculpatory clauses and which sets also limits to the unilateral consent of injured party, such as the protection of life, body integrity and health. [11]

Relating to the consent, *Attila Harmathy* drew attention to the fact that the new HCC does not require the former extra-conditions any more, according to that consent may not hurt or risk social interest or public policy. However, he pointed out that the express consent also should remain within the limits of the above mentioned cause of invalidity independently of the way this consent was made. Attila

8 Court Decision No. Pfv.III.20.069/2012/10.
9 Court Decision No. BH 2011.195.
10 Court Decision No. EBH 2001.413.
11 LÁBADY T.: Hatodik Könyv Negyedik Rész. 6:20. § In: VÉKÁS L.–GÁRDOS P. (szerk.): Kommentár a Polgári Törvénykönyvhöz Vol. II, Budapest, Wolters Kluwer, 2014, 2239.

Harmathy considered that it needs to draw a line between the concepts of assumption of risk and of consent, which opinion is reflected by the case of 1977.[12]

Ádám Fuglinszky examined[13] the consent from the viewpoint of its nature of renouncement (waiver); he pointed out the requirement of its explicitness[14]. He added that the rules of validity, invalidity and ineffectiveness relating to the legal statements are to be applied as well. In relation to this, *András Kisfaludy* held that the express nature of the renunciation is to be interpreted on the only correct way that the form of the waiver can be either written or oral, but implied as well.[15]

In relation with the consent Fuglinszky reminds us of the cautious application of the provisions concerning exculpatory clauses[16]: in most cases, these rules can be applied analogously, since the two concepts (exculpatory clause and consent) do not serve the same situation.[17]

It is to be remarked that the special issues on the informed consent in the field of medical law are not dealt with here, but it is prescribed by *Tímea Barzó* among other authors.[18]

As it was mentioned above, the old HCC contained the provisions on the express consent and on the exculpatory clauses almost the same way as the new one. Having regard to this, it is worth concerning on legal literature from the period of the old HCC.

According to *Tamás Fézer,* the consent and the exculpatory clauses are near to each other. He dealt with their unified application as *Ferenc Petrik*'s idea, which he could accept conditionally.[19] Another author, *György Wellmann* also wrote about this issue in the monograph edited by Petrik, in the following manner:

> "In our opinion, comparing with the subsections 1 and 2 of section 342. the interpretation leading us the only correct solution that the agreement is inva-

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12 HARMATHY A.: Hatodik Könyv Negyedik Rész XXVI. Cím 6.520. §, in: WELLMANN Gy. (szerk.): *Az új Ptk. magyarázata*. Vol. VI/VI, Budapest, HVG-ORAC, 2013, 440.; Court Decision No. BH 1977. 17.

13 FUGLINSZKY Á.: *Kártérítési jog.* Budapest, HVG-ORAC, 2015, 224.

14 Section 6:8. HCC: [Interpretation of legal statements] subsection (3): "Any waiver of a right in part or in full shall be considered valid if made by express legal statement. Should a person waive his rights in part or in full, such a legal statement shall not be broadly construed."

15 KISFALUDY A.: Hatodik Könyv Első Rész I. Cím. Ptk. 6:8. §, in: WELLMANN Gy. (szerk). *Az új Ptk. magyarázata*. Vol. V/VI, Budapest, HVG-ORAC, 2013, 46.

16 Section 6:526. of HCC: "[Limitation or exclusion of liability] Any contract term limiting or excluding liability for intentional tort or for causing damages resulting in loss of life, or harm to physical integrity or health shall be null and void." Comparing to the similar regulation of contractual exculpatory clauses, in our opinion, the English version of the latter – the contractual one – does not shows the fact there are two separated states of facts which make the agreements of that kind invalid.

17 FUGLINSZKY Á.: 6.520. §, in: OSZTOVITS A. (szerk): *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*. Vol. IV, Budapest, OPTEN, 2014, 53.

18 BARZÓ T. A kiskorú egészségügyi önrendelkezési joga kapcsán felmerülő anomáliák. *Családi jog,* 2015/1., 10–16.

19 FÉZER T.: A kártérítési felelősség feltételei. In: FÉZER T. (szerk.): *A kártérítési jog magyarázata*. Budapest, 2010, 94–95.

> lid in which the injurer excluded his liability for damages from injury and in which the injured person had made the consent to be injured in his body integrity and to bear the consequences – provided that the agreement neither infringes nor endangers social interest or public policy."[20]

According to his thought, there is no any other way for interpretation to achieve the *contractual consent* to the risk attendant with sports or medical interventions.

Gyula Eörsi analysed this issue in his monograph and stated that causing damage with the consent of the injured party within limits is not unlawful. He referred to the invalidity of exculpatory clauses and added that this statement does not mean an express consent, but it is a near concept in the viewpoint of the law, since it facilitate the exoneration from liability by a legal statement.[21]

Reviewing the Hungarian theoretical opinions, we conclude that the former legal opinions looked for the solution of the collision of the provisions in the bilateral nature of the agreements including the voluntary acquiescence of the injured person. The recent legal opinion stressed upon the differences between the express consent and the assumption of risk to resolve the discrepancy responding the practical requisites.

Furthermore, the issue of the consent is very relevant in the viewpoint of the protection of personality rights[22], especially when it concerns with body integrity or health. In our opinion, this is such level of the regulation, where the moral and public norms are put into scales to measure and where the limits leading to invalidity can be set.

4. Approaches of the consent in national laws and model-rules

According to the comparative law reports supporting the *Draft of Common Frame of References* (hereinafter *DCFR*), it can be said that the consent of the injured person is common in the European national laws. However, to tell the truth, it is not formulated expressly in each country. Any person who inflicts damage on another with the previous consent of the latter, commits no civil wrong.

According to the DCFR, consent need not be given expressly; it may result from the circumstances thus it is implicitly conferred.[23] Here we should underline again, that in the case of contractual relationship the provisions relating to the exculpatory clauses determine the effect and the regulation of the consent of the injured person. In this case, the rule of non-cumul of HCC has effect, the clause which excludes the party to build his claim upon the ground of delictual liability, if

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[20] WELLMANN Gy.: A kártérítési felelősséget korlátozó és kizáró körülmények. In: PETRIK F. (szerk.): *A kártérítési jog*. Budapest, KJK, 1991, 51.

[21] EÖRSI Gy.: *A polgári jogi kártérítési felelősség kézikönyve*. Budapest, KJK, 1966, 117–118.

[22] HCC, Section 2:42. subsection (3) "Personality rights shall not be considered violated by any conduct if the person affected has given prior consent thereto."

[23] A person has a defence if the person suffering the damage validly consented to the legally relevant damage and was aware or could reasonably be expected to have been aware of the consequences of that consent. VI.–5:101. susb. 1.

there is a contract between the injured person and the tortfeasor and the damage was casual connection with the breach of contract or the fulfilment of the contract.[24]

Returning to the consent, it is generally required that the consent is made by the injured person, whom rights or interests (property or personal rights) are at risk of intended injury and can dispose the right.

The consent is to be given to intended conduct from the part of the injurer. The damages, the injury can be estimated and at least the types of the damages are to be predicted or ought to be predicted. The injured person must be aware of not only the damages he is to be suffered and its physical and psychological consequences, but also the legal consequences of his consent. If the harm is not certain, the risk of suffering loss can be assumed only through the assumption of risk. The person with endangered interest or right accepts the high risk of damage, despite of his hope for damages would not occur.

Manifold requirements are to be applied for the form and the content of the consent. One of the issues of this kind is the capacity of the injured person. Person having his full capacity can give the consent. Special issues emerge in the field of medical law, in which circumstances minors can give consent to medical interventions.[25] The consent is generally invalid, if it contravenes the law or incompatible the basic ethical value of the legal system. However, according to the Commentary of the DCFR Commentary it might be possible to give a valid consent if the infringed rule aims other than the protection of injured person.

The invalidity of the consent may be based on fraud, mistake, coercion or threats. These are the frequent grounds of invalidity. Under DCFR provision, the injured person should have been aware or could reasonably be expected to have been aware of the consequences of that consent.[26]

The consent is also a justifying ground in the Austrian lability law. In the opinion of *Koziol*, even if a statement as consent was invalid, it has some legal effect: it does not conclude the liability, but could reduce the amount of the loss to be reimbursed under the section 1304. ABGB. If the injured person contributed to the damages, he deserves less protection as normal.[27]

The nature of the consent is the bone of contention among Austrian authors. Some say that it is a legal statement *(Rechtsgeschäft)*; others think that the consent

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[24] HCC, Section 6:145. "[Exclusion of parallel compensation claims] The obligee shall enforce his claim for compensation against the obligor in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation even if the obligor's non-contractual liability also exists."

[25] On consent of minors see BARZÓ ibid.

[26] See DCFR *VI.-5:101. Consent and acting at own risk.* Comments. See: VON BAR, Ch. et al. (eds.): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR).* Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law. Munich, 2009, [DCFR outline ed.] 3459–3468.

[27] KOZIOL, H.: *Österreichisches Haftpflichtrecht.* Band I., Allgemeiner Teil Wien, 3, aufl., 1997, 182–185.

is a legal statement and a legally relevant act at the same time. Koziol emphasizes that the consent should be recognizable by other, given sophisticated, whole and of somebody's own free-will. While the consent to the infringement or to endangering a right is an exercise of the right of disposition, therefore the authors agree that it requires legal statement form. [28]

Ansgar Ohly collected and analysed the theories prevailing in the German literature.[29] The opinions are split to the approaches of legal statement, of statement-like act *(geschäftsähnliche Handlung)* and of real-act. The latter one underlines the real-act characteristics of the consent, which realizes in the waiving a mean of protection *(Rechtsschutzverzicht),* or in the comparison of the interests *(Interessenabgwägung)* or in the non-enforceability of rights to protections *(Nichtgeltendmachung von Abwechtansprüchen)*.[30]

The Code Civil in France was not extended with provisions referring to 'maxim volenti non fit iniuria' in spite of the law reform drafts called *Catala*[31] and *Terré*.[32] It is not deemed as a proper justification ground of the liability, but this concept emerged already in the fields of sport activities and of medical treatments.

The *Principles of European Tort Law* (hereinafter *PETL*) deals with this concept as a defence against the claim for damages and besides it with the assumption of risk as well. "The same applies if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and is to be regarded as accepting it." The Commentary of the PETL amplifies that this provision subsumes not only the maxim volenti non fit iniuria but also the concept pertaining to it.[33]

Under the DCFR the tortfeasor has a defence, if the person suffering the damage validly consented to the legally relevant damage and was aware or could reasonably be expected to have been aware of the consequences of that consent. "The same applies", it continues, "if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and is to be regarded as accepting it". We think that the *assumption of risk* and *the acting at own risk* are synonyms in the terminology of DCFR.[34]

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28 Ibid.

29 OHLY, A.: *„Volenti non fit iniuria": die Einwilligung im Privatrecht*. Mohr Siebeck, 2002.

30 OHLY, A.: ibid. 59.

31 Rapport Catala Art. 1350. See. CATALA, P.: *Proposal for Reform of the Law of Obligations and the Law of Prescription*. (English translation by John Cartwright and Simon Whittaker) Oxford, University Press, 2007.

32 MORÉTEAU, O.: French Tort Law in the Light of European Harmonization. *Journal of Civil Law Studies*, Vol. 6, 2013/2., 759–801, 775.

33 European Group on Tort Law (eds.): *Principles of European Tort Law*. Text and Commentary, Wien–New York, 2005, 126.

34 On the comprehensive examination of DCFR and PETL see JUHÁSZ Á.: Az európai kártérítési jog egyes kérdései. In: BARTA J.–BARZÓ T.–CSÁK Cs. (szerk.): *Magyarázat a kártérítési joghoz*. Budapest, Wolters Kluwer, 2017.

5. Acting at own risk, assumption of risk

The notion of 'acting at own risk' has different meaning and scope in the system of liability rules of DCFR. It results in exclusion of liability. This sentence resonates with the note appeared in the Hungarian judicial practice and literature that the notion assumption of risk has different or partially different, but distinguishable meaning from consent. According to the Commentary of the DFCR, the main fields where it is concerned are the contact sports and the extreme sports, but the notion cannot be limited such a way, it could appear among the issues on product liability, on transport liability law or on liability for animals. The Commentary ascertains that the only correct consequence of the assumption of risk is the exoneration from the liability, and it could not lead to the apportionment of damages.[35] We aim to prove that the latter can be a possible solution.

Nevertheless, we have to accept that the assumption of risk can be interpreted only in the case when the conduct of the tortfeasor is not intentional but negligent or careless. The Hungarian authors also mention that the assumption covers only the typical and well-known negative results of activity and it generally does not depend on the extent of damages. The decisive condition for the assessment of the assumption of risk is that the injured or endangered person should voluntary incur the danger and it will be obvious for the external bystander that the person has accepted the risks of damages (or the harm too). To be acquitted of the liability, the injurer should prove that he acted complying with the special rules of the activity (fair play). The DCFR emphasizes the difference which should be made between the leisure activity and the professional sport. Not only the damages, but the motives of the assumption are to be examined.[36]

Koziol shows the characteristic of the German judicial practice that the notion of consent was often applied in the cases of acting at own risk *(Handeln auf eigene Gefahr)*. That is the point, when a person exposes himself to a known or at least a discernible danger, while he does not consent the harm directly, he generally expects not being harmed at all. Therefore, we should limit the notion only to the assumption of *risk*, not the damages. The assumption of risk has the own effect distinguished by the consent. Consequently, it is necessary to ponder the opposite interests.[37]

In Koziol's opinion the true primary meaning of the notion acting at own risk belongs to the field of *Verschuldenshaftung*, the person endangering another individual is due to perform protective conduct for the person at risk. In the field of strict liability *(Gefährdungshaftun)*, there might be a situation, where the injured person is not entitled with full protection as a result of comparing of interests. On the one hand the assumption of risk with its primary meaning results in exoneration from liability. On the other hand, its secondary meaning (i.e. the self-risking)

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35 DCFR outline ed. 3463.

36 Ibid.

37 KOZIOL, H.: *Österreichisches Haftpflichtrecht*. Band I. Allgemeiner Teil, Wien, 3. aufl., 1997, 228.

drives to the apportionment of the damages under § 1304 ABGB *(Mitverantwortung)*, as already noticed.[38]

It is worth to note that certain subtypes are distinguished such as incurring oneself to the generally accepted risk, or exposing oneself to illegal impacts, to the risk from passing the control over the thing or participation in a sport or other activity. Some of the facts are regulated.[39] It is ought to be mentioned at least the first one: the operator of a motor vehicle *(Kraftfahrzeughalters)* can exonerate himself from liability, if he proves that the injured person was transported for free, only in his own interest.[40]

Finke shows that the English common law deals with the acting at own risk unlike the German one. Its scope and consequences are differentiated from the contributory negligence. In the practice, the „maxim volenti non fit iniuria" is accepted as an independent legal institution which results in the total exoneration from liability.[41] Furthermore, this principle is also called as express or implied consent of the injured person, who agreed in this way with the injurer: he takes the risk of damages over knowing about what type and extent of damages may occur. In the scope of the transport law, the special legal act concerning with these issues *(Fatal Accidents Act)* excludes the application of the principle in itself, while there is a special solution for indemnification of damages by compulsory liability insurance ordinarily. In his summary, Finke mentioned that the rule of contributory negligence enables the courts to share the loss between the involved parties instead of the "all or nothing" rule. However, its application is not free from discrepancies in the recent judicial practice resulting from its relatively new status.[42]

The absolute exonerative nature of the assumption of risk can be experienced also in the American tort law.[43] We have to call attention to the fact that nowadays the *Uniform Apportionment of Tort Responsibility Act (UATRA)* is already under in the implementing process or debate in several states.[44] The UATRA puts the comparative negligence at the place of the former contributory negligence (in the meaning of common law) allowing to compare the fault (subjective elements of conduct) of both side. Moreover, under the *American Second Restatement of the Law of Torts* (1977) a defendant is liable even where he has "exercised the utmost care to prevent the harm" nor is liability avoided when the harm has been caused by the

38 KOZIOL op. cit. 229.
39 EKHG
40 KOZIOL ibid. 227–228.
41 FINKE, T.: *Die Minderung der Schadensersatzpflicht in Europa: zu den Chancen für die Aufnahme einer allgemeiner Reductionsklausel in ein Europäishes Schadensrecht*. Göttingen, 2006, 268.
42 FINKE 2006, 308.
43 DEWOLF, D. K.–HANDER, D. G.: Assumption of risk and abnormally dangerous activities: a proposal. *Montana Law Review*, Vol. 51, 1990, 161–189.
44 STEENSON, M.: Minnesota Comparative Fault – Statutory Reform. *Journal of Law and Practice*, Vol. 9, 2016/1. http://open.mitchellhamline.edu/lawandpractice/vol9/iss1/4

intervention of a third party, or by force of nature. However, the victim is deemed to have assumed the risk if he knowingly exposed himself to the danger. [45]

In the law of *South Africa*, the consent of sportsmen is also to be subjected to the test of *boni mores*. Consent must be given freely or voluntarily; the person giving the consent must be capable of volition; the consenting person must have full knowledge of the nature and extent of the risk of possible prejudice; the consenting party must also comprehend and understand the nature and extent of the harm or risk; the person consenting must in fact subjectively consent to the prejudicial act – this consent has to be inferred from the proven facts; and the consent must be permitted by the legal order; in other words, the consent must not be contra bonos mores. The court continued that consent to bodily injury or consent to the risk of such injury is normally regarded as being contra bonos mores. Participation in sport or consent to medical treatment, may, in appropriate circumstances, constitute lawful consent to bodily injury or at least to the risk of such injury.[46]

Under the *Russian Federation Code*, defender is allowed to escape liability if he can prove that the harm arose as a result of insuperable force or due to the intentional conduct of the victim. It means that the principle „volenti non fit iniuria" is applied.

In *France*, the consequences of the assumption of risk depend on the fact, whether the liability is fault-based or non-fault-based. In the former case, the assumption of risk has no effect neither on the mitigation, nor on the exoneration the damages, unless it shall be deemed as contributory negligence. On the contrary, the assumption of risk *(acceptation des risques)* generally entails in the cases of non-fault liability that it becomes a justification ground for the injurer. [47] Some authors say that this is the direct consequence of the attributable contributory conduct of the injured person. Others think that the assumption of risk amounts to a mutually agreement between to absolve each other from liability. The concept of assumption of risk appears only in the relation of competitive sports and it is inapplicable in the case of a non-competitive or impromptu sporting meetings.[48]

6. Exculpatory clauses in the context of maxim volenti non fit iniuria

The next issue to be examined is the regulation of the exculpatory clauses in the Hungarian Civil Code. In accordance with the HCC, any contract term limiting or excluding liability shall be null and void in the case, when the damages caused by premeditated non-performance (in contractual liability) or by other intentional

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[45] Elspeth REID: Liability for Dangerous Activities. *International and Comparative Law Quarterly*, Vol. 48, 1999 October, 731–755.

[46] NEETHLING, J–POTGIETER, J.: Volenti Non Fit Iniuria and Rugby Injuries. *Journal of Contemporary Roman-Dutch Law*, Vol. 75, 675–680, 2012.
Electronic copy available at: http://ssrn.com/abstract=2259677

[47] ESMEIN, P.: L'idée d'acceptation des risques en matière de responsabilité civile. *Revue internationale de droit compare*, Vol. 4, 1952/4., 683–691.
www.persee.fr/doc/ridc_0035-3337_1952_num_4_4_6941

[48] DCFR outline ed. 3469–3470.

harmful conduct (in delictual liability) or in case when the results are loss of life, or harm to physical integrity or health (in both regime).

The validity limits of exculpatory clauses are grounded basically on several policies. One of them with economical nature is that "the enterprise is the best loss distributor either distributing the loss among its consumers through prices or, preferably, by distributing the loss among the group of those causing similar damages: through insurance".[49] The other approach is the victim-oriented one: the minimal and absolute protection is in the favour of the potential victims. Both of the abovementioned approaches require a very strong restriction on the validity of exculpatory clauses.

The HCC repeats this validity rule not only among the provisions on the contractual liability (HCC 6:152.), but also among the delictual ones (HCC 6:526.). At the same time, it establishes a stronger restriction for the validity of exculpatory clauses in the case of highly dangerous activities (HCC 6:535. subs. 3).[50]

About the relation between the two main validity rules – on the ground of the old HCC –, we agree with *Kornél Solt*: under the old HCC the concurrence of action (delictual and contractual liability for damages) was possible. The tortfeasor was liable for damages on the special ground of highly dangerous activities (hazardous operation), although he was in contractual relationship with the injured person. Thus, the special provision on the validity of exculpatory clauses in the scope of the strict liability was *lex special* compared with either the general contractual rule or the general delictual one.[51]

The regulation method of the new HCC requires for the rethinking of this issue. The exclusion of the concurrence of action, the so called rule "non-cumul" debars the injured person to claim damages on the parallel base of delictual liability from his contractual party.[52] In our opinion, the liability rule on contractual liability, such as delictual ones, are not permissive, so the validity provisions are also imperative. Therefore, the imperative rule 'non-cumul' has a special and disputable ef-

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[49] EÖRSI, Gy.: The Validity of Clauses Excluding or Limiting Liability. *The American Journal of Comparative Law*, 23/2., 215–235, 1975, 216.

[50] Section 6:152. "[Limitation or exclusion of the consequences of non-performance] Any contract term limiting or excluding liability for premeditated non-performance of an obligation resulting in loss of life, or harm to physical integrity or health shall be null and void." (In our opinion this official translation is not correct: "…for premeditated non-performance of an obligation *or for non-performance* resulting in loss of life…"
Section 6:526. "[Limitation or exclusion of liability] Any contract term limiting or excluding liability for intentional tort or for causing damages resulting in loss of life, or harm to physical integrity or health shall be null and void."
Section 6:535. subs. (3) "*Any* exclusion or limitation of liability shall be null and void; this prohibition shall not apply to damage caused to a tangible thing."

[51] SOLT K.: Kogencia és diszpozitivitás a veszélyes üzemi kártérítési felelősség körében. *Jogtudományi Közlöny*, 1968 (6), 302–307. Solt criticised the possibility for reducing the liability for damages on tangible things. He thought that this rule wakened the severity of the strict liability rules.

[52] This rule is criticised by several authors. Among them see: LESZKOVEN L.: *Szerződésszegés a polgári jogban*. Budapest, Wolters Kluwer, 2016, 164.

fect: if there were contractual relationship between the aggrieved parties, the tortfeasor can limit or exclude his liability for non-performance caused by (gross or slight) negligent conduct notwithstanding that his conduct would be deemed as highly dangerous on ground of delictual liability.

Further formal requirements and substantive grounds for avoidance are to be mentioned against the exculpatory clauses. In our opinion the main grounds are the nullity of the unfair standard contract terms (HCC 6:102.), unfair clause in consumer contracts (HCC 6:100.) or consumer disclaimers (HCC 6:101.).

7. Injured person as operator

The approach that qualifies an injured person as operator of hazardous operation could be based on the assumption of risk or contributory conduct of the aggrieved party. The provision of HCC determining the operator and focusing on the comparison of interests might establish the ground for that[53] but this misses the other elements of the notion "operator" elaborated by the judicial practice already.[54] The quality of operator *per se* can be established only in the cases where – on the field of the professional sport activities –, the injured person has taken control the sporting device (such as paraglide, soaring aircraft, racing car), and where the original (primary) operator's possibilities to avert the injury end up, and have no effect.

We should mention too, that the rule *non-cumul* will preclude the possibility of applying the *collision rule* between the operators[55], while that belongs to the delictual liability regime.

The end solution can be formally correct, which will apportion the damages among the operators aside from their role for operator. However, in our opinion, it is debatable that the injured person could be qualified as operator – as co-operator, common with the primary one – because of the conflicting interests. In our opinion, that is the reason, why the provision relating to collision of hazardous operations (highly dangerous activities) is not to be applied for the indemnification.

The qualification of the injured person to operator is particularly vulnerable in the cases of the amusing leisure activities. If the operator received licences for the pursuing the highly dangerous activity, it is obvious that its operation could not mean undue risk for others. There is no reason, why the injured person could entrust himself to the operator's protective measures, in spite of the fact that he had observed the high risk. Theoretically, it is true that he cannot become operator just

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53 HCC 6:536. subs. (1) "The person on whose behalf the hazardous operation is carried out shall be recognized as the pursuer of a highly dangerous activity."

54 "The components of the notion of 'operator' included the following: who was the owner of the equipment being used to carry out the activity; in whose interest the activity was carried out and who profited from that (profit and responsibility shall go hand in hand); who was able to control, coordinate, regulate and influence the activity; and who was entitled to make the fundamental decisions on how, where and when the dangerous activity was carried out." Translation see FUGLINSZKY, Á.: Risks and Side Effects: Five Questions on the 'New' Hungarian Tort Law. *ELTE Law Journal*, 2014/2., 199–221, 203.

55 Section 6:539. HCC.

because of the assumption of risk. But the legal consequences of the assumption of risk are to be set off.

In our opinion, the notion of operator was used to fill the legal vacuum resulting from the fact that the legal consequences of the assumption of risk are on the rim of contributory fault applied by courts in very restrained way, while the exculpatory clauses are *ex officio* stipulated invalid one by one.

8. Conclusion

The limited exculpatory clauses approach another way to the consent of injured person than the assumption of risk, but both of them are factors taken into account limiting liability for damages. These terms or notices reflect the unilateral interest inside and are imbued only the willing of tortfeasor to exonerate from liability. The victim's consent reflects the informed assumption of risk and of being harmed also, especially in cases when the possibility for prevention against source of risk is hindered by several factors and are exposed to the chance. The assumption of risk is more than mere waiving of a right; it serves justification ground only under the conditions and in the scope of the statement. Looking for the connection between exculpatory clauses and victim's consent, it might be asked whether the imperative limits of exculpation and the expressed will of the injured person can collide, and therefore whether a relative nature of the invalidity can be observed, exclusively in extreme situations.

It is probable to notice certain situations resulting in damages where the express consent from the injured person/party is missing, but his will to expose himself the direct and serious danger impending significant damages is obvious. Why the operator alone has a duty to prevent damages occurring from the highly dangerous activity? Even in the cases when the injured person is who has contributed willingly and significantly to the damages. It was noted that courts do not exonerate the operator from the liability hardly ever in the Hungarian legal practice since strict liability and the apportionment of liability. But, we think this approach is as a groundless amplification of the notion of strict liability (over-enhancement of concept of risk).[56]

In order to exoneration we should examine the charges laid on the operators. If the Hungarian judicial practice do not accept the entire exoneration of operator in cases of avoidable contributory conduct of injured party, we suggest that the court ensures lower legal protection for the injured person exposing himself to the risk wilfully and his contributory conduct was more then negligence act but the operator failed to avoid it because he breached the very strict obligations for preventive measures, should the comparison of interests suggest more protection for the victim's interests.

Returning the above-mentioned cases from judicial practice, the followings must be underlined. The second case dealing with the highly dangerous paragliding

[56] Mentioned by FÜRST L.: *A magánjog szerkezete*. Budapest, 1934, 66.

activity brought us a classic example for assumption of risk. In this case and in the climbing wall case the court held that the contributory conduct of the injured person is deemed as an activity of operator. Under the old HCC provision, the general liability rules are to be applied in the relation of the operators, so the conducts of both party were to be examined in the viewpoint of the blameworthiness (relatively objective standard of care). In the latter case, the court went forward and applied the special rule (malfunction) allocating the damages between two hazardous operations.[57] But in both cases the exculpatory clauses were null and void, this is out of question.

In the third case "preconcerted road accident" the court applied incorrectly the rule of express consent to eliminate the liability of the tortfeasor and the triggered obligation of the insurance company. We agree with Harmathy's opinion that the application of principle would have been adequate: "A person may not rely, in support of his claim, on an unlawful act he has committed."[58]

The fourth case (wine-smash) is a good example to mark out the application limits of notion assumption of risk. The deceased persons were quasi employee, they worked on behalf of the defendant. The comparison of the interests does not allow to apply the consequences of the assumption of risk, but their unreasonable act could be deemed as contributory negligence.

The extreme sports and leisure activities came into the everyday life. The proper legal effects of the consent or the assumption of risk are debatable even in the national laws regulating them expressively. Even if it is true that the enterprises are the best loss distributors, this fact could not result that the operator is alone who should suffer the consequences of completely reckless or intentional self-endangering or uncontrollable acts driven by the injured party.

It would be asked whether there are other significant cases of assumption of risk besides extreme recreational activities, medical treatment and road traffic accidents, and, whether all of these special fields require special regulation. The above – mention regulation methods of certain national laws and the model-rules suggest that these issues require a unified approach from the courts or from the legislation.

[57] Section 6:539. HCC.
[58] HCC sec. 1:4. subs 2