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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

A MUNKÁLTATÓ FELELŐSSÉGE A MUNKAVÁLLALÓ ÁLTAL, VESZÉLYES DOLOG HASZNÁLATÁVAL VAGY VESZÉLYES TEVÉKENYSÉG VÉGZÉSÉVEL MÁSNAK OKOZOTT KÁRÉRT A SZERB JOG SZERINT – ESETTANULMÁNY

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Under Serbian law one of the cases of vicarious liability explicitly foreseen by the 1978 Obligations Act is the liability of the employer for damage caused to a third party by an employee at work or in work-related situations. The employer's liability emerges only if the employee acted with fault, whereby the existence of the employee's fault is presumed. The employer may exempt his/her liability if successfully rebuts this presumption, namely, if proves that the employee acted with due diligence and care. Thus, there is no employer's liability if the employee did not act with fault. Some argue that the requirement that the employee acted with fault qualifies the employer's vicarious liability as fault-based. However, according to the prevailing opinion in the recent literature it is considered as strict liability, since the employer cannot be exempted from liability by proving that there was no fault of his/her own.

However, any contemplation on the relevance of either the employee's or employer's fault is redundant, and thus on the nature of the employer's liability as well, if the employee causes damage to a third party using a so-called hazardous thing, or if the performance of his/her working tasks is regarded as a so-called hazardous activity. Then, the general rules of strict liability apply and the employer cannot exclude his/her liability even by proving that the employee acted with the required care and diligence. The employer's liability in this case is based on an increased, elevated risk of damage to the surroundings, originating from a hazardous thing or hazardous activity. If the general rules of strict liability are applied to the

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employer's vicarious liability, the employer is considered as the proprietor of a hazardous thing, or a person conducting a hazardous activity, regardless that the employee directly controls the elevated risk of damage from the hazardous thing, or performs an activity considered hazardous.

This paper aims to explore how Serbian case law interprets the notions of hazardous thing or activity in relation to employer's vicarious liability. It also examines the relevant factors that may impact the outcome of such cases, such as the nature of the activity being performed, the degree of the risk of damage caused things or activities considered as hazardous, etc.

Keywords: *hazardous thing, hazardous activity, employer's liability, strict liability, Serbian Obligations Act*

A szerb jogban az 1978. évi Kötelmi viszonyokról szóló törvény a másért való felelősség esetei között szabályozza a munkáltató felelősségét a munkavállaló által harmadik személynek, a munkavégzés során vagy azzal kapcsolatban okozott kárért. A munkáltató kárfelelőssége azonban csak a munkavállaló felróhatósága esetén áll be, amit a törvény vélelmez. A munkáltató kimentheti magát a felelősség alól, amennyiben sikeresen megdönti ezt a vélelmet, azaz, ha bizonyítja, hogy a munkavállaló az elvárt gondossággal járt el. Nincs tehát munkáltatói kárfelelősség a munkavállaló felróható magatartása nélkül. Ezt figyelembe véve a szakirodalomban fellelhetők olyan álláspontok, amelyek a munkáltató kárfelelősségét a másért való alanyi felelősség eseteként minősítik. Azonban, az újabb szakirodalomban uralkodó álláspontnak tekinthető az a megközelítés, amely szerint a munkáltató kárfelelőssége a másért való tárgyi felelősség esete, mivel a munkáltató nem mentesülhet a felelőssége alól a saját felróható magatartása hiányára való hivatkozással.

Ettől eltekintve, mind a munkáltató, mind a munkavállaló felróhatóságának vizsgálata felesleges, és a munkáltató kárfelelőssége egyértelműen objektív, amennyiben a munkavállaló ún. veszélyes dolog közrehatásával vagy veszélyes tevékenység végzése közben okozta a kárt harmadik személynek. Ebben az esetben a tárgyi felelősség általános szabályai felülírják a munkáltató másért való felelősségére vonatkozó szabályokat, így ebben az esetben a munkáltató még akkor sem mentesül a felelősség alól, ha bizonyítani tudja, hogy a munkavállaló az elvárt gondossággal járt el. Ilyenkor a munkáltató tárgyi felelőssége a veszélyes dolog vagy veszélyes tevékenységről eredő, fokozott kárveszélyen alapul. Ha a tárgyi felelősség szabályai alkalmazhatók a munkáltató másért való felelősségét megalapozó tényállásra, a munkáltató minősül a veszélyes dolog üzemeltetőjének, illetve a veszélyes tevékenységet végző személynek, függetlenül attól, hogy ténylegesen a munkavállaló van abban a helyzetben, hogy ellenőrzése alatt tartsa a veszélyes dologból eredő fokozott kárveszélyt, illetve a munkavállaló végzi a veszélyes tevékenységet.

A tanulmány betekintést nyújt, hogyan alkalmazzák a szerbiai bíróságok a tárgyi felelősség általános szabályait a munkáltató másért való felelősségét megalapozó tényállásokra. Ugyanakkor, feltárja azokat a tényezőket, amelyeket a bíróságok figyelembe vesznek a felelősség minősítésében, mindenekelőtt a veszélyesnek minősülő tevékenység természetét, illetve a tevékenység vagy a dolog által okozott fokozott kárveszély szintjét.

Kulcsszavak: *veszélyes dolog, veszélyes tevékenység, a munkáltató másért való felelőssége, tárgyi felelősség, szerb Kötelmi viszonyokról szóló törvény*

1. Introductory remarks – General rules of strict liability under Serbian law

In Serbian law strict liability is regulated by the Obligations Act of 1978[1] as a form of liability for damage regardless of the fault of the tortfeasor[2]. Art. 154, sec. 2 of the Obligations Act prescribes that liability shall ensue, regardless of fault, for injury or loss caused by objects of property or activities generating increased danger for the surroundings. Thus, the major circumstance excluding the application of the general regime of fault-based liability, and triggering the application of strict liability, is that the damage is caused either by a so-called hazardous thing or a hazardous activity. The liability is strict, since it does not require the liable person to be at fault. Thus, the essence of strict liability is not that the tortfeasor shall be held liable without, but independently of his/her fault[3]. Strict liability does not exclude the existence of the fault of the tortfeasor, but it is irrelevant in establishing liability[4]. It is based on an increased, elevated risk of damage to the surroundings generated by a hazardous thing or hazardous activity[5]. Since, the fault of the tortfeasor is not a condition of establishing strict liability, only two conditions must be met: a demonstrable damage must be caused, and a causal link must exist between the damage and the hazardous thing or the performance of a hazardous activity[6]. Moreover, the position of the injured party is additionally privileged in the regime of strict liability, since the Obligations Act sets a presumption of causation: it shall be presumed that all damage in relation to a hazardous thing or activity emanates from that thing or activity, unless otherwise proven[7].

The 1978 Obligations Act does not define either hazardous thing or hazardous activity. As for the concept of hazardous thing the literature and the case law still adhere to the criteria set out by Mihailo Konstantinović as early as 1969. In his proposal of a normative text of a prospective obligations act, titled 'Obligations and Contracts – Draft for Code of Contracts and Obligations', a thing may be considered hazardous if it generates an increased, elevated risk of damage to the surroundings

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1 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).

2 Đorđe NIKOLIĆ: *Obligaciono pravo* [Law of Obligations]. Projuris, Beograd, 2016, 105.

3 Jakov RADIŠIĆ: *Obligaciono pravo* [Law of Obligations]. Nomos, Beograd, 2008, 193.

4 Jožef SALMA: *Obligaciono pravo* [Law of Obligations]. Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, Novi Sad, 2009, 573.

5 Marija KARANIKIĆ MIRIĆ: *Tort Law in Serbia*. Wolters Kluwers, Alphen aan den Rijn, 2023, 89.

6 NIKOLIĆ: op. cit. 106.

7 Obligations Act [Art. 173].

due to its nature, individual attributes, position or use[8]. The 1969 Draft tied the general regime of strict liability only to the notion of hazardous thing. Karanikić Mirić analysed the reasons for the emergence of hazardous activity in the 1978 Obligations Act. Her assessment seems well-founded that in Konstantinović's system of strict liability it is completely redundant to have a hazardous activity in addition to a hazardous thing[9]. Konstantinović argued that hazardous activities always comprise the use or possession of a thing that can be considered hazardous based on any of the criteria mentioned above[10]. Triggering strict liability based only on performing an activity, but without any interference of things as physical objects, would mean that an individual's actions, more precisely the movements of his/her body would produce an elevated risk of damage[11]. Still, in the 1978 Obligations Act a different approach prevailed, supporting that hazardous activities should also be regarded as a circumstance triggering strict liability, in addition to hazardous things[12]. An activity is regarded as hazardous if it produces an elevated risk of damage, even if performed in a legitimately expected manner[13]. It does not have to be a business or professional activity of the liable person, nor a legally regulated activity: any human pursuit or engagement may be considered as hazardous if generates an abnormal, elevated risk of damage[14].

The 1978 Obligations Act specifies that for damage caused by a hazardous thing or activity the proprietor *(imalac)* of the thing or the person performing the activity shall be liable[15]. It is quite challenging to translate the term 'imalac' into English. It has a wider scope of meaning as the term proprietor, since it encompasses not only the owner of the thing, but also possessors who have legal title to possession. As Karanikić Mirić properly concludes, the nearest expression in English is still the term 'proprietor', but it must be differentiated from the concept of the owner[16]. Thus, 'imalac' is the one who is in a position to exercise control over the hazardous thing and use it for his/her own benefit[17]. There are two situations envisaged by the law when the proprietor of a hazardous thing shall not be held liable under the regime of

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8 Mihailo KONSTANTINOVIĆ: *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, 1969, [Art. 136 Section 1], 81.

9 Marija KARANIKIĆ MIRIĆ: *Objektivna odgovornost za štetu* [Strict Liability for Damage]. Službeni glasnik, Belgrade, 2019, 87–88.

10 Mihailo KONSTANTINOVIĆ: *Obligaciono pravo – prema beleškama sa predavanja profesora Dr, M. Konstantinovića* [Law of Obligations – According to the Lectures of Professor Dr, M. Konstantinović]. Savez studenata Pravnog fakulteta, Beograd, 1962, 134–135.

11 Ibid.

12 Obligations Act [Art. 154, Section 2].

13 KARANIKIĆ MIRIĆ: *Tort…*, 90.

14 KARANIKIĆ MIRIĆ: *Objektivna...*, 115.

15 Obligations Act [Art. 174].

16 KARANIKIĆ MIRIĆ: *Tort...*, 91.

17 Ibid.

strict liability for the damage the thing may cause. One is when the proprietor has been unlawfully deprived of the possession of the hazardous thing[18]. However, if there is a fault of the proprietor for the loss of possession over the hazardous thing, he/she can still be held liable, but under the rules of fault-based liability (though his/her fault is not presumed, but must be proven), whereas strict liability shifts to the person who unlawfully acquired possession[19]. The other situation is when the proprietor releases possession over the hazardous thing to a third party or the third party relies on other legal grounds required to exert control over the hazardous thing, but is not employed with the proprietor[20]. Still, the proprietor remains liable if he/she did not warn the third party of the hazardous features of the thing[21] or transferred possession to a third party not qualified or authorised to handle the hazardous thing[22]. In these cases, similarly to the former, relating to unlawful dispossession of the proprietor, the liability of the proprietor does not extinguish, but changes from strict to fault-based[23]. Whenever the liability of the proprietor is sustained parallelly to the liability of the third party, they are jointly and severally liable towards the injured party[24].

2. Liability of the employer for damage caused to a third party by an employee at work or in work-related situations

In the rules on various forms of vicarious liability, the 1978 Obligations Act regulates employer liability for damage caused to a third party by an employee at work or in work-related situations. The liability of the employer for damage caused at work or in work-related situations to the employee and, vice versa, the employee's liability for the damage caused to the employer is not regulated by the Obligations Act, but by the Employment Act[25]. In case of state officials, and officials employed with the autonomous provinces and local municipalities, the vicarious liability of their employers is regulated by special statutes[26]. The rules on the liability for the damage caused by officials, however, merely reiterate the basic rules from the Obligations Act.

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18 Obligations Act [Art. 175].

19 See for instance the judgment of the Supreme Court of Serbia No. Prev. 173/2006. Cited from KARANIKIĆ MIRIĆ: *Objektivna*…, 107.

20 Obligations Act [Art. 176. Section 1].

21 Obligations Act [Art. 176. Section 2].

22 Obligations Act [Art. 176. Section 4].

23 KARANIKIĆ MIRIĆ: *Objektivna*…, 112.

24 KARANIKIĆ MIRIĆ: Tort…, 92.

25 Zakon o radu [Employment Act] Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – decision of the Constitutional Court, 113/2017 and 95/2018 – authentic interpretation, Arts. 163–164.

26 Zakon o državnim službenicima [Act on State Officials] Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 79/2005, 81/2005 – correction, 83/2005 – correction, 64/2007, 67/2007 – correction, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020 and 142/2022, Art. 124.; Zakon o zasposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave [Act on Employees of Autonomous Provinces and Local Municipalities] Službeni glasnik RS [Official Gazette of the

The Obligations Act prescribes that the employer shall be held liable for a damage caused to a third party by an employee at work or in work-related situations, unless the employer proves that the employee acted as he/she was required to[27]. The formulation of the said rule provides a basis for different interpretations[28]. Clearly, the employee's fault is legally relevant, but the employer's own fault is not, hence some argue that this is a form of fault-based vicarious liability[29] or at least mixed fault-based/strict liability[30]. However, taking into account that the own fault of the liable party, i.e. the fault of the employer is legally irrelevant, the standpoint in the literature seems convincing that it is still a case of strict vicarious liability[31]. Therefore, the employer cannot relieve him/herself from liability by providing that there is no his/her own fault[32]. The employer's fault could manifest in his/her failure to properly control the acts of the employee *(culpa in vigilando)*, failure to give him/her the proper instructions *(culpa in instruendo)* or failure to choose the proper employee for a given working task *(culpa in eligendo)*[33]. None of them is legally relevant, which supports the reasoning in the literature that the employer's vicarious liability is in Serbian law a case of strict liability[34]. This approach relies on the understanding that in determining whether a given form of liability is fault-based or strict, the fault of the liable party and not that of the tortfeasor should be legally relevant, when the identities of the liable party and the tortfeasor do not coincide[35].

Another peculiarity of the employer's liability for damage caused to a third party is the so-called direct liability of the employee. Namely, the Obligations Act prescribes that the injured third party may claim damages directly from the employee

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Republic of Serbia], No. 21/2016, 113/2017, 95/2018, 114/2021, 92/2023, 113/2017 – other statute, 95/2018 – other statute, 86/2019 – other statute, 157/2020 – other statute and 123/2021 – other statute, Art. 155.

27 Obligations Act [Art. 170. Section 1].

This rule speaks of the company and not of the employer. However, the first section of the next article extends its application to all employers. Obligations Act [Art. 171. Section 1].

28 For a detailed overview of the different interpretations of this rule see Mihajlo, CVETKOVIĆ: Osnov neugovorne odgovornosti poslodavca za štetu koju radnik prouzrokuje trećem licu [The Employer's Liability for Damage Caused by an Employee to a Third Party (Strict or Fault-based)]. *Pravo i privreda* LVI. 2018/7–9., 479–482.

29 Dmitar POP GEORGIJEV: In: *Commentary of the Obligations Act* [Art. 154]. (ed. Slobodan Perović) 1980, 486. Cited from Mihajlo CVETKOVIĆ: Osnov…, 480.

30 With some differences, this approach is supported by Oliver Antić and Jakov Radišić. Oliver ANTIĆ: *Obligaciono pravo* [Law of Obligations]. Pravni fakultet Univerziteta u Beogradu, Beograd, 2012, 490; Jakov RADIŠIĆ: *Obligaciono pravo* [Law of Obligations]. Nomos, Beograd, 2008, 242.

31 KARANIKIĆ MIRIĆ: *Tort*…, 79.

32 Ibid.

33 Stojan CIGOJ: In: *'Commentary of the Obligations Act'.* (ed. Slobodan Perović) Savremena administracija, Beograd, 1995, 389.

34 KARANIKIĆ MIRIĆ: *Tort...*, 78–79.

35 KARANIKIĆ MIRIĆ: op. cit. 77.

if he/she caused damage intentionally[36]. As Karanikić Mirić properly assesses, the liability of the employer is, however, neither subsidiary (secondary), nor supplementary: it is not dependent thereupon, if the employee can be held liable for damage directly towards the injured party[37]. The rule on the direct liability of the employee is one of the very rare cases in Serbian tort law when gross negligence does not produce the same consequences as causing damage intentionally (an exception to the rule of *culpa lata dolo aequiparatur*)[38]. The burden of proof that the employee caused damage intentionally is on the injured party[39]. The principle of *culpa lata dolo aequiparatur* is, however, applied to the employer's recourse claim. The Obligations Act prescribes that the employer has a right of recourse against the employee for the damages paid to a third party, if the employee caused the damage intentionally or with gross negligence[40]. This claim expires in a prescription period of six months[41]. This means that causing damage to a third party by an employee with ordinary fault falls within the regular business risks of the employer[42].

The employer's liability emerges primarily for damage caused to third parties at work. This formulation from the Obligations Act is construed that damage must be caused by an employee during working hours, at the workplace, and performing his/her job duties[43]. In addition, it is required that the tortfeasor caused damage in the function of the employee of the given employer[44]. However, the formulation of the rule is sufficiently wide to cover cases of causing damage which are only indirectly in relation to the performance of the employee's job duties. A case of causing damage in such a work-related situation is, for instance, when the employee cases damage by company car outside working hours[45].

In addition to the employer's vicarious liability, the Obligations Act regulates specifically legal persons' liability for damage caused by their organs by performing their functions or in relation to them[46]. There are different interpretations of the legal

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36 Obligations Act [Art. 170. Section 2].

37 Marija KARANIKIĆ MIRIĆ: Granice odgovornosti poslodavca za zaposlenog [The Scope of Employer's Liability for Employee's Acts]. In: *Kaznena reakcija u Srbiji* Vol. 10 (ed. Đorđe Ignjatović) Univerzitet u Beogradu – Pravni fakultet, Beograd, 2020, 168.

38 Marija KARANIKIĆ MIRIĆ: *Krivica kao osnov vanugovorne građanskopravne odgovornosti* [Fault as Basis of Non-contractual Civil Liability]. Pravni fakultet Univerziteta u Beogradu, 2008, 174–175.

39 KARANIKIĆ MIRIĆ: *Tort*…, 79–80.

40 Obligations Act [Art. 171. Section 2].

41 Obligations Act [Art. 171. Section 3].

42 Stojan CIGOJ: In: *Commentary…*, 390.

43 For instance, the employer shall not be held liable for damage caused by the raping of one employee by another at the workplace, during working hours. See Stojan CIGOJ: op. cit. 390.

44 Stojan CIGOJ: op. cit. 390.

45 Milan ŠEMIĆ: *Prouzrokovanje i naknada štete*. Gradska narodna biblioteka "Žarko Zrenjanin", Zrenjanin, 1999, 111.

46 Obligations Act [Art. 172. Section 1].

nature of this liability too. However, the prevailing scholarly opinion is that the liability of the legal person is strict: the legal person cannot exclude its liability by proving that its organ acted as it was required to[47]. The Obligations Act prescribes verbatim the same recourse right as in the case of employer's vicarious liability[48]. However, a major difference is that there is no direct claim against the person performing the function of the organ. It has been properly identified in the literature that there may be an overlapping between the employer's vicarious liability and the liability of the legal person for damage caused by its organ, if the natural person employed with the employer, performing the function of its organ (for instance, a managing director with an employment contract) causes damage to a third party. In that case, the liability regime which is more favourable to the injured party shall be applied.[49]

3. Application of the general rules of the liability of the employer for damage caused by an employee to a third party

As already mentioned, the vicarious liability of the employer is considered strict, since he/she may not be released from liability based on the lack of his/her fault. The employer's liability may be lifted if he/she proves that the employee acted as required. However, even this 'niche' for excluding liability disappears if the damage was caused by the employee to a third party using a hazardous thing or performing an activity regarded as hazardous. The Obligations Act, namely, prescribes that the rule on the liability of the employer for damage caused by an employee (with the possibility of excluding the employer's liability if the employee acted without fault) does not influence the application of the general rules on strict liability[50]. Consequently, the employer is liable, regardless of the fault of the employee, if the employee caused damage to a third party at work or in work-related situations using a hazardous thing or conducting a hazardous activity.

Strict liability of the employer, according to the general rules, emerges when the employee uses the employer's assets that are considered hazardous things. In this case, the strict liability is not shifted onto the employee, regardless that he/she gains the possibility to directly control the dangerous features of the thing. An employee does not qualify as a third person, according to Art. 176 Sec. 1 of the Obligations Act, to which strict liability shifts if the proprietor releases to him/her the possession over the hazardous thing[51]. This position is further strengthened in the rule on force majeure as exculpatory ground. An unforeseeable and unpreventable act of a third party, causing exclusive contribution to the emergence of damage, can also be

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[47] See in more detail Živomir ĐORĐEVIĆ – Vladan STANKOVIĆ: *Obligaciono pravo (opšti deo)* [Law of Obligations – General Part]. Naučna knjiga, Beograd, 1987, 417.

[48] Obligations Act [Art. 172. Sections 2 and 3].

[49] ĐORĐEVIĆ – STANKOVIĆ: op. cit. 417.

[50] Obligations Act [Art. 170. Section 3].

[51] Obligations Act [Art. 176. Section 1].

considered as a force majeure excluding strict liability[52]. However, the Obligations Act specifies that a person instructed by the proprietor to use the thing on his/her behalf is not considered a third party[53]. An employee is certainly considered such, since he/she does not use the hazardous thing for his/her account, but on the account of the employer/proprietor[54]. The same logic applies to strict liability triggered by a hazardous activity performed by the employee: he/she does not act in his/her own interest, but in the sole interest of the employer. Thus, the activity performed by the employee, which is considered hazardous, shall be regarded as the activity of the employer[55].

The principles of labour law mandate that an employee has to act according to the employer's instructions. However, if the employee deviates from the instructions of the employer, reasonably emerges the question, who will be liable for any damage caused by the unauthorised use or unlawful disposition of a hazardous thing entrusted to the employee?[56] In the recent literature, Karanikić Mirić gave a thorough overview of diverging answers to this question[57]. Her research revealed that some authors have conflicting views, but in the end, they concur that when someone holds the thing for the proprietor, but uses it without his/her instructions or orders, the proprietor is still liable for any damage caused[58]. For the cases when the hazardous thing is used contrary to the proprietor's instructions, Karanikić Mirić supports joint and several liability of the proprietor and the person who used the thing contrary to instructions, whereby the liability of the former is strict, while the liability of the latter fault-based[59].

Finally, the application of the rules on strict liability to the employer's vicarious liability has the consequence that the employer may be exempted from liability for damage only in the capacity of the proprietor of the hazardous thing, if specific reasons prescribed by law exist[60]. The Obligations Act specifies that the proprietor may be exempted from strict liability if the damage is attributable to a cause external to the hazardous thing (or activity), which was not foreseeable, nor preventable[61]. In addition, strict liability is waived if the damage is attributable to the injured party's or a third party's exclusive contribution to the damage, under the same condition, i.e. if their contribution was neither foreseeable, nor preventable[62]. This means that only force majeure exempts from strict liability the person engaged in a hazardous activity or possessing a hazardous thing, while a simple *casus* (lesser accident) is not an

52 Obligations Act [Art. 177. Section 2].
53 Obligations Act [Art. 177. Section 5].
54 KARANIKIĆ MIRIĆ: *Objektivna*…, 110.
55 KARANIKIĆ MIRIĆ: op. cit. 115–116.
56 KARANIKIĆ MIRIĆ: op. cit. 111.
57 KARANIKIĆ MIRIĆ: op. cit. 111.
58 RADIŠIĆ: op. cit. 249; Stojan CIGOJ. Cited in KARANIKIĆ MIRIĆ: op. cit. 111.
59 KARANIKIĆ MIRIĆ: op. cit. 111.
60 ANTIĆ: op. cit. 2012, 498.
61 Obligations Act [Art. 177, Section 1].
62 Obligations Act [Art. 177, Section 2].

exculpatory ground[63], whereby acts of a third party or the injured party may also be considered as such, if they meet the requirements of force majeure.[64]

4. Selected Case Law[65]

4.1. Judgment of the Supreme Court of Cassation of the Republic of Serbia No. Prev 1458/2022 of 30 March 2023

In this case the court held the defendant liable for damage caused by its organ based on Art. 172 of the Obligations Act that occurred on an aircraft at the 'Nikola Tesla' airport in Belgrade in 2012. The court qualified the liability of the defendant as strict liability based on performing a hazardous activity.

The case involved four parties, two on the defendant's and two on the plaintiff's side. The first defendant was the 'Nikola Tesla' airport, while the second the 'Airport Catering' Ltd. One of the plaintiffs was the owner of the aircraft, while the second was the insurer of the first plaintiff. The accident happened when a vehicle owned by the second defendant used for delivery of food and beverages to aircrafts collided with the first plaintiff's aircraft. The loading platform handle of the catering vehicle, which was in a lowered position, penetrated by 70 cm into the aircraft's plating below the service door.

The planned flight was cancelled, the airport officials quickly responded to the situation, and the driver underwent a breathalyser test, which showed no signs of alcohol consumption. Based on the reports and analyses provided by the mechanical engineering experts, the estimated damage was approximately USD 253,000.00. As the insurer of the first plaintiff, the second plaintiff settled a total of USD 152,865.51. The first plaintiff paid USD 100,000.00 out of the total amount, since the insurance contract foresaw a fixed deductible of USD 100,000. The accident was caused by the driver's mishandling of the platform due to his negligence and recklessness, hence it was not attributable to a malfunction of the braking system, as claimed by the defendant.

The court determined that the defendant company, the "Nikola Tesla" airport was established as a public company for the management of Belgrade Airport. It was responsible for ensuring the safe and uninterrupted operation of the airport, including providing ground handling services, and taking measures to ensure the safe stay of aircraft. Also, it established "Airport Catering" Ltd Belgrade.

The defendant, as the airport operator, was obliged to take measures necessary for the safe take-off, landing, movement and stay of the aircrafts, as well as to provide ground handling services at the airport. To ensure safe servicing, the

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[63] Atila DUDAŠ: *Obligaciono pravo*. Bojan PAJTIĆ – Sanja RADOVANOVIĆ – Atila DUDAŠ: [Law of Obligations] Pravni fakultet u Novom Sadu, Centar za izdavačku delatnost, Novi Sad, 2018, 481.

[64] KARANIKIĆ MIRIĆ: *Objektivna*…, 142.

[65] The cases analysed in this paper stem from the official database of Serbian case law available on the internet: https://sudskapraksa.sud.rs/sudska-praksa

defendant was liable for thorough checking the conditions for service provided by 'Airport Catering' Ltd Belgrade. This included reviewing any guidelines, protocols, or safety measures in place to prevent accidents during the servicing process. The court established that there is a non-contractual liability for damage caused by a legal person's organ based on Art. 172 of the Obligations Act. The court determined that the defendant verified the technical compliance record of the catering vehicle that participated in the accident. However, the fact whether the vehicle met the required level of technical compliance is not legally relevant, because the defendant is obliged to participate in the safe servicing of the aircraft, failure to which triggers its strict liability. The court, thus, pointed out that it is not decisive whether the vehicle met the requirement of technical compliance or not, nor whether the correct content was entered in the record on the vehicle's technical compliance.

The court determined that there is a joint and several liability of both defendants. The reason for this is that the first defendant is liable for the use of the hazardous thing on the platform and must take measures to ensure safe conditions. Therefore, the first defendant is liable for any damage caused by failing to provide safe conditions.

The second defendant disputed that the substantive law was properly applied, claiming that they took all necessary measures for the safe take-off, landing, movement and stay of the aircraft, providing all the necessary airport ground handling services. They alleged that the damage was not caused by their actions but that of the employee of 'Airport Catering' Ltd Belgrade. The first defendant pointed out that the court's conclusion about their liability was based on Art. 172 of the Obligations Act is ill-founded, since they verified the proper functioning of the braking system of the vehicle three days before the accident. In addition, they claimed that they cannot be held liable under Art. 173 of the Obligations Act either, because not all aspects of their activity can be considered hazardous. Furthermore, they argued that the aircraft in question was not in motion and had no passengers onboard, which meant that it did not produce any hazardous situation. Therefore, the defendant claimed that they could not be held liable for contributing to the hazardous activity by performing duties in relation to the aircraft. Furthermore, they claimed that the lower-instance court failed to apply the provision of Art. 177, paragraphs 1 and 2 of the Obligations Act, reasoning that the defendant's strict liability is excluded since the damage was caused by the sole action of the employee of the other defendant, the 'Airport Catering' Ltd Belgrade.

The Supreme Court rejected these arguments as unfounded and decided that the lower courts correctly held the first defendant liable jointly and severally with the second defendant for damages, based on strict liability. The rationale is as follows: strict liability refers to the liability triggered by a hazardous thing or activity, regardless of the fault of the liable person. Art. 173 of the Obligations Act establishes the presumption of causation in cases of liability for damage caused by hazardous things or activities. It stipulates that the damage caused by a hazardous thing or activity is considered to originate from that thing or activity unless proven otherwise. Furthermore, Art. 174 prescribes that the proprietor is liable for any damage caused

by a hazardous thing, while the person engaged in hazardous activity is liable for any damage such activity may cause.

The Supreme Court reasoned that the defendant is the airport operator, which pursuant to 117 of the Act on Air Traffic is obliged to take all the measures necessary for the safe stay of aircrafts and to provide ground handling services at the airport. The nature of tasks involved in ensuring safety and order at the airport makes the defendant's activity in the relevant airport management segment hazardous. These include providing ground handling services and warranting the safe stay of aircrafts. Moreover, the court held that the movement of motor vehicles, which are considered hazardous things, at the airport and their approach to aircrafts, additionally increases the risk of damage.

The court concluded that in this situation, this activity poses an increased risk of damage, even when the aircraft is not in motion. Despite all precautionary measures, the court held that the strict liability cannot be waived, because the damage is a result of a hazardous activity, for which the defendant's liability is strict based on the law. While the Obligations Act prescribes certain conditions for excluding strict liability, the court held that the defendant failed to meet these requirements. Therefore, the court ruled that the first defendant, the 'Nikola Tesla' airport and the second defendant, the 'Airport Catering' Ltd Belgrade are jointly and severally liable for the damage sustained by the second plaintiff.

4.2. Judgment of the Court of Appeal in Novi Sad No. Gž 1639/19 of May 16, 2019

In this case, the plaintiff lived in a common household with her son, who lost his life at work. She was emotionally devoted to him, and he also supported her financially. After the loss of her son, the state of her health deteriorated. She filed a lawsuit against the company's employee because the injury and death of her son occurred as a result of the employee's gross negligence in acting during the work process. In her claim, she requested compensation from the defendant employee for the non-material damages she suffered due to her son's death.

According to the factual situation determined by the first-instance court, the defendant and the deceased son of the plaintiff were employees of the same company when the deceased son of the plaintiff was injured at work and subsequently died as a result of the injuries. A separate criminal procedure was initiated against the defendant in which he was found guilty. Namely, the defendant held the position of shift leader and as such involved in the accident that resulted in the unfortunate death of the plaintiff's son. The investigation confirmed that a malfunction in the can sterilisation machine occurred. The defendant undertook the act of sterilisation of the cans in pressure-sink autoclaves, contrary to the Law on Workplace Safety and Health regulations. Despite lacking the necessary professional qualifications and certifications, he did not refuse the director's instructions. Still, he was able to understand that it could endanger life and physical integrity of people. In such a way, the process of sterilisation was carried out contrary to the instructions for safe work. The defendant instructed the deceased son of the plaintiff to get into the pressure

vessel and take out the spilled cans; although he was aware that it could endanger other people's lives and physical integrity, he lightly believed that it would not happen.

During the cooling process, the defendant opened the overflow tap on an autoclave. This action caused hot water to overflow into another autoclave, whose overflow tap was not closed as required, resulting in hot water flowing into the vessel where the deceased son of the plaintiff was. He was directly exposed to water at a temperature of 120 degrees, suffered burns on his lower and upper extremities and later succumbed to injuries. The failure to close the overflow tap was a breach of safety protocols, which could have been prevented with proper attention and due care. According to the provisions of the Criminal Code, the defendant has been found guilty of committing with negligence a grave offence against general security.

Nonetheless, the court rejected the claim, since it was directed against the employee, and not against the company where both the plaintiff's deceased son and the defendant worked. The court concluded that according to Art. 170, Sec. 1. of the Obligations Act the liability of the company for a damage caused by an employee at work or in work-related situations emerges where the employee worked at the time of the damage. However, in this case the plaintiff filed the action against the shift-leader, i.e. a fellow employee who caused the damage, and not against the employer. The court argued that according to Art. 170, Sec. 2, the injured party, here the plaintiff, would have had the right to demand compensation directly from the defendant, if he had caused the damage intentionally.

It was determined during the hearings that the defendant had no intention of causing the death of plaintiff's son. The plaintiff did not prove the defendant's fault in the terms of civil law, namely that he has been aware and had the intention to cause the damage, nor did the results of the criminal proceedings support this claim. If these conditions had been met, the plaintiff would have been entitled to demand damages directly from the defendant, natural person, in line with Art. 170, Sec. 2 of the Obligations Act. Therefore, the court could not oblige the defendant to compensate for the damage because he did not cause it intentionally. Had the plaintiff filed the claim against the company, as employer, it would have been held liable for damage under the rules of strict liability. The damage was a result of the defect of the pressure vessels, which fall under the category of dangerous things. According to Art. 174 of the Obligations Act, the proprietor of such things is held liable for any damage caused by them. In this case, the company where both the plaintiff's son and the defendant worked is considered the proprietor of the thing in question. The accident occurred while the employees were performing working tasks using the thing.

4.3. Judgment of the Court of Appeal in Niš No. Gž 4971/17 of May 15, 2018

In this case the plaintiffs were the two children and the wife of a deceased person, who worked as a sailor for the defendant company. His responsibility was to clean and wash the vessel. According to the employer's risk assessment act, the workplace where he was working was considered a high-risk environment.

At one occasion the deceased, together with his colleagues, was engaged in cleaning the fifth barge connected to a series of objects. Unfortunately, the barge was not equipped with a protective fence, he accidentally slipped and fell into the water. Despite the efforts made by his colleagues, they could not rescue him, and he had to be rescued by a fisherman boat. However, upon the arrival of the ambulance, he was pronounced dead. A report submitted by the responsible person in the company led to a conclusion that use of personal protective equipment was recommended and provided for the tasks during which the accident occurred. It was established that the deceased was not wearing a life jacket at the time of the accident. Based on an on-site inspection and statements from the manager and eyewitnesses, it was determined that the accident was attributable to a lack of attention from the employee, contrary to Art. 35 of the Law on Safety at Work. In addition, the autopsy report indicated that the deceased was under the influence of alcohol at the time of the accident.

The wife of the deceased first requested the insurance company to pay the insured amount. Her request was rejected on the grounds the deceased person contributed to the accident. In the litigation that followed the testimonies of the witnesses were taken. They revealed that on the day of the accident, there were insufficient resources available for rescue operations, such as ropes, lifelines, and other necessary equipment. The employees had their specific gear, including helmets, masks, belts, and fluorescent vests, as confirmed by two witnesses, but they didn't wear it. They further stated that the vests of employees who were not working at the time were locked in the warehouse and that there were reports filed by the responsible personnel against workers who failed to use their equipment. The court determined the contribution of the deceased in the extent of 60% to the occurrence of the damage because he did not wear protective equipment and brought himself into an intoxicated state. For this reason, the court granted the claim only in part. However, the court underlined that the damage was not attributable solely to the fault of the deceased because there was an omission on the part of the defendant. In order to release the employer from liability, it must be established that the employee was at fault for causing the damage while engaged in a hazardous activity or in connection with a hazardous thing. The conditions of the workplace are taken into account while assessing the employee's conduct before the damage is caused. The employer can only be exempted from liability if the employee is entirely liable for the accident. Any misconduct not directly influenced by working conditions is not considered. Normal carelessness can be treated as a part of business risks, as it is the employer's liability to provide a safe working environment with adequate safety measures in place to ensure the employee's safety and health. In order to claim successfully that the employee is at fault, the employer must demonstrate that all reasonable steps were taken to maintain a safe workplace and that the employee's misconduct was unforeseeable, unpreventable, or unavoidable.

The employees, including the deceased person, should wear protective equipment, but they often didn't. Their employer was aware of this, still didn't do enough to ensure safe conditions for all employees. They were sometimes warned or reported for not using the equipment, but they still didn't wear it. This means that

the employer could have predicted that the employees might not use the equipment and should have done more to make them use it. In addition, the deceased was drunk, which his superior should have noticed. The fact that the person was qualified for their job and had passed a health check doesn't mean the employer is not liable for what happened. It only means that the deceased person also had a part in what happened and the employer could have foreseen the risky behaviour of the employer, thus avoided the accident. Therefore, the responsible personnel (the employee at the defendant company) would have been obliged to remove the deceased person from the workplace when they had noticed that the employee was drunk and did not wear protective equipment.

4.4. Judgment of the Court of Appeal in Belgrade No. Gž 5136/19 of September 8, 2020

In this case the plaintiff was a person serving a prison sentence, while the defendant the Republic of Serbia.

The plaintiff, serving a 40-year sentence, was in the prison in Niš when an uprising occurred. The prison officials requested the assistance of police to reinstate the order. In collaboration with the prison's security staff, the police had to enter the confined area of the prison to assert control and restore order. During the operation the police used force against the prisoners who were actively resisting after breaching the barricades. The plaintiff sustained severe physical injuries, including multiple fractures, the dislocation of the right shoulder joint, and a contusion of the left shoulder and the head which also resulted in hypotrophy of the muscles and restricted shoulder mobility, particularly during rotatory movements, as well as degenerative changes in the right shoulder joint. These injuries required outpatient treatment and hospitalisation. The plaintiff also experienced significant physical pain and fear of a certain duration, and his injuries resulted in a reduction in life activity and impairment.

The court concluded that the plaintiff was incarcerated during the tumultuous events of the riot in the prison cell and did not partake in the rebellion of the prisoners. Furthermore, the plaintiff was found to be without any weapons or objects capable of inflicting damage and was considered eligible for amnesty at the time. The plaintiff did not show resistance when police officers stormed into the room. Instead, he obeyed orders and dropped to the ground. He and the other prisoners were then struck multiple times with batons. The plaintiff was thrown to the ground, fell on his shoulder, and hurt himself after policemen lifted and carried him out into the hallway. Subsequently, as he was going through the hallway, a policeman hit him with a baton in the right collarbone area. Thus, he was injured by the defendant's organs during the suppression of the rebellion, and not by other convicts who resisted, and on that occasion, he did not participate in the rebellion in any way.

Upon his arrival at the yard, the plaintiff promptly reported his injuries to the attending medical professionals who provided medical care to him. Subsequently, he was transported to a hospital in Niš, where he underwent a thorough examination, received prompt medical assistance, and had plaster immobilization put on him. He

was then returned to the prison hospital for continued treatment and care. During the recovery from the injury, the plaintiff suffered pain and fear of great intensity, and his life activity was reduced by 15%, which is reflected in the limited movements of the right hand, deformities of the left arm, muscle hypertrophy, and slight impairment. The court determined these facts based on written evidence, findings, and opinions of expert neuropsychiatrists and experts in physical medicine and rehabilitation. The court established that the defendant was liable for the damage and her liability qualified as strict, relating to conducting dangerous activity, i.e. maintaining order and security in the prison. The court concluded that the person liable for damage caused by dangerous activity is the one who is engaged in that activity, according to Art. 174, Sec. 1 of the Obligations Act, or his/her employee based on Arts. 170 to 172 of the Obligation Act as well. The Constitution of the Republic of Serbia in Art. 35 and the Obligations Act in Arts. 171 and 172, in conjunction with Art. 170, prescribe the state's liability for the illegal and improper work of the state's organs. According to these statutes, a legal person, an employer, is held liable for any damage caused by its organ or employee to a third party during or in connection with their duties or work performance.

4.5. Judgment of the Supreme Court of Cassation of the Republic of Serbia No. Rev 1124/2016 of 9 November 2016

The case emerged from an explosion at a military training ground where a group of boys (minor plaintiffs) were collecting metal parts for recycling. During this process, one of them inserted some of the metal parts into a plastic canister, which activated a detonator of either a trombone mine or an automatic grenade launcher. The controls of these devices can be activated by touch, shock or friction. The law requires that records are maintained for every military exercise, and it is mandatory to dispose of any ammunition that does not explode during the exercises. However, the polygon where the military exercise was conducted was not secured or fenced, and no measures were taken to prevent third-party access either. In addition, the polygon was not cleaned after the shooting exercise.

One of the minors lost his feet, one thumb and sustained injuries to his shoulder as a result of the explosion. According to an expert testimony the injuries could have potentially been fatal. He was in excruciating physical pain because of the three surgeries, had rehabilitation, using crutches, and wearing a prosthesis. Due to multiple scars on the shoulder, arm, and legs, as well as the loss of the lower parts of both legs and a thumb on the right hand, his disfigurement was assessed as severe, in percentage estimated by 85%. The plaintiff has a 100% permanent disability as a result of the aforementioned injuries, which have reduced his general life activity by 90%. He is unable to perform any tasks requiring mobility and precision in movement, hindered from performing daily activities. Due to the extent of the damage and the sense that his life and body were in danger, he experienced fear as a result of the injury. He also experienced anxiety about the consequences of the injury and the need for additional interventions. The court established the liability of the

defendant for the damage suffered by the plaintiffs, relying on Arts. 173 to 177 of the Obligations Act in connection with Art. 27 of the Law on the Serbian Armed Forces. The court's judgement is based on the defendant's lack of due care, failing to ensure the safety and maintenance of the training ground where the firing exercises were held, leading to the plaintiff's injury. The court determined the liability of the Republic of Serbia for these failures, based on her responsibility for the illegal and irregular actions of her organs.

The court reiterated that the essence of strict liability, based on a hazardous thing or a hazardous activity prescribed by Arts. 173 to 177 of the Obligations Act, is not about being liable without fault, but being liable independently of fault. The court confirmed that this means that fault for damage most often exists even in cases of strict liability, but it is legally irrelevant, thus determining liability on this ground favours the injured party. The liable person cannot, namely, exclude his/her liability claiming that he/she acted as required. The court stated that whoever created the source of the elevated risk of damage must be liable for the damage caused by that source, independently of his/her fault. In the specific case, the defendant's liability is based on the liability for damage caused by hazardous things or hazardous activities, because the damage was caused by the explosion of materials remaining from combat shooting at a military polygon. It was considered as a place where the risk of damage is elevated, because remnants of materials from combat shooting were not collected after the military exercise, nor it was properly secured. The liability of the defendant is based on the illegal and irregular work of its organ, the army, which is reflected in the failure to clear the shooting range and remove unexploded explosive devices after the military exercise.

5. Conclusion

This paper aimed to enlighten the relationship in the Serbian Obligations Act of 1978 between the employer's vicarious liability and his/her strict liability according to the general rules for the damage caused by an employee to a third party. Under the rules regarding employer's vicarious liability he/she cannot be exempted from liability due to the lack of his/her fault, but he can, if he proves that the employee acted without fault, that is as he/she was required to. Therefore, the employer's fault is legally not relevant, whereby the employee's is. This rule gave rise to different interpretations in the literature. Some argue that the employer's liability is fault-based, although not his/her fault is relevant, but the employee's. The majority opinion in the recent literature is, on the other hand, that the employer's liability is strict, since his/her own fault is legally irrelevant.

However, the Obligations Act explicitly specifies that these rules do not set aside the application of the general rules of strict liability. The general rule on strict liability relies on the concept of so-called hazardous thing or hazardous activity. If the damage is attributable to either of these two, the general regime of strict liability shall be applied. In terms of employer's vicarious liability it means that even the

employee's fault becomes legally irrelevant, if he/she caused the damage using a hazardous thing or performing a hazardous activity at work or in relation to it.

The paper offered an insight into the application of strict liability based on hazardous thing or hazardous activity in the Serbian case law, when applied to employer's vicarious liability.

Five cases were presented in this paper. In the first case, the airport operator was held liable for the damage caused by the airport catering company, which was considered as the organ of the former, using a hazardous thing and performing a hazardous activity, for which the airport operator was held liable according to the rules of strict liability. In the second case, the plaintiff mistakenly filed a lawsuit against an employee directly, who did not cause the damage intentionally, but only with gross negligence. Instead, she should have brought action against the company with which he was employed. The injured party may claim damages directly from the employee if he/she intentionally causes the damage. In this case, the employee did not cause the damage intentionally, thus the court rejected the lawsuit. However, the court obiter dicta gave a detailed elaboration of the liability of the employer and confirmed that it would otherwise exist as a strict liability, since the accident was caused by a hazardous thing under the control of the company/employer. In the third case the court held the employer liable according to the rules of strict liability, even though the employee significantly contributed to the occurrence of the damage. Still, the employer's activity was considered hazardous since he/she failed to provide all measures to ensure safe working conditions. In the fourth case, the state was held liable for the illegal and improper work of its organs in connection with performing a hazardous activity (maintaining order and security in prison). The fifth case is an outstanding example confirming that strict liability is not without, but independent from the fault of the liable person. The Republic of Serbia was held liable for damage based on strict liability, that is regardless of whether her organ, in this case the army, acted with fault or not. The fault of the army clearly existed, but its activity (military exercise) was considered hazardous, thus the strict liability of the Republic of Serbia emerged.

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[20] Judgment of the Court of Appeal in Niš No. Gž 4971/17 of May 15, 2018.

[21] Judgment of the Court of Appeal in Belgrade No. Gž 5136/19 of September 8, 2020.

[22] Judgment of the Supreme Court of Cassation of the Republic of Serbia No. Rev 1124/2016 of 9 November 2016.