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

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Abstract. In this paper, the authors give a review of the rules on the employer's liability for damage caused by an employee to a third party at work or in work-related situations under Serbian law. It is a form of liability for others (vicarious liability), which is by the majority opinion in the Serbian literature qualified as strict liability. The justification for such an opinion is that the fault of the liable person, in this case the fault of the employer, is not legally relevant (it may exist, but it is not of legal importance). However, the fault of the employee is legally relevant: for establishing the liability of the employer, it is required that the employee is at fault for the damage caused. Relying on this requirement, some support that the employer's liability is fault-based, but it can be considered as a minority opinion. These considerations are, however, relevant only if damage is not caused by a so-called hazardous thing or activity. If such is the case, the employer is liable according to the general rules of strict liability. In addition to the fault of the employee, the other requirement of the employer's liability is that the damage is caused by the employee at work or in relation to it. The case law tends to interpret extensively the category of damage caused in relation to work. The injured party's claim is directed against the employer. However, the law prescribes that the injured party may claim damages directly from the employee as well, if they caused damage intentionally. This rule gains practical relevance in the case of employer's insolvency. The interests of the employer are protected by the rule granting them a recourse right against the employee, for the damages paid to a third party, if the employee caused damage intentionally or with gross negligence. In addition, the employer's liability for damage caused to a third party may surface in the framework

of the liability of the legal persons for the damage caused by its organs. Namely, if the employee performs the function of an organ of the employer that is a legal person, the special rules on the liability of the legal person for the damage caused to third parties by the acts of persons performing the function of the organ of the legal person may also be applied.

Keywords: vicarious liability, the employer's liability, fault-based and strict liability, Serbian Obligations Act

1. Introductory Remarks

Regarding damages caused in connection with employment relationship, three different situations should be differentiated. Either the employee causes damage to the employer or the employer to the employee or the employee to third parties. In Serbian law, these are regulated by the Obligations Act[1] and the Employment Act.[2] The liability of the employee for damage caused to the employer is regulated in detail by the Employment Act.[3] The rules of the Obligations Act are applied only in relation to issues not regulated by the Employment Act. Conversely, in relation to claims of the employee for compensation for damage caused to them by the employer, the Employment Act does not contain any special rule but refers to the rules of other statute (Obligations Act) and general acts of the employer.[4] The first two situations are cases of liability for one's own tortious conduct.[5]

The third situation is when the employee causes damage to a third party in performing their work tasks. In such a case, the employer's liability emerges, which is a special type of vicarious liability (liability for another's tortious conduct).[6]

The main feature of vicarious liability is that another person will be liable for the damage, other than the one who caused it, hence they are two separate persons involved on the side of the debtor in the obligation: the tortfeasor and the liable person.[7] Vicarious liability is usually qualified as non-contractual liability and,

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 – 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 Zakon o radu [Employment Act], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17, and 95/18.

3 Employment Act, Art. 163, Secs. 1–6.

4 Employment Act, Art. 164.

5 Karanikić Mirić 2020. 163.

6 Karamarković 2004. 141.

7 Pajtić–Radovanović–Dudaš 2018. 492.

as Karanikić Mirić properly summarizes, an exception to the basic principle that everyone may be held liable for their own conduct, hence it must be explicitly envisaged by law. She gives an overview of considerations usually leading the legislator to institute vicarious liability. First, between the person who caused the damage and the liable person, there is regularly a special legal relationship, based on which the liable person can control the risk of damage by supervising the tortfeasor, giving them instructions and tasks for which they are liable. Second, the liable party is usually economically stronger than the tortfeasor, so it may be easier to the injured party to collect damages from the former.[8] Finally, in some cases, the liable person obtains certain benefits from the tortfeasor's acts – regularly financial but not necessarily only such.[9] The liable person, therefore, becomes the debtor in obligation, although they did not cause the damage.[10]

An example of vicarious liability in the Serbian law is the employer's liability for damage caused by an employee to a third party at work or in work-related situations. From a historical perspective, this legal institute traces back its roots to the Serbian Civil Code of 1844. It prescribed in §810 as a general principle that no one can be held liable for others' actions. However, the Code in the same paragraph also specified that if one employs persons who are commonly known as vagabonds, misfits, or criminals or persons without any proper identification documents, they are liable for all the damage caused by these persons to third parties. In addition, in §811, the Code prescribed the liability for damage of a person who hires another one to perform a specific task, for which they knew that such person was incompetent, if any damage is caused to third parties by the hired persons. In the literature, these two cases are interpreted as fault-based liability of the employer, whereby the fault of the employer should have been proven by the injured party.[11] As an exception to this rule, §812 contained a special rule on vicarious liability of innkeepers, taverners, boatmen, and drivers (carriers) for the damage that the persons in their service caused to passengers. The contemporary doctrine supported the interpretation that the liability of these persons in the position of an employer existed regardless of whether they knew of the personal traits of the employed/hired persons.[12]

Although it emerges in relation to employment relationship, the employer's liability for damage caused by an employee to a third party is not regulated in the Employment Act. It contains only one specific rule envisaging a recourse right of the employer against the employee for compensation for damage paid to the third party.[13] This means that in this case the rules of the Obligations Act apply.

8 Karanikić Mirić 2020. 162.
9 Id. 162.
10 Nikolić 2016. 101.
11 Aranđelović 1924. 36–37. Similarly, Babić 2015a. 49–50; Cvetković 2018. 479.
12 Aranđelović 1924. 38.
13 Employment Act, Art. 163, Sec. 7. See in more detail: Karamarković 2004. 141.

However, in this case, the Obligations Act contains specific rules in addition to the general rules of tort law.[14] More precisely, this is the only form of liability in the context of employment relationships specifically regulated in the Obligations Act.

2. Conditions of the Employer's Liability

The Obligations Act specifies the conditions of the employer's liability for the damage caused to a third party by an employee. However, as Karanikić Mirić properly assesses, they are at the same time the limits of such liability: the employer may not be held liable outside the frame of these conditions. She also properly concludes that these conditions are prescribed only at an abstract level – they acquire their true meaning in the case law.[15]

The first condition for establishing the employer's liability is that the person who caused the damage has the status of an employee of the employer at the time of causing the damage.[16] The terms of employer and employee are not defined by the Obligations Act but in the Employment Act. The latter defines employee as a natural person employed by an employer, while the employer is a domestic or foreign legal or natural person who employs, i.e. hires, for work one or more persons.[17] An employee is considered any person employed by the employer based on an employment contract, be it for an indefinite or specific period. However, persons who perform work tasks for the employer temporarily, based on other contracts not constituting employment relationship, are not considered employees according to this liability regime.[18] The Obligations Act, in the basic rules on the employer's vicarious liability, does not use the term 'employer' but the term 'company'.[19] However, in the subsequent article, it extends the applications of the basic rules to other employers as well.[20] It seems therefore expedient to analyse both regimes as unique as the employer's liability for damage caused by an employee to a third party at work or in work-related situations.[21] Consequently, this term covers all employers in the public and private sectors, as well as the sole trader (individual entrepreneur), who is defined[22] as a natural person engaged in business for profit, recognized as a form of business organization in the Companies Act.[23] A third party

14 Obligations Act, Arts. 170 and 171.
15 Karanikić Mirić 2020. 164.
16 Karamarković 2004. 144.
17 Employment Act, Art. 5.
18 Veljković 2005. 188.
19 Obligations Act, Art. 170.
20 Id. Art. 171.
21 Pajtić–Radovanović–Dudaš 2018. 501.
22 Babić 2015a. 52; Veljković 2005. 192.
23 Zakon o privrednim društvima [Companies Act], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos 36/11, 99/11, 83/14 – other statute, 5/15, 44/18, 95/18, 91/19, and

is any person who has suffered damage caused by an employee's actions. This can be any natural or legal person, including other employees of the same employer, to whom another employee of the same employer caused damage.[24]

The second condition is that the damage is caused at work or in a work-related situation. These are situations when damage is caused during the performance of work operations.[25] This primarily comprises damage caused by the employee at their workplace, during working hours, and in relation to the function of performing work and the work process.[26] It is necessary that the damage is caused while performing tasks falling within the job description of the employee and that the employee performs them in such function.[27] However, the requirements for establishing the employer's liability can also be met if the employee executed work operations outside working hours and the workplace. The case law tends to interpret this extensively. For instance, the employer shall be held liable for damage caused by the employee using company vehicle, outside working hours, used for private purposes.[28] As Karamarković puts it accurately, the employer's liability exists if the damage is caused using assets that the employee obtained in the course of performing their job.[29] The courts' assessment, therefore, is that whether the damage was caused to a third party at work or in a work-related situation depends on the circumstances of the case.[30] A recent research in this subject-matter conducted by Karanikić Mirić reveals even more interesting cases. She analysed a decision[31] in which one of the employees sent inappropriate SMS messages from company cell phone to a business partner of the employer. The court held the employer liable for the moral damage caused to the third party.

The final requirement is that the employee did not act as they should have.[32] If the employee acted as they were required to but the damage still accrues, the cause of damage is outside the conduct of the given employee in the course of performing working processes.[33] As Karamarković properly asserts, the employee's fault is based on a relative (rebuttable) presumption: the employer may rebut it by

109/21, Art. 83.

24 Karamarković 2004. 146. This has been confirmed in the case law as well. See, for instance, the Judgement of the Appellate Court in Novi Sad, No Gž1 1645/2012 of 23 August 2012. Cited from Karanikić Mirić 2020. 167. fn. 26.

25 Karamarković 2004. 144.

26 Karanikić Mirić 2020. 172.

27 Karamarković 2004. 144.

28 Ibid.

29 Ibid.

30 Ibid.

31 Decision of the Basic court in Stara Pazova, judicial department in Inđija, No P. 507/16 of 3 November 2017, Judgement of the Higher Court on Sremska Mitrovica, No Gž. 1577/17 of 25 April 2018, Decree of the Supreme Court of Cassation, No Rev. 4314/2018 of 6 September 2018. Cited from Karanikić Mirić, 2020, p. 169, fn. 37.

32 Karamarković 2004. 144.

33 Id. 145.

proving that the employee's conduct complies with the expected standard: if they acted in accordance with the rules of the work process that was carried out safely without causing damage to others.[34] Whether the employee acted properly will be evaluated by considering if they demonstrated the required diligence according to the employer's standards and according to the type of activity and work tasks.[35] An analysis of the case law conducted by Karanikić Mirić revels how courts construe the diligence required from the employee. The standard of due diligence is very strict: the standard of a diligent expert, who conducts the given activity as a professional.[36] One should, however, also take into account that the fault of the employee is relevant only if the general rules of strict liability cannot be applied. The Obligations Act explicitly states that the mentioned rule on the liability of the employer for a damage caused by the employee by fault is not applicable to damage caused by hazardous thing or activity.[37] It triggers the application of the general rules of strict liability directly.

3. The Relevance of the Employee's Fault in the Qualification of the Employer's Liability

As already indicated, the Obligations Act makes the fault of the employee legally relevant but does not attribute any legal relevance to the fault of the employer. The fault of the employee is presumed and can be rebutted only by achieving a diligent expert's high standard of proof.[38]

These rules, which, one the hand, do not require the fault of the employer but clearly make the fault of the employee legally relevant, open the door to different possible doctrinal interpretations, which have been in the recent literature summarized by Cvetković. He differentiates four interpretations.[39]

First, some claim that the liability of the employer is fault-based. According to this approach, the fault of the employee is directly attributed to the fault of the employer. The fault of the employee is simply a manifestation of the fault of the employer.[40] Cvetković's research also revealed that there are some decisions

34 Ibid.

35 Ibid.

36 See, for instance, the Judgment of the Serbian Supreme Court, No Rev. 1990/2005 of 5 October 2005, the Judgement of the Supreme Court of Cassation, No Rev. 243/2016 of 16 March 2017, and the Judgement of the Commercial Appellate Court, No Pž. 2213/2011 of 5 July 2012. Cited from Karanikić Mirić, 2020, pp. 167–168, fn. 28.

37 Obligations Act, Art. 171, Sec. 3.

38 Karanikić Mirić 2020. 167.

39 Cvetković 2018. 479.

40 Such opinion is supported by Georgijev, Vučković, and some scholars of labour law such as Lubarda and Ivošević. See: Perović 1980. 486; Vučković 1989. 272; Lubarda 2013. 691; Ivošević–Ivošević 2016. 343. Cited from Cvetković 2018. 480, fn. 28, 32, 33, and 34.

in case law as well in which the courts qualified the liability of the employer as fault-based.[41] He properly concludes that the basic flaw in this interpretation relies on conflating the two different concepts of fault (that of the employer and that of the employee) into a single one.[42]

The second interpretation clearly describes the employer's liability as strict. This approach relies on the possible reasons for the exoneration of the employer: they can be exempted from liability for force majeure, third-party action, or the actions of the injured party but cannot be released from liability for errors in employee selection, supervising, giving instructions to the employee, and organizing the employee's work.[43] The fault of the employer may be, therefore, either in their mistake in appointing a concrete employee to a given work task (*culpa in eligendo*), giving them the proper instructions (*culpa in instruendo*), or in failing to supervise them properly (*culpa in vigilando*). None of them is relevant in establishing the employer's liability.[44]

The third interpretation understands the employer's liability as strict, which transforms into fault-based. The employer is liable instead of the employee, and they can be released from liability by proving that the employee acted properly; hence, this is not a pure form of strict liability. This understanding puts emphasis on the link between the fault of the employee and the strict liability of the employer: if there is no fault of the employee, the liability of the employer does not emerge either; hence, it is actually fault-based.[45]

Finally, Cvetković singles out Cigoj's understanding as the fourth possible interpretation. Cigoj claims that the liability of the employer is strict for establishing employment relationship, which is enabling the employee to cause damage; however, the liability for the caused damage is fault-based. The employer hence cannot be released from liability if they prove that there was no error in the selection of the employee, in supervising or giving instructions to them.[46]

Cvetković concludes that the liability of the employer for the damage caused by the employee to a third party at work or in relation to it is somewhere between strict and fault-based liability, whereby the boundaries between them are not sharp. His opinion is that the flaws in different interpretations can be traced back to identifying the quality of the conduct of the employee in their fault and

41 See, for instance, the Judgment of the Appellate court in Niš, No Gž. 1960/2015 of 24 May 2015, Judgment of the Appellate Court in Belgrade, No Gž 12342/2010 of 11 April 2012, and the Judgement of the Supreme Court of Serbia, No Rev. 1900/2005 of 5 October 2005. Cited in Cvetković, 2018, p. 480, fn. 27.

42 Cvetković 2018. 480.

43 In the recent Serbian literature, the most prominent representative of this interpretation is Marija Karanikić Mirić. See Karanikić Mirić 2019. 11, 65.

44 Karanikić Mirić 2020. 162–163.

45 This concept of liability is represented by Antić and Radišić. See Antić 2008. 479 and Radišić 2004. 242. Both cited in Cvetković 2018. 481.

46 Cigoj in Perović 1995. 393–394, cited in Cvetković 2018. 481.

interpreting the rule of Art. 170, Sec. 1. of the Obligations Act as envisaging a presumption of the fault of the employee. He argues that the quality of the conduct of the employee should be rather discussed on the terms of unlawfulness.[47]

4. Exemption of the Employer from Liability

The employer can be exempted from liability on different grounds. First, the employer can rebut the presumption that the employee did not act with professional diligence required in the given case. The employer can achieve that by proving that the conduct of the employee met the standard of professional diligence, that is, the employee behaved as they should have.[48] The analysis of the case law conducted by Karanikić Mirić offers instructive cases when the employer's rebuttal of the presumption of the employee's fault was successful and when it was not. In one of the cases, for example, the court held that the school cannot be held liable for damage caused to a pupil if the teacher supervised the pupil as they were required to and the pupil hurt themselves disregarding the teacher's direct verbal prohibitions.[49] Instructive is in this context, on the other hand, that the case already referred to an earlier one in which the employee caused damage to a third party by sending inappropriate SMS messages from the company cell phone. The defendant employer claimed that the employee violated the internal rules and code of ethics of the company, for which he was fired. However, this argument not only that did not support the employer's position but weakened it actually. It only supported the court's conclusion that the employer should be held liable for damage, since, on the one hand, the employer admitted the fault of the employee, while, on the other, the employer's own fault has no legal relevance.[50]

The other means by which the employer can try to exclude their liability is by proving that the damage was not caused at work or in a work-related situation, that is, by proving that the concrete case of causing damage is not in the required connexity with the activity and working processes of the employer.[51] For instance, the courts held, even before the enactment of the Obligations Act, that the employer cannot be held liable for a damage caused by one employee to another one by throwing a stone at them or by attempting to rape them in the workplace.[52] However, any clear connexity with the workplace qualifies the damage caused in relation to work. Karanikić Mirić gives an instructive hypothetical example:

47 Cvetković 2018. 488.
48 Karanikić Mirić 2020. 168.
49 Judgment of the Appellate Court of Novi Sad, No Gž. 4061/2010 of 14 September 2011. Cited from Karanikić Mirić 2020. 168, fn. 30.
50 See in more detail: Karanikić Mirić 2020. 170.
51 Id. 171.
52 Perović 1995. 390.

the employee abuses the uniform of a security personnel, obtained from the employer, after working hours, in a private interaction with third parties, and causes damage to it.[53] In such a case, the employer could not successfully claim in court that the damage was not caused in relation to work.

In addition, the employer may be exempted from liability if any of the general exculpatory grounds exists. Kamarković properly notes that both the grounds of excluding fault-based liability (such as rightful defence, state of emergency, rightful self-help, and the injured party's consent) and force majeure (which excludes both fault-based and strict liability) may be legitimate grounds for waiving the employer's liability.[54] However, it may be added that it follows from the qualification of the employer's liability as strict liability that the exemption of the employer from liability on the grounds relating to fault are of legal relevance only if they are in relation with the conduct of the employee.

A balancing of the interests of the parties represents the rule on the recourse right against the employee and on the direct liability of the employee towards the injured party. The Obligations Act prescribes a recourse right of any person, against the employee, who actually paid damages to the injured party, provided the employee caused damage by intent or by gross negligence.[55] This will usually be the employer, but the rule is framed sufficiently wide so as to comprise other persons who may appear as the ones compensating the injured party, such as the insurer, for instance, in case of liability insurance. The same rule on the recourse is envisaged by the Employment Act as well, but it restricts the personal scope of the claimant to the employer.[56] The Obligations Act, however, prescribes that the recourse right may be enforced in six months from the day when the damages have been paid to the third party.[57] In addition, the injured party may request compensation directly from the employee provided they caused the damage intentionally.[58] This rule gains its relevance if the employer, regularly a legal person, ceases to exist or becomes insolvent. The conditions of direct claim against an employer are strict: the damage must be caused intentionally – a gross negligence does not suffice. This is a unique case in the Serbian tort law, when in establishing the liability gross negligence is not equated to the consequences of intentional torts; hence, it is an exemption from the long-standing principle of *culpa lata dolo aequiparatur*.[59] These special forms of liability relationships do not relativize the position of the employer. As Karanikić Mirić properly concludes, the vicarious liability of the employer for the damage caused by the

53 Karanikić Mirić 2020. 172.
54 Karamarković 2004. 145–146.
55 Obligations Act, Art. 171, Sec. 2.
56 Employment Act, Art. 163, Sec. 7.
57 Obligations Act, Art. 171, Sec. 3.
58 Id. Art. 170, Sec. 2.
59 Karanikić Mirić 2009. 174–175.

employee to a third party is not subsidiary or supplementary – the ground of an employer's liability is not that the employee cannot be liable.[60] The liability of the employer is primary.

5. Liability of a Legal Person for Damage Caused by Its Organ

Following the rules on the liability of companies and other employers regarding a damage caused by their employees to third parties at work or in relation to it, the Obligations Act regulates another form of liability: the liability of a legal person for the damage caused by its organs to third parties. Unless otherwise provided by law, the legal person has a recourse claim against the person who actually caused the damage in case they acted intentionally or with gross negligence. This right expires in six months from the day when the legal person paid damages to the third party.[61] The logical nexus between these rules and the aforementioned ones is that there are frequent cases in which the employee performs at the same time the functions of the organ of the legal person/employer. In such cases, the rules of the Obligations Act pertaining to the liability of a legal person for the damage caused to third parties by its organs may also apply.

In this case, the question arises as to whether it is a liability for another one's acts (vicarious liability) at all or a liability for one's own actions, because all legal persons necessarily act through their organs. The organs of a legal person are not separate legal entities. They are considered an integral part of the legal person in whose name and behalf they act.[62] Therefore, it seems to have more merits as a conclusion that it is rather a case of liability for one's own acts than a form of vicarious liability.[63] The Obligations Act does not require the existence of fault either of the persons conducting the function of the organ of the legal person or that of the legal person itself. For this reason, this form of liability is considered strict liability in recent literature.[64] There are, however, other opinions as well. Đurđević, for instance, ties the liability of the legal person to the fault of the natural person who performs the function of the organ. However, he also emphasizes that in the case of a legal person's liability for damage caused by its organ the Obligations Act does not specify that a legal person can be released from liability by proving that there is no fault of the organ.[65] However, if the legal person proves that the damage was caused by force majeure or by the

60 Karanikić Mirić 2020. 168.
61 Obligations Act, Art. 172.
62 Karanikić Mirić 2019. 65.
63 Đurđević 2006. 138; Karanikić Mirić 2019. 65.
64 See for instance Karanikić Mirić 2019. 66.
65 Đurđević 2006. 140.

actions of the injured party or a third party, it can be released from liability.[66] This additionally supports the conclusion that the liability of a legal person for the damage caused by its organ to a third party is a form of strict liability.

Anyway, the conclusion stands that whereas in relation to the liability of the employer for the damage caused by an employee to a third party at work or in relation to it the employer may exclude their liability by proving that the employee acted as they were required to, the Obligations Act does not imply in any way that the fault of the person conducting the functions of the organ could be of any relevance in establishing the liability of the legal persons for the damage caused to third parties by its organs. However, a research conducted by Karanikić Mirić revealed that the Serbian courts require that the actions of the organ are qualified as unlawful or irregular in order to establish the liability of the legal person.[67]

The legal person will not be held liable for damage caused by a person who does not perform the role of its organ (for instance, a person pretending to act as the director of a company) or causes damage outside that role (for example, the managing director during their vacation causes damage to a pedestrian with a car).[68] As for the basis of liability, the legal person is liable for the damage caused by its organ regardless of its own fault. This applies to the case when damage is not caused by a hazardous thing or activity. If such is the case, the general rules of strict liability apply.[69]

The mentioned rules of the Obligations Act are framed so that they comprise both legal persons of public law and those of private law.

In relation to legal persons of public law, that is, state organs and organizations, two other statutes should also be examined that regulate the rights and duties of civil servants and other employees of the state. One is the Act on Civil Servants,[70] which contains special rules on the liability of the state for the damage caused by civil servants to third parties.[71] It prescribes the liability of the Republic of Serbia for the damage caused by civil servants to third parties by conducting their work in an unlawful or irregular manner. The Act specifies further that the injured party can claim damages directly from the civil servant if they caused damage intentionally. Finally, the Republic of Serbia has a recourse claim against the civil servant for the damages paid to the injured party provided the servant

66 Id. 141.

67 See, for instance, the Judgment of the Serbian Supreme Court, No Rev. 3927/2001; Judgment of the District Court of Valjevo; No Gž-551/2001, Judgment of the District Court of Zrenjanin, No Gž-1518/1995, and Judgment of the Serbian Supreme Court, No 5266/2000. Cited from Karanikić Mirić 2019. 66, fn. 178.

68 Nikolić 2016. 104.

69 Id. 105; Radišić 2008. 243–244; Salma 2009. 567–568.

70 Zakon o državnim službenicima [Act on Civil Servants], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020, and 142/2022.

71 Act on Civil Servants, Art. 124, Secs. 1–3.

caused damage intentionally or with gross negligence. These rules pertain only to civil servants employed by organs and bodies of the Republic of Serbia. The rights and obligations of civil servants and other employees of the bodies and organs of the autonomous provinces and local self-governments are regulated in another act.[72] It also contains explicit rules on employer's liability for the damage caused by an employee to a third party, but they literally correspond to the ones specified by the Act on Civil Servants.[73] The rules of both acts pertaining to persons employed as civil servants are the same as the rules on the liability of the employer specified in the Obligations Act. The only meaningful difference is that they both emphasize the requirement that the damage must stem from the unlawful or irregular conduct of the employee, whereby the Obligations Act does not specify such requirement explicitly.

The other portion of the scope of the application of the rules of the Obligations Act on the liability of the legal persons is the legal persons of private law, especially business organizations. Similarly to civil servants and state employees, in the case of employees that at the same time perform the function of the organ of a company (for instance, managing director employed based on an employment contract), both the regime of employer's liability for damage caused by an employee to a third party (Art. 170) and the regime of the liability of the legal person for the acts of its organ (Art. 172) may apply.

Not all organs of the company are capable of causing damage to third parties. Đurđević concludes that these can only be organs representing the company in relation to third parties. Organs conducting management tasks without direct contact with third parties, just as supervisory bodies, are incapable of causing damage to third parties.[74] The liability is limited only to damage caused to a third party. Đurđević claims that the concept of a third party entitled to compensation is not defined by the Obligations Act, but, certainly, it cannot be any person employed in the company. If the organ of a legal person causes damage to its own employees, the Employment Act applies.[75] Partners in general or limited partnerships, members of a limited liability company, or shareholders could not be considered as third parties in this context. If the organ of the company causes damage to any of these persons, they exercise their rights towards the company based on the rules of the Companies Act.[76]

72 Zakon o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave [Act on the Employees of the Autonomous Provinces and Local Self-governments], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos 21/2016, 113/2017, 95/2018, 114/2021, 113/2017, 95/2018, 86/2019, 157/2020, and 123/2021.

73 Act on the Employees of the Autonomous Provinces and Local Self-governments, Art. 155, Secs. 1–3.

74 Đurđević 2006. 139.

75 Id. 139.

76 Id. 139–140.

6. Concluding Remarks

Causing damage in the context of employment relationship can lead to three types of legal relationship in the Serbian law. The first is when the employee causes damage to the employer, the second when the employer causes damage to the employee, and the third when the employee causes damage to a third party at work or in relation to it. The first two are cases of liability of one's own acts, while the last one is a case of liability for others', acts (vicarious liability). The first one is regulated by the Employment Act in more detail, and hence the general rules of tort law of the Obligations Act apply subsidiarily, that is, only in relation to issues not regulated by the Employment Act. The second type of legal relationship, that is, the one emerging from causing damage by the employer to the employee, is not regulated specifically in the Employment Act – it simply refers to the general rules of tort law and internal acts of the employer. In this case, therefore, the rules of the Obligations Act apply entirely. The third possible relationship, the employer's vicarious liability, is again not regulated in the Employment Act (except for one rule governing the employer's recourse right), but, in contrast to the previous case, the Obligations Act contains specific rules.

The Obligations Act prescribes that the employer is liable for a damage caused by the employee to a third party at work or in relation to work, unless proven that the employee acted as they were required to act. As the research conducted by Cvetković demonstrated, there are four interpretations of this rule in the doctrine. Although the Act clearly makes the fault of the employee legally relevant, the majority opinion is that the liability of the employer is strict. As Karanikić Mirić properly stated, in the assessment whether a given case of liability for damage is to be considered fault-based or strict liability, the fault of the liable person, and not of the tortfeasor, should be taken into account. Since in this case the employer cannot exclude the liability proving that their own fault does not exist, a proper conclusion is that the liability of the employer is strict. The rationale for the employer's strict liability lies in the fact that they benefit from the activities of the employee, hence they should be the economic risk of emergence of damage in relation to work operations. In contrast, the employee's fault is indeed legally relevant. Thus, from the perspective of the injured party, this sort of liability functions as fault-based liability: the successful rebuttal of the presumption of the fault of the employee leads to the exoneration of the liability of the employer. Someone's fault is relevant in establishing the liability: whether it is the fault of the employer or of the employee seems less relevant in the eyes of the injured party. The relevance of the employee's fault is even more strengthened by the rule of the Obligations Act specifying the direct liability of the employee if they caused damage intentionally. However, by the explicit norm of the Obligations Act, the

liability of the employer is always strict, and general rules of strict liability apply if the damage was caused by a so-called hazardous thing or activity.

A balancing of the interests of the employer and the employee can be seen in the rule envisaging a recourse right of the employer against the employee. However, the recourse right is conditioned on a qualified fault of the employee: intent or gross negligence. The limitation of the employer's recourse right is justified on the grounds that the employer is required to bear the regular risks of conducting an economic activity, to which causing damage by an employee acting with ordinary negligence certainly belongs. In addition, this recourse right is further restricted by a short time limit: the recourse right becomes time-barred after six months.

Although a distinct legal institute, closely related is the liability of legal persons for the damage caused by their organs to third parties, also explicitly regulated by the Obligations Act, subsequently to the rules on employer's vicarious liability for the damage caused to third parties by the employees. As Karanikić Mirić properly concluded, it has more grounds to consider this form of liability rather as a liability for one's owns acts than as a liability for another one's conduct, since the natural persons acting as organs only express the will of the legal person. In addition, this form of liability is clearly devised as objective, though, as the research of Karanikić Mirić demonstrated, the courts determine whether the organ acted unlawfully or in an improper manner. The liability of the employer for the damage caused by an employee to a third party overlaps with the scope of the application of the rules on the liability of a legal person for the damage caused by its organs to a third party if the employer has the status of legal person and the employee who caused the damage was at same time an organ of the legal person and caused it in the course of performing the function of the organ.

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