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General Framework of Fault-based Liability and Reasonability of Its Modification upon Covering of Injuries, Stemming from Labour-Law Relationship

The Labour Code of Georgia does not provide for some special rule regarding damages in labour law context. The procedure of coverage of injuries arising from employment relationships is regulated by Georgia law. The article discusses specificities of fault upon coverage of injuries arising from employment relationships. In general, what is typical for fault, as one of the grounds of liability in labour disputes. Specifically, against a backdrop of subordination principle, modification of fault in employment relationships often results in different legal consequences in the context of damages.
Key Words: Legal Status of Employee, Vicarious liability, Contributory negligence, Shifting the burden of proof, Source of abnormal hazard.

1. Introduction

When there exists the principle of subordination it is impossible for the regulation of the coverage of injuries stemming from employment relationships to fall only within the standard framework of contractual or tort liability. When researching the problem of coverage of workplace injuries incurred during the working process, particular attention is accorded to the question - whether or not it is adequate to apply the general principle of fault-based liability upon occurrence of such injury and whether or not there exist specific circumstances, in the light of which circumstances it would be reasonable to justify the relevance of application of alternative or mixed schemes of liability to strike balance between the interests of both the employees and the employers.

2. Fault as a Precondition of Liability

According to Article 44[1] of the Labour Code of Georgia (LLG)[2] the question of coverage of injury stemming from labour-law relationships falls within the scope of regulation of the Civil Code of Georgia (CCG).[3]

CCG, like German Civil Code (BGB)[4] is traditionally based on the principle of fault-based liability.[5]

However the second sentence of Section 276 of the BGB provides for an exemption from this general rule in terms of provision for a higher or lower degree of liability. Similar regulation is also provided by Article 395

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1 As per Article 1 II of the LLG the employment relationship related problems, that are not regulated by this Law or some other special law, are regulated by provisions of the Civil Code of Georgia.

2 The Labour Code of Georgia, SSM (Legislative Herald of Georgia), 75, 27/12/2010 (in Georgian).

3 Sakartvelos Parlamentis Utskebani (Reports of the Parliament of Georgia), Legislative Appendix, 1997, №31 (in Georgian).

4 German Civil Code, <https://www.gesetze-im-internet.de/englisch_bgb/>, [24.07.2017].

5 Under Section 276 I (1) of the BGB, also as under Article 395 I of the CCG, as a general rule, the basis of liability is an intentional or negligent action of a person. *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 153 (in Georgian).

I of the CCG.[6] This principle applies to cases of both contractual and tort liability,[7] however in tort law the scope of application of the principle of strict liability is wider owing to the scope of its regulation.[8]

According to CCG the essence of the elements of fault is different from the meaning of similar terms of intent and negligence, applied in criminal law. The foregoing is particularly striking with regard to the concept of negligence.[9] The degree of violation of reasonable case, characteristic for civil circulation, maybe extremely high (gross negligence) or relatively low (ordinary negligence). Negligence is the most common form of fault in civil law.[10] The same can be said is the case of coverage of injury stemming from labour-law relationships.

2.1 The Scheme of "Pure" Fault-based Liability in Employment Relationships

In the context of labour-law relationships the grounds of liability may become injury, incurred as a result of breach of a pre-contractual obligation or an employment contract, also the liability for the breach of a tort obligation.

2.1.1 Liability for Breach of Pre-contractual Obligations

The solution of the question of liability in the case of breach of a pre-contractual obligation differs from a legal system to legal system. While German law relies on *culpa in contrahendo* principle,[11] the French law regulates the problem of injury coverage in the case of breach of pre-contractual relationship on the basis of tort law;[12] however, it can be said, that in both cases the basis of liability is the principle of good faith, which means not only the fact that the parties are required to provide information to each other, but also that they are obliged not to impair the interests of the other party.[13]

Article 317 III of the CCG provides for the imputation of liability for the breach of pre-contractual obligation in the case of faulty action of the other party. Worth mentioning is the implication of the concept of "fault" upon the breach of a pre-contractual obligation. It should be mentioned, that upon breach of a pre-contractual obligation fault can be defined as an action which breaches the provision on duty to exercise reasonable care. A plaintiff is not required to prove an intent. Bad faith action and failure to exercise reasonable care is regarded as a fault.[14]

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6 See: Article 395 I of the CCG, which, unlike parallel provision of the BGB does not directly refer to the application of higher or lower degree of liability, but the stipulation "unless otherwise envisaged" means the admissibility of an exemption from general rule.

7 See: Article 992 of the CCG.

8 With regard to wider application of the principle of no-fault liability See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 237.

9 If in the definition of an intent the CCG relies on the concept elaborated in criminal law (knowledge of the outcome and desire with understanding of unlawfulness), it makes certain amendments to the concept of negligence. The concept of negligence does not depend on the degree of care, that may be demonstrated by an individually liable person. Negligence in civil law is determined according to impartial scope of claim. See *Zoidze B.,* Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 384 (in Georgian).

10 See: *Zoidze B.,* Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 384 (*in Georgian*).

11 *Culpa in Contrahendo* - was developed by German scholar Jhering, which can be defined as an interstice between contractual and tort law regulating pre-contractual relationship. See: *Sturua N.,* Compensation of Damage in the Case of Breach of a Pre-contractual Obligation in Labour Law, Employment Law (Collection of Articles), I, Tbilisi, 2011, 237 (in Georgian).

12 According to French law, for the imposition of liability in the case of breach of a pre-contractual obligation all the preconditions necessary for the application of tort liability should be present, amongst them, the existence of fault. The fault should be essential and unconditional. See: *Sturua N.,* Reimbursement of damage caused by breach of a pre-contractual obligation in Employment Law, Employment Law (Collection of Articles), I, Tbilisi, 2011, 272 (*in Georgian*).

13 See: *Sturua N.,* Reimbursement of Damage Caused by Breach of a Pre-contractual Obligation in Employment Law, Employment Law (Collection of Articles), I, Tbilisi, 2011, 237 (in Georgian).

14 *Nedzel N.E.,* A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability, Tulane European and Civil Law, Vol. 12, 1997, 6, <http://heinonline.org>, [20.06.2017].

However, some authors regard a party to a contract, which is liable to compensate damages due to breach of pre-contractual obligation as a bad faith party.[15] What is more, some believe, that in the case, envisaged by Article 317 III of the CCG, a "faulty action" is equal to "bad faith action".[16]

There is no exact analogue of Article 317 III of the CCG in BGB. Section 311 of the BGB provides for liability for a breach of pre-contractual obligation, however with regard to fault for the breach of obligation BGB makes reference to Sections 276-278.[17]

For the breach of obligation envisaged by Article 317 of the CCG, the damages mainly cover the interest related to infringement and legal trust. In labour law, worth mentioning is the question of discrimination in the light of breach of pre-contractual obligation. Despite the absence of contractual binding the persons engaged in negotiation are regarded as parties. Initiation of negotiations aiming at the execution of a contract gives rise to relationship based on contractual trust.[18] Respectively, in the case of discrimination during pre-contractual phase, an aggrieved party may claim compensation for property damage in accordance with Article 294 I of the CCG,[19] and in the case of violation of personal rights - compensation can be claimed both for property and non-property damage under Article 18 VI of the CCG. In both cases, the precondition for the success of a claim is good justification of faulty action.[20]

According to general principle prescribed by the Code of Civil Procedure of Georgia, in the case of a dispute for compensation of damages caused by a discriminatory question, the burden of proof is vested with the aggrieved party as the LCG does not provide for a different procedure, what places a candidate in an unfavourable position in the light of specificities of employment relationships.[21]

2.1.2 Liability for Breach of Contractual Obligations

Under BGB an employer is liable for injury incurred to an employee in the course of performance of work, only when breaches obligation intentionally or by negligence, which obligation implies the provision with safe working environment, equipment and working materials, also when he does not undertake preventive measures to protect the health and life of an employee. The foregoing is a derivative obligation of an employer, which stems from an employment contract and is regulated by Section 618 of the BGB.

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15 Comp. *Chanturia L.,* Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 51 (*in Georgian*). Comp. Also *Ioseliani A.,* Principle of Good Faith in Contract Law (Comparative Law Study), Georgian law Review, special edition, Tbilisi, 2007, 40 (in Georgian), where the author directly states, that "it would have been more reasonable for Article 317 III of the CCG to mention the concept of "bad faith action" instead of the vague one - "faulty action"".

16 See: *Ioseliani A.,* Principle of Good Faith in Contract Law (Comparative Law Study), Georgian law Review, special edition, Tbilisi, 2007, 40 (in Georgian).

17 *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 198 (in Georgian).

18 See: *Kereselidze T.,* Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 221 (in Georgian).

19 If a candidate was rejected due to her pregnancy and she hoped that she would get that job because of her qualification, experience and best compatibility with the announced vacancy as compared with the other candidates and owing to the foregoing she rejected an alternative proposal, the aggrieved party is entitled to demand the compensation of property damage incurred owing to discriminatory circumstances, what according to German literature, is admissible within the limits of the amount of wages before the first hypothetic termination of employment contract. See: *Kereselidze T.,* Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 224 et seq. (in Georgian).

20 See: Articles 18 VI, 413 I of the CCG.

21 Comp. *Kereselidze T.,* Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 221 (in Georgian). "In Germany the content of Article 22 of the Law on Equal Treatment evidences, that if in the case of a dispute a party proves sufficient grounds to doubt discriminatory circumstance, the other party will be vested with the burden to prove the absence of inconsistency with non-discrimination provisions. The foregoing simplifies referral to a court of law and proof of the statement of claim for a discriminated person."

Injury incurring to an employee by an employer is subject to requirements stemming from the breach of a contract ($280).[22] The provisions on tort liability may also apply. Insofar as injury is incurred within the framework of company activities delegated upon an employer, the account should be taken of the fact, that the organization of company activities has a major impact on the risk of employee's liability.[23]

In the case of breach of duty, stemming from an employment contract, the principle of fault-based liability applies as a general rule. Specifically, except for the termination of an employment contract on grounds, envisaged by law, an employee may demand his reinstatement in a job and reimbursement of forced idleness caused by loss of work.[24] In the case of satisfaction of an action, grounds for claiming damages is the idleness of an aggrieved party by fault of an employer.[25]

2.1.3 Liability for Breach of Tort Obligation

The grounds for tort liability in labour-law relationships is the preach of statutory rule,[26] or strict liability owing to increased risk, Article 992 et seq. of the CCG do not provide for special regulation of fault insofar as statutory obligations are regulated by Article 992 of the Civil Code and other grounds of claim under tort law, in such cases the provisions regulating obligations, stemming from a contract, additionally apply - as Article 992 et seq. of the Civil Code do not provide for otherwise regulation.[27] Hence in the case of fault, the first paragraph of Article 395 may apply, under which paragraph a person inflicting damage is liable both for intentional and negligent behaviour.[28]

Apart from being a contractual obligation, provision with safe working environment and conditions is a statutory duty of an employer. This fundamental rule, related to the life and health of an employee, is contained in more than one public acts,[29] as this duty has already become a part of public law, which can be presumed as a standard, accurately describing the breach of contractual duty according to Section 618 I of the BGB.

Apart from contractual liability, an employer is required to create safe working environment and protect employees and consumers against risks again under the tort law.

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22 *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

23 Ibid.

24 According to the interpretation of the Tbilisi Appeals Court, "Forced idleness is also the situation, when as a result of unlawful termination of employment contract an employee is deprived of the possibility to perform his/her contractual duties as, at the same time, there exists the will of an employee to perform his/her contractual duties and receive respective remuneration. Consequently, the period from unlawful termination of an employment contract until the reinstatement to job is regarded as forced idleness, caused by fault of the employer. The Appeals Court also explained that invalidation of the grounds of an employment contract, in the light of consequences, results in the restitution of the situation existing before the invalidation of the contract and compensation of damages incurred to an employee by an employer through unlawful dismissal thereof. Respectively, in the light of Articles 408 and 411 of the LCG reinstatement to a job and compensation for forced idleness are the legal consequences of unlawful actions of an employer." See: Ruling of the Supreme Court of Georgia on October 10, 2014 on Case №AS-762-730-2014 (in Georgian).

25 See: LCG, Article 32.I.

26 In tort law a breach of statutory rules provides for the application of the principle of strict liability instead of the principle of fault-based one. See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 237.

27 *Luttringhaus P.,* Tort Law, Tbilisi, 2011, 18 (in Georgian).

28 To assess the fault of a person it is necessary to undertake an objective test, where the general standard of reference is a neutral, reasonable person. In private law, unlike criminal law, fault is not defined individually, from the viewpoint of a person inflicting damage as in the case of an injury, the tort law is not about punishing someone, but rather the compensation of injury. Also important is the social goal, meaning acting in compliance with adequate behavioural standard dominating in the society and the one who neglects this standard pays for this breach. See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 221.

29 Health and Safety at work Act, §3, <http://www.legislation.govt.nz>, [20.07.2017].

According to BGB a breach of a statutory duty becomes grounds for compensation of injury only when an aggrieved party belongs to defined class, protected by law.[30] For example in the case of *Hartley v. Mayoh & Co* a fireman was killed by electrocution while fighting a fire at the factory. The court of law has not satisfied the action of fireman's widow against the owner of the factory, which action was based on the breach of safety rules on the part of the owner. The court held that such safety rules aim at the protection of safety of the employees and not that of the firemen. Hence, the widow's action, which was based on the breach of statutory rule, was dismissed, however the court of law satisfied the tort action, based on negligence. It is also important for the breached interest of a person to fall within the scope of protective rule.[31]

As established by German judicial practice, if a defendant breached a statutory rule, and this rule prescribed a special standard of conduct,[32] it is presumed, that the defendant acted negligently. In his turn, the defendant can rebut this presumption by proving that he did not act negligently.[33]

In its Recommendations the Supreme Court of Georgia considers neglect or inadequate performance of the requirements of labour law, labour protection rules, regulations and other normative acts as a faulty behaviour of a company. Respectively, the employer is to fully cover incurred injury.[34]

Injury inflicted to life and health of an employee in the course of employment is regarded as a breach of absolute rights and thus, the action, as a general rule, is regarded as a tort. Consequently, the person, who committed the action, is required to prove the lawfulness of his actions.[35] This legal relationship is still a liability arising through infliction of injury (tort), insofar as a liability is a consequence of breach of absolute civil rights, it is of non-contractual nature and aims at compensation of injury inflicted on non-property wealth (life and health). Based on the foregoing all the principles, distinctive of a tort liability applies to these legal relationships and it is necessary for a causal link to exist between the fault of the perpetrator and inflicted injury and action - grounds prescribed for the origin thereof.

Coverage of psychological injuries also fall within the scope of tort liability. In some systems the obligation to compensate exists only when the psychological injury is a result of physical injury. Under the legislation of some states the precondition for compensation is for the psychological injury to stem from the same accident as the physical injury.[36] According to BGB, as a general rule, only the injured person is entitled to claim compensations. There are only two exemptions from this rule, that are prescribed by Sections 844-845. As for the shock suffered by a relative due to the fact, that he/she became the witness or unexpectedly became known of the injury or death of a person, this exemption is created by judicial practice.

The Majority of the USA states denies recovery for stress-induced psychological injuries unless the injuries are caused by extraordinary or unusual stress.[37] Barriers for compensation of psychological injuries are necessary to prevent sham actions. For example, in the case of *Bedini v. Frost* the Vermont Supreme Court imposed

30 See: Section 823 II of BGB.

31 Comp.: In French tort law violation of a written legal rule does not additionally require the proof of fault, the breach of interests, protected by law is quite sufficient. The argument is that the purpose of statutory rules is the protection of the persons in general, i.e. the class of persons is not specified, respectively it applied to any person. Statutory duties are absolute ones. However, this absoluteness is limited by the requirement to prove causal link. See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 245.

32 *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 245.

33 Ibid.

34 See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 88-99, <http://www.supremecourt.ge>, [20.07.2017] (in Georgian).

35 *Luttringhaus P.,* Tort Law, Tbilisi, 2011, 16 (in Georgian).

36 *Janutis R.M.,* The New Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009, 39, <http://heinonline.org>, [20.06.2017].

37 Extraordinary or unusual stress is a stress that is of a greater magnitude than the ordinary stress distinctive for the workplace in general. In the case of compensation of a psychological injury, unlike ordinary physical injury, problematic is the difficulty with diagnosing. See: *Janutis R.M.,* The new Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009, 41, <http://heinonline.org>, [20.06.2017].

a heightened standard of proof on workers seeking benefits for psychological injuries. The court concluded that such a heightened standard was reasonable because of the greater uncertainty in the diagnosis of such injuries.[38] There is another, no less bitter problem along with diagnosing: Is the psychological injury always caused by employment-based stress? This question is particularly pressing with regard to psychological stress developed under the influence of permanent employment-based stress, than injury caused by unexpected stress factor. As a general rule, the risk of suffering a psychological injury is commonly borne by an employee on a daily basis unlike the system of compensation of employees, where the employee never bears a risk caused by health injury at a workplace, even in everyday and ordinary situation.

2.2 Contributory Negligence - Apportionment of Liability

Contributory negligence is an exemption from the general scheme of fault-based liability insofar as it, as a general rule,[39] causes the distribution of li ability pro rata to the fault of the person, causing injury.[40] Article 415 of the CCG, like Section 254 of the BGB concerns cases when full compensation of injury is limited.

The implication of the principle of contributory negligence is mainly manifested in the assumption of risk, however in labour-law relationships the meaning of contributory negligence is somewhat different. For example, this difference, in cases when an injury is inflicted on an employee by an employer, is conditioned by employer's duty to organize company management. The foregoing results in the assumption of liability risks.[41] Under Section 254 of the BGB the principle of contributory negligence applies.

The rule of assumption of liability is not limited to cases, when industrial jeopardy is evident or the risk is increased, respectively, the risk of injury should be assumed both by the employer and the employee, accounting for all the circumstances.[42] However, it should as well be taken into consideration, that the degree of negligence plays an important role in the determination of employee's liability.[43]

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[38] It should be mentioned that in 1980 the Association of American Psychiatrists developed the criteria of accurate diagnosis for those mental disorders, that may develop in the course of employment, See: *Janutis R.M.,* The new Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009,42, <http://heinonline.org>, [20.06.2017].

[39] In Roman Law contributory negligence would deprive an injured party the possibility to claim damages. To this end the account was taken even of ordinary negligence. See: *Shudra T.,* Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 254 (in Georgian).

[40] The doctrines of contributory negligence and assumption of the risk limited workers' ability to recover against their employers in tort suits for workplace injuries. The doctrine of contributory negligence completely barred recovery if the injured worker was determined to have been negligent in any way. Recovery was also barred under the doctrine of assumption of the risk if the worker either reasonably knew or could have been expected to know about the risk of injury. Not surprisingly, most workers were unable to recover damages. Due to this reason the doctrines of contributory negligence and assumption of the risk almost disappeared. See: *Forte G.,* Rethinking America's Approach To Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industy, Cleveland Law Review, 2005-2006, 517, <http://heinonline.org>, [20.06.2017].

[41] *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

[42] *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

[43] According to judicial practice of Federal Labour Court of Germany, employer's claim against a worker for ordinary (light) negligence is fully excluded; in the case of moderate negligence the injury is apportioned according to quotas, taking account of specific circumstances, and in the case of gross negligence, as a general rule, a worker is held fully liable. An exemption from this rule is the situation, when there is a gross incompatibility between the income (wages) of a worker and the risk of injury For details See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 460-461 (in Georgian).

As regards the injury of worker's health at a workplace, unlike workers' compensation system,[44] the court takes account of worker's fault upon the determination of damages.[45]

According to the interpretation of the Supreme Court of Georgia in the case of contributory negligence "The existence of company's fault in the infliction of injury is already the grounds for company liability. The existence of employee's fault is the grounds for the reduction of the amount of recovery and not company's exemption from the liability."[46]

The principle of contributory negligence operates in the case of plaintiff's (injured party's) suits against an independent contractor or a company. If the court finds that both were proximate causes of the plaintiff's injury, the liability will be apportioned pro rata to the fault.[47]

No less important is the principle of contributory negligence with regard to Article 997 of the CCG as well. If the fault of injured party is apparent, this will influence the degree of employer's liability.[48]

2.3 Vicarious Liability

A tort committed by an employee within the scope of his/her employment gives rise to employer's vicarious liability for faulty behaviour of the other person (employee). The rationale underpinning this principle is not fault theory, but rather the fact, that there is a contractual relationship between an employer and an employee, within the framework of which relationship the employer gets benefits from the performance of the employee.[49] At the same time, the latter, being the strong party of employment relationship is in the better position to bear the expenses. It is worth mentioning, that vicarious liability traditionally arises where an employee commits a tort within the scope of his or her employment.[50]

The rationale underpinning employer' liability for faulty behaviour of an employee is the subordination principle, and more specifically - the right to control and direct. This is the difference between employment

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44 The workers' compensation system is based on strict liability system. In the USA it dates back to 1910. According to this system employers assume liability for workplace injuries from the very outset to automatically provide with compensation for workplace injuries, regardless of the employee's fault. According to this very feature workers' compensation system works much like a contract between workers and their employers in which workers give up their rights to sue in return for access to adequate compensation.

45 According to the law of some USA states (e.g. Arizona, Arkansas, Colorado, Georgia, Idaho, Nebraska) if a plaintiff (injured party) is found to be 50% negligent, he recovers nothing, while a plaintiff who is found to be 33.3% negligent recovers 66.6% of his/her damages. See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 665, <http://heinonline.org>, [20.06.2017].

46 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 88-99, <http://www.supremecourt.ge> (in Georgian).

47 See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 669, <http://heinonline.org>, [20.06.2017].

48 The position of the Supreme Court of Georgian with regard to damages for injuries inflicted to employee's health takes account of the degree of company's fault upon determination the amount of payable damages. In the case of contributory negligence the existence of the fault of the injured party becomes grounds for the reduction of damages and not for company's exemption from liability. Essentially the same may apply to vicarious liability as we. Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 89, <http://www.supremecourt.ge>, [20.07.2017] (*in Georgian*).

49 *Neild D.,* Vicarious Liability and the Employment Rationale, 2013, 707, <http://heinonline.org>, [20.06.2017].

50 Determination of the "scope of employment" is very important for the imposition of liability to the employer. In Germany a tort is regard as committed within the scope of employment, when an employee was performing assigned duties when inflicting damage. See: *Markesines B.S., Unberath H.,* The German Law of Torts, A Comparative Treatise, Hart Publishing, Oxford, 2002, 696. In its Recommendations, the Supreme Court of Georgia explains, that "an official duty may be the duty, delegated upon an individual on the basis of a normative act, employment contract or an assignment of the administration." For details See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 89, <http://www.supremecourt.ge>, [20.07.2017] (in Georgian).

relationship and an independent contractor case[51] and contract of hiring work, where a principal is not entitled to control the work to be performed by the contractor.

In its interpretation of Article 997 of the CCG the Tbilisi Appeals Court states, that the precondition for application of this Article, along with general preconditions of imposition of damages, is the employment (or contractual) relationship with the defendant. It is worth mentioning that fault, the existence of which is the mandatory precondition for damages, should be committed by a company employee and not the company itself.[52]

Worth mentioning is German law regulation, which unlike CCG, focuses on employer's fault instead of that of the other person (employee).[53] Employer's fault is manifested in his negligence while selecting the performer of the assignment or inadequate control of the employee's performance. The peculiarity of liability is that the fault of a principal upon selection of a performer and his connection with the occurrence of injury is presumed.[54]

It is of interest whether Article 997 can be applied in the context of contract of hiring work, moreover the wording of Article 997 of the CCG contains the phrase "while performing official duties".[55]

A person, liable to compensate damaged incurred as a result of unlawful action of his worker, can be both legal or natural person (employer).[56] In this case a natural person employer may be a sole entrepreneur. An employer is liable for his/her fault and not for that of some other person.[57] In this case the performance of a worker should be regarded as the performance of the employer himself.[58] It should be mentioned, that BGB uses the term "employee (in the meaning of jobholder)" (Arbeitnehmer). Word-for-word interpretation of this Article and assumption of an employee only as a party to employment relationship would have limited the scope of application of this provision. The scope of application of the Article extends to relationships similar to employment one, which may arise even outside employment relations, e.g., within a family.

In German law the term "employee" implies any person who is hired by another person for the performance of some activity, and the former falls under the influence an "employer" and becomes subordinated thereto to some extent.[59] Typical for these relationship is that the auxiliary person depends on "master's" directions. With such employed persons one faces direction-dependent relationship. An auxiliary cannot be an independently operating company.

For Article 997 to apply the fault of an auxiliary/employee/worker should be evident. Respectively, in cases envisaged by Article 997 of the CCG the burden of proof of non-faultiness of an auxiliary/employee/worker is vested with the employer.[60]

Under Section 831 of the BGB employer's liability is not strict and absolute. He possessed two defences: firstly, he is not liable if he proves that he has exercised reasonable care in the selection of an employee, and in

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51 Independent Contractor.

52 Decision of the Supreme Court of Georgia, December 16, 2013, Case №as-660-627-2013, Available at: <http://prg.supremecourt.ge/DetailViewCivil.aspx> (in Georgian).

53 The wording of Para. 1 of Section 831 of the BGB is as follows: A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised." *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 653 (in Georgian*)*.

54 See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 653 (in Georgian*)*.

55 Comp.: Article 997 of the CCG "A person shall be bound to compensate the harm caused to a third person by his employee's unlawful act when the latter was on duty. The liability shall not accrue if the employee acted without fault."

56 *Akhvlediani Z.*, Law of Obligations, Tbilisi, 1999, 267 (in Georgian).

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid, 27

the procurement of tools and the supervision of the employee. Secondly, he is not liable if the injury would have also been caused if he had taken such reasonable care.[61] Hence, Section 831 implies a negligence liability with reversed burden of proof.[62]

The Courts generally require the employer to act with high level of care which, in fact, causes Section 831 in its application to be close to a rule of strict liability.[63] It should as well be mentioned, that if employer's liability is also established, e.g., the employer hired a worker, who is an alcohol addict and it is typical for him to through things down from scaffold holding, then employer's personal liability will additionally arise, this time, under Article 992 of the CCG.[64]

2.3.1 Main Factors Providing for Employer's Liability

2.3.1.1 Element of Subordination

The element of subordination is one of the major argument for imposition of liability upon an employer.[65] The right to give directions to an employee and control his/her performance stems right from the principle of subordination, what, in its turn, creates grounds for employer's liability.[66] However, the right to control is rather broad in itself, hence the application of control test with regard to certain occupations (doctors, ship captains) is somewhat limited.[67]

There are counterarguments against the application of the element of subordination as the main ground of liability. Specifically, when an employer employs the other person's employee for the performance of his activities, is he able to apply the subordination mechanism to full extent or not? Some jurisdictions, e.g. the UK believe, that the right to dismiss an employee is a part of subordination, what is really impossible in the case of other person's employee.[68] In Germany the resolution of a dispute depends on whether which employer was able to exercise control and give directions.[69] Unlike the foregoing French judicial practice delimits according to the field of activities of the workers and defines the employers' liability on the basis of the foregoing.[70]

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61 *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 448.

62 Ibid.

63 Ibid.

64 *Luttringhaus P.,* Tort Law, Tbilisi, 2011, 27 (in Georgian).

65 The analogue of the principle of subordination in common law system is the so-called a "control text".

66 According to French law an employer is responsible not only for control, but also for incorrect selection of an employee. In the first case the employer would have always been able to prove, that he exerted adequate control however, it is far more difficult to prove anything with regard to selection. See: *Shudra T.,* Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 216 (in Georgian).

67 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 330 (in Georgian).

68 See: *Shudra T.,* Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 218 (in Georgian).

69 See: Section 831 of the BGB.

70 "If a freight forwarder lends its driver to a construction company for some earthwork, the employer's liability depends on whether the injury was incurred through the breach of driving rules or incorrect unloading of the truck body. In the first case the liability is borne by the company, whilst in the second one - by the construction company as it was its personnel who managed and supervised the unloading". See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 327 (in Georgian).

2.3.1.2 Opportunity to Gain the Economic Benefit

One of the grounds of employer's liability is the opportunity to derive economic benefit as a result of employee's performance, however this opinion can be justified with regard to those employers whose activities are related to gaining the economic benefit.[71]

The alternative theory, according to which the better solvency of an employer is the grounds for employee's action, is worth mentioning and rather persuasive right in the context of an employer oriented on gaining benefit.[72]

2.3.1.3 Respondeat Superior Doctrine

It is of interest whether or not the *respondeat superior* Doctrine is the sole grounds against faulty action of an employee and if there is some alternative, which, in its turn, taken by itself will be sufficient for the imposition of liability on the employee.[73] Can negligent entrustment, displayed in the course of selection of an employee, becomes independent ground for *respondeat superior* liability[74] However, focusing on this issue contradicts the theory of comparative fault. In this case the court will be induced to take account of the employer's liability and ignore its proximity cause.

Many of courts believe, that negligent entrustment is just another way to find an employer vicariously liable for an employee's conduct, and regard it as an independent ground for liability based on this argument.[75]

According to comparative negligence doctrine,[76] in the case of a car accident, when there is a plaintiff driver on the one part and a defendant (employed driver) on the other, their faults are compared as proximate causation stems from their behaviour. Insofar as the basis of employer's liability is the employee's fault, the negligence of the employer upon selection of a driver is of no importance within the framework of comparative negligence doctrine.[77] All the aforementioned proves that employee's fault is the basis of employer's vicarious liability; however, employers fault is not taken into consideration in the case of contributory negligence.

No action against an employee is admissible without employee's faulty behaviour. But the only reason of the foregoing is that the absence of employer's liability excludes proximate causation. As regards negligent entrustment, this is the direct basis of employer's fault-based liability. It is not necessary for an employer, who is vicariously liable for faulty behaviour of the employee, to be also at fault himself. His liability is conditioned by the fact, that this happened within the scope of employment,[78] and the conduct of business places him in a

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71 *Qui* sentit commodum debet sentire et onus – "He who derives a benefit ought also to bear a burden." Cited from: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 335 (in Georgian).

72 See: *Shudra T.,* Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 223 (in Georgian).

73 *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 665, <http://heinonline.org>, [20.06.2017].

74 Ibid.

75 Basis of responsibility is the owner's own negligence in permitting his motor vehicle to become a dangerous instrumentality by putting it into a driver's control with knowledge of the potential danger existing by reason of the incompetence or reckless nature of the driver. See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 665, <http://heinonline.org>, [20.06.2017].

76 Comparative Negligence Doctrine.

77 See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 667, <http://heinonline.org>, [20.06.2017].

78 According to the interpretation of the Supreme Court of Canada in the case of Vazleys v. Curry, insofar as the employer created the risk, enforced by the employee, it will be fair for the employer to pay damages incurred as a result of realization of the risk. Comp.: *Shudra T.,* Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 221 (in Georgian).

more favourable condition as compared with the employee.[79] If compared with fault for negligent entrustment, here the focus of the claim is the fault of the employer.[80]

2.3.2 Legal Status of an Employee

An employee does not mean only a person employed within the frame of employment relationship. The term has broader meaning for the purposes of Article 997 of the CCG. The persons working in a household are also regarded as employees owing to the possibility to give them directions and control their performance. It is of interest whether which criteria are taken into consideration for the determination of the status of an employee in cases, when the scope of application of control test is minimised. In this respect mentioned should be made of the category of highly-qualified workers, who are more like contractors owing to high level of independence demonstrated thereby in the course of performance of their activities, however it is the employer who makes decision about their leave, working schedule. The principle of subordination is revealed in this manner in relationships like that.[81]

This category of employees does not include the sole entrepreneurs, who personally decide upon the course of their performance even in the case of fulfilment of detailed assignment of an employer.

2.3.3. Principal's Non-delegable Duty

Insofar as the existence of the element of subordination is one of main factors of delimitation between the legal statuses of a contractor and an employer. Organizational independence and ability to perform own activities independently and without directions makes a contractor liable for own faulty behaviour. However, exempted from this rule is employer's non-delegable duty, which excludes contractor's liability.

The context of non-delegable duty allows for the employer to be held liable for injury inflicted by an independent contractor, similar to compensation of injury inflicted by an employee. The situation is different to the extent that an independent contract does not fall within the scope of the concept of an employee.

Given to its nature, non-delegable duty cannot be assigned to any other person. In the case of *Lewis v. British Columbia*[82] the Canadian Supreme Court held liable the Ministry of Transportation and highways for injury inflicted by contractor company, engaged to remove rocks from a cliff bordering a highway. The work was done negligently and one of the remaining rocks fell and killed a passing motorist. Because the work was done by contractor company and not by the Ministry employees, the court held that the Ministry was not vicariously liable. The court regarded repair works conducted to the highway as non-delegable duty of the Ministry and respectively considered the action as a negligence on the part of the Ministry regardless the fact, that the works were done by an independent contract and not the employee. The main rationale of the court underpinning the imposition of non-delegable duty was that Ministry derived its powers to repair the road from statute and the non-delegable duty arose from the statutory framework.[83]

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79 See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 668, <http://heinonline.org>, [20.06.2017].

80 The same approach is taken in the case of negligent entrustment, for breach of duty to adequate care, proof of employer's fault results in his direct and vicarious liability. For details See: *Burns J.J.,* Respondeat Superior as an Affarmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 668, <http://heinonline.org>, [20.06.2017].

81 *Shvelidze Z.,* Characteristics of Legal Status of Employee According to the Labour Code of Georgia, Employment Law (collection of articles), I, Tbilisi, 2011, 93.

82 See: *Neild D.,* Vicarious Liability and The Employment Rationale, 2013, 711, <http://heinonline.org>, [20.06.2017].

83 Ibid.

Under a contract for works "a principal bears not a common duty of care, but rather more strict duties, proving that the duty of care is taken".[84] A principal is liable only when delegating the fulfilment of "abnormally dangerous works" upon a contractor.[85]

2.3.4 The Scope of Employment

The precondition of application of Article 997 of the CCG is inflicting injury on a third person by an employee in the course of employment.[86]

The analysis of judicial practice is of particular importance for the determination of the scope of the course of employment.[87] Employee's trip to his/her workplace and back - to his/her home is not related to the course of employment and consequently, an employer is not liable for any accident that may happen during this period. As regard the case, when a worker receives wages after the accomplishment of work and injures a colleague by negligence on the territory of the enterprise, it is presumed that a tort is committed in the course of employment.[88]

The fact that injurious action was committed directly on the territory of employer's enterprise, does not mechanically allows for the presumption, that there might be the preconditions for application of Article 997 of the CCG. Furthermore, it is not mandatory for an action to breach official duty, it is sufficient for it to be done in the course of employment and what is more, should be related to the essence of job to a certain extent. For example, smoking during working hours, what results in braking out of fire - if the worker's duty is to perform fire-related tasks, to what end special safety rules should be followed, the liability will be borne by the entrepreneur, as he/she assigned tasks to his/personnel, which were associated with major fire risk.[89]

According to Recommendations of the Supreme Court of Georgia "A car accident involving a vehicles allocated by company is regarded as an industrial accident. Awarding a free travel ticket, or other travel benefits for taking specific transportation means does not mean the allocation of a vehicle."[90]

According to German law the mandatory precondition for application of Section 831 of the BGB is inflicting injury by a deployed person in the course of performance of assigned duties.[91] According to judicial practice of general courts it is still the course of employment when an employed person proceeds with the fulfilment of commercial purposes of the employer.[92]

There is quite a number of cases of broad interpretation of Article 997 of the CCG in judicial practice of the Supreme Court of Georgia, when the Court rules that the injury of an employee himself (injured party) in the course of employment is a precondition for application of Article 997 without taking account of the fact, that grounds for liability under Article 997 of the CCG is inflicting an injury on a third person by an employee (a

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84 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 332 (in Georgian).

85 "The fault of a contractor, engaged in construction works, breaking down the buildings, assembling appliances, spraying pesticides from aircrafts, explosive works, laying high-voltage cables or oil pipelines nearby the highways with intensive traffic, will be imposed on the other person who entrusted the fulfilment of these "ultra-hazardous activities" upon the contractor"." See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 333 (in Georgian).

86 Under Section 831 of the BGB "A person deployed to perform a task is required to act in compliance with the instruction, and the principle continuously defines the type, content and scope of the activity." For details See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 655 (in Georgian*)*.

87 In the course of employment.

88 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 330 (in Georgian).

89 Ibid.

90 See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, p.89, <http://www.supremecourt.ge>, [20.07.2017] (in Georgian).

91 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 323 (in Georgian).

92 Change of the route by a hired driver of a trailer under the pretext of taking freight to the place of destination on time, what results in an accident and injury of a pedestrian, will be presumed to be committed in the course of employment. See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 320 (in Georgian).

tort is always committed by an employee). Respectively, there are at least three parties to the above dispute: an injured party (a third person), an employee and an employer.[93]

2.3.5 Fault - a Precondition of Employer's Regressive Claim

Whereas an employer is entitled to make an employee return paid remuneration in terms of a regressive claim, if we assume the presumption of the necessity of employer's fault, the possibility of raising regressive claim may case unfair consequences for en employee.

Under common law, the right of an employer to regression is not limited to some specific form of fault of an employee,[94] whilst under German judicial practice[95] an entrepreneur Is required to exempt a worker from liability when the latter caused damage through ordinary negligence .[96] The reason of the foregoing is said to be the risk of employer's business-activity.[97]

2.3.6 Liability for Agent's/Auxiliary's Actions

Article 396 of the CCG provides for liability of an obligor for his representative or a person he employs for the performance of his obligations. In this case as well the wording of the Article is *prima facie* similar to the composition, prescribed by Article 997 of the CCG and the principle of vicarious liability applies. However there still is a difference.

The case envisaged by Article 396 of the CCG is the demonstration of distribution of actions, to be performed on the basis of an obligation, between an obligor and an auxiliary person, when the actions of an auxiliary is regarded as those of the obligor. "Insofar as (contractual) obligations do not directly refer to auxiliary persons, as non-obligors, the attention should be focused on the personality of the obligor when establishing the scope of either the liability or reasonable care. As auxiliary person is liable only for actions outside the scope of reasonable care." [98]

For the purposes of Article 396 of the CCG the social dependence or accountability of an auxiliary person is not a determinant criterion unlike Section 831 of the BGB; also of minor importance is the extent of influence an obligor may have on the performance of an auxiliary person (through control or supervision).

In the case of section 831 of the BGB, when an auxiliary person is in breach of own duties, he is personally committing a tort.

Some scholars believe, that in cases, envisaged by Article 396 of the CCG the obligor's liability is prescribed brought about by his fault, manifested in the failure thereof to demonstrate reasonable care during the selection of an agent or a conveyor of his will and to duly supervise them.[99]

2.4 . Shifting the Burden of Proof

These days, the elements of fault-based and strict liability have so assimilated, that it is rather difficult to make a strict delimitation between them. Their explicit division into two different systems has become obsolete for a long time now. The legislators and judiciary aim at striking balance between the elements of fault-based and strict lia-

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93 See: Ruling N BS-1156-1156-118 (K-08) of the Chamber of Administrative and Other Cases of the Supreme Court of Georgia, dated December 11, 2008.

94 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 331 (in Georgian).

95 Comp. Section 840 (2) of the BGB.

96 *Shudra T.,* Responsibility of an Employer for the Damages Caused by Employee, Employment Law (collection of articles), II, Tbilisi, 2013, 221 (in Georgian).

97 See: *Zweigert K., Kotz H.,* Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 326 (in Georgian).

98 Cit. *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 157 (in Georgian).

99 See: *Amiranashvili G.,* Features of Recovery for Damages to the Third Person Caused by Employee Performing Work Duties, Employment Law, (collection of articles), II, Tbilisi, 2013, 199.

bility and quite often they try to attain this goal through shifting the burden of proof from a plaintiff to a defendant.

Upon modification of the scope of liability, of particular importance, along with the fault, is shifting of the burden of proof in such a manner, that one of the parties may find itself in a far more favourable position as a result of the foregoing. In employment relationship the shift of the burden of proof for the protection of the interests of an employee as a weak party is a rather powerful defence.

Based on the negative wording of the second sentence of the first paragraph of Section 280 of the BGB, as a general rule, the burden to prove his innocence is vested with an obligor.

The BGB allows for an exemption in labour disputes. Specifically Section 619a states, that sentence one of Section 280 (1) (reversal of the burden of proof) does not apply to claims stemming from the breach of contract.[100]

According to Para. 7 of Article 38 of the LCG, in labour disputes, when appealing an unjustified termination of a labour contract under the initiative of an employer the burden of proof of the facts of the case is borne by the employer. The LCG does not admit the explicit shift of the burden of proof to the employer in any other case.

As a general rule, a plaintiff is required to prove, that a person who inflicted injury is to be blamed, however there are exemptions, when a plaintiff is not able to prove the fault of the perpetrator. Hence, for such cases the necessity of special type of burden of proof becomes evident - *Res Ipsa Loquitur*[101]. This rule is applied in cases, when the aggrieved party (plaintiff) is definitely in an disadvantageous position as compared with the perpetrator. The aggrieved party is not able to prove the fault of the perpetrator based on the evidences. Hence, the burden of proof, that the person was acting without any fault, shifts to the perpetrator.[102]

The main precondition for the application of the principle of shifting the burden of proof to the defendant is the existence of the exclusive right of the perpetrator or an employee thereof to control the object or an action.[103] Furthermore, the plaintiff's injury must be of a type, that ordinarily would not have happened unless negligence were involved. It should be mentioned, that the defendant must be in the better position to prove his/her lack of negligence than the plaintiff is to prove the defendant's negligence.

For the burden of proof to be shifted to the defendant, it is necessary for the events, that led to the injury of a person, to be under the defendant's exclusive control. This includes the actions of the employee, for whose actions the employer is vicariously liable.[104] Under BGB employer's liability for damage caused by his employer is also a negligence liability with a reversed burden of proof, whereas in England and France strict liability rules apply.[105]

According to BGB a reversal rule can be found in the framework of the violation of a statutory rule and the breach of a safety duty. In any of these cases the causal connection between the breach and the accident is assumed; it is then up to the defendant to prove that there is no causal connection.[106]

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100 See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 461 (in Georgian*)*.

101 Res Ipsa Loquitur – "The thing [res] speaks [loquitur] for itself [ipsa]" - for example, the surgical nurse failed to remove all the sponges from the patient after the surgery. The patient was unconscious during the surgery and now is unable to prove, whether who is faulty of the accident: nurse, surgeon or assistant surgeon. See: Buckley W.R., Okrent C.J, Torts&Personal Injury Law, New York, 2004, 49.

102 See: *Buckley W.R., Okrent C.J,* Torts&Personal Injury Law, New York, 2004, 49.

103 Ibid, 50.

104 The following example is an interesting illustration to this situation: The employees had stacked crates of merchandise and the stacks rose thirty feet high in the shop warehouse. The plaintiff was injured when a top crate fell upon him, but nobody except the plaintiff was present in that part of the building, respectively there was nobody for him to point finger toward as having been negligent. Using *res ipsa loquitur* the plaintiff would shift the burden of proof to the defendant (warehouse owner) to show that the crates had been safely stored, because the crates were under the defendant's exclusive control. Respectively the question of application of *res ipsa loquitur* is beyond doubt. In this case the owner is to prove that reasonable care was used when storing the boxes, to ensure the safety. See: *Buckley W.R.,* Okrent C.J, Torts&Personal Injury Law, New York, 2004, 250.

105 See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 263.

106 Ibid, 282.

In the case of application of Section 831 of the BGB the burden of proof is borne by an employer. He is to prove that he has not breached the duty to exercise reasonable care when selecting the person deployed and provide relevant arguments. Furthermore, he may refute the presumption of existence of causal link giving rise to liability, demonstrating that the injury would have occurred in the event of careful selection as well.[107] In such a situation another defence is to claim the release from decentralized liability,[108] as the mechanism of personal selection of all the performers of principle's assignment and direct control is employed only by small companies.[109]

An employer may prove that he is not at fault and thus exclude his own liability, however this cannot be economically beneficial for him as in this case he will have to demand the release of the employee from the liability before the aggrieved person.[110]

3. Strict Liability

Unlike fault-based liability, which necessarily implies liability for intentional or negligent conduct, the principle of strict liability[111] is also employed in private law relationships, including labour law relationships. Respectively, the liability is to be established independent from the tortfeasor's conduct.[112]

Irrespective of cooperation of the employees it is almost impossible to ensure fully secure working conditions. Especially with regard to the source of increased risk. Although an employer is conducting his activities under the direct supervision of the employer, this control and supervision is not always possible.[113]

It is reasonable to apply the principle of strict liability in the case of increased risk. Firstly, the employer is better positioned than the employee to gather information about occupational hazards and to control them by taking precautions. The employer controls the use of machinery and other equipment, time, duration, and environmental conditions of dangerous activities.[114] The abuse of right and fraud are major risk-factors for strict liability-based insurance schemes.[115]

The employers' duty to take reasonable care for the safety of their workers is non-delegable and personal duty thereof.[116]

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[107] See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian*)*.

[108] Ibid.

[109] Based on judicial practice of the Supreme Court of Germany, it was presumed admissible to delegate the duty to care to a subordinated personnel in a manner for the records management to be justified in the case of delegation of duty to a one level lower employee. Larenz/Canaris SchR II/2, §79,III,3b. With further reference to *Kropholler I.,* See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian*)*.

[110] See: *Kropholler I.,* German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian).

[111] Strict liability, objective liability or risk liability.

[112] See: *Van Dam C.,* Europian Tort Law, Oxford University Press, New York, 2006, 255.

[113] Through the introduction of the principle of strict liability the system of compensation of the employees fully exempts an employee from liability in the case of contributory negligence. This may as well be another factor for the employer not to be interested in taking all the necessary measures for the introduction of safety rules at workplaces, to prevent the injuries.

[114] See: *Wagner, G.,* Tort, Social Security, and No Fault Schemes: Lessons from Real-World Experiments, Duke Journal of Comparative and International Law, 2012-2013, 18, <http://heinoline.org>, [20.06.2017].

[115] It is noteworthy that no "employer's privilege" is employed in the United Kingdom which would have protected him against a tort action. On the contrary, the compensation system does not exclude the possibility of filing a tort action by an aggrieved employee. See: *Wagner G.,*Tort, Social Security, and No Fault Schemes: Lessons from Real-World Experiments, Duke Journal of Comparative and International Law, 2012-2013, 36, <http://heinoline.org>, [20.06.2017].

[116] *Fordham M.,* A New Era of Employer Liability in Negligence, Singapore Journal of Legal Studies, 2010, 200, <http://heinonline.org>, [20.06.2017].

3.1. Source of Abnormal Hazard

One of the grounds of strict liability is the risk associated with the source of abnormal hazard.

Paragraph 520 of the Restatement of Torts (Second) defines the source of abnormal hazard as an unit with high degree of risk, with the likelihood that harm that results from risk will be great and the risk could not have been eliminate be exercising reasonable care. There are several preconditions for the imposition of strict liability, amongst them, it is important for the abnormally dangerous activity[117] should give rise to high degree risk for potential injury. It should be impossible to totally eliminated such risk despite the exercise of reasonable and necessary measures.

The wording of Article 1000 (I) of the CCG[118] is general and provides for strict liability of the owner of a building/substances with abnormal degree of hazard consequences of realization of this hazard. The content of Part 2 of the same Article evidences, that the only possibility for the exemption of the person envisaged by Article 1000 from his duty to compensate damages is the existence of some force majeure circumstances. Based on the foregoing, determination of fault upon application of Article 1000 is important to the extent, that based on the principle of contributory negligence, if the aggrieved party is at fault, the amount of damages could be reduced pro rata to the fault of thereof.

According to Georgian legal doctrine,[119] the specificity of application of Article 1000 of the CCG is that the existence of three preconditions is sufficient for the imposition of liability: a) injury; b) unlawful action; c) causal link between unlawful action and occurred injury.

Essential for the application of Article CCG is the determination of injury and causal link.

With regard to compensation of damages caused by abnormal hazard in the light of employment relationship of particular interest is Decision N AS-477-1110-03 of the Supreme Court of Georgia, dated October 15, 2003, which concerns the compensation of injury caused source of abnormal hazard in the course of employment by a.

In 1988, when pouring down caustic soda from a railcar at Borjomi factory the plaintiff took off his protective glasses and proceeded with his work without glasses, as a result of what a drop of soda hit his eye and his right eye was injured, i.e. he suffered industrial accident due to his own negligence, as a result of what he was diagnosed with 50% disability.

It is noteworthy, that the company was paying subsistence to the employee at its own free will, but stopped the payment of the subsistence in 2002 based on the fact, that the injury was caused by the employee's own negligence, what excluded the possibility of compensation of damages under the Ordinance of the President of Georgia of 1999, under which Ordinance the precondition of compensation was the fault of the enterprise.

The Appeals Court rules that the company was not liable for the occurrence of injury, as it has not breached or inadequately fulfilled the law, labour protection rules or other normative acts. The injured employee received special training about labour protection rules about working with abnormal hazard. Hence Article 992 of the

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[117] The courts in the USA often apply a balancing test to decide in an activity is abnormally dangerous. Such an analysis compares the dangers created by the activity with the benefits that the community derives from the activity. For example, suppose a local builder is building a new road to improve access between hospitals and an isolated rural town. The construction crew uses dynamite to clear the area for the road. A nearby homeowner suffers structural damage to her house as a result of the blasting and sues the builder under strict liability theory. The courts would balance the benefits derived against the risks involved and the public interests may outweigh the interests of one specific homeowner. See: *Buckley W.R., Okrent C.J,* Torts&Personal Injury Law, New York, 2004, 266.

[118] "If there is an increased danger associated with some structure because of the energy power, inflammable, explosive, poisonous or toxic substances produced by, put in or supplied through this structure, then the possessor of the structure shall be obligated to pay compensation if the realization of this danger causes the death, bodily injury or disability of an individual or damage to a thing. The same liability shall be put on possessors of inflammable, explosive, poisonous or toxic substances when there is an increased danger associated with these substances."

[119] *Chikvashvili S.,* Commentary to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 412 (in Georgian).

CCG should have been applied. Consequently, insofar as in this very case, there existed no company fault, the composition of Article 992 cannot serve as grounds for liability when there is no fault.

The Cassation Court has not sustained the opinion of the Appeal Court about the application of Article 992 of the CCG,[120] as it considered that there existed no grounds for refusal to compensation under the new law as well - Article 1000 (III) of the CCG. There existed no grounds for exemption from liability - no force majeure circumstances. However, the justification of the Cassation Court is controversial to a certain extent because of the following: on the one part, the court states that "Based on the content of this provision (meaning Article 1000 of the CCG), in this very case the administration was required to compensate injury sustained by the worker, as it was caused by caustic soda, abnormal hazardous substance under the ownership of the company and not by force majeure circumstances."

It is quite clear from this paragraph that there is no need to additionally prove the fault of the administration as otherwise the difference between Article 992 and 1000 almost disappears. However, the Court states, that "Company administration admitted worker's inadequate awareness of working with chemicals of abnormal hazard and thus ordered the repetition of the training, i.e. admitted its fault in the occurrence of the accident".

When proving employer's fault as a precondition of application of Article 1000 the Cassation Court presumably aimed at proving the connection of this Article with Ordinance N48 of the President of Georgia of February 9, 1999. The below deliberations of the Court speaks just for the foregoing. According to Paragraph 15 of the above Ordinance, "An injury to worker's health is regarded to be incurred by fault of the employer, if it was caused by neglect, inadequate fulfilment of the requirements of labour law, labour protection rules, standards and other normative acts."

The Cassation Court considered that insofar as it became necessary to repeat training for workers with regard to the source of abnormal hazard, they were not properly trained in due time, i.e. this is the case of poor education in labour protection rules when working with substances of abnormal hazard on the part of the administration - i.e., the fault of the administration.

Mention should as well be made of the fact that under Ordinance N48 of the President of Georgia negligence of an aggrieved party does not result in the termination of the compensation of damages. If the negligence of the aggrieved person promoted the occurrence of the injury, the compensation for injury may be reduced pro rata to the fault of the aggrieved party.

Based on the foregoing, it can be concluded, that the existence and proving of employer's fault was regarded as a mandatory precondition for application of Article 1000 of the CCG not under CCG, but rather a sublegal act.

As of to date Resolution №45 of the Government of Georgia On Approval of the Procedure of Granting Allowance for the Compensation of Injury Incurred to the Health of an Employee in the Course of Employment, dated March 1, 2013,[121] does not require the existence of employer's fault in the case of worker's occupational disease, sufficient is just an excerpt from medical-social examination report, which establishes causal link, while in the case of occupational injury (mutilation) the employer's fault is regarded as a necessary precondition for compensation of injury. In opposite to the foregoing, the failure of tort actions in modern world and the cases of

[120] According to Article 463 of the Civil Code of Georgia (1964) effective for the moment of inflicting injury the organizations and citizens, whose activities are related to increased danger for wider public (carrier companies, industrial companies, construction sites, car owners, etc.) are obliged to compensate damages caused by the source of increased danger unless they prove that the injury was caused by some force majeure or the will of the injured person himself. According to this provision there existed two grounds for the exclusion of administration's liability and insofar as none of them existed the company was entitled not to compensate injury sustained by worker.

[121] Resolution №45 of the Government of Georgia On Approval of the Procedure of Granting Allowance for the Compensation of Injury Incurred to the Health of an Employee in the Course of Employment, dated March 1, 2013, <www.matsne.gov.ge>, [04/03/2013] (in Georgian).

mass death and injury of employees at workplaces by the end of the nineteenth century (called "industrial accident crisis")[122] promoted the development of the system of compensation of employees based on the principle of strict liability.[123]

3.2. Impossibility to Fully Neutralize the Risk

Absolute liability resembles insurance. Defendants are insuring, or guaranteeing the safety of plaintiffs, who come into contact with that tort law calls abnormally dangerous (ultrahazardous) instrumentalities.[124] These activities or objects are dangerous by their very nature. Even if all precautions are taken, an injury might still occur.

According to benefit theory,[125] an employer's strict liability is associated with the fact, that employers get income through abnormally dangerous instrumentalities. As their use generates a risk factor, the liability for consequences thereof is borne by the employer to this very end.

Employe's duty to ensure the safety of the employees and create adequate conditions is abided by the reasonable care is exercised in good faith and all the measures he was supposed or was aware that he was supposed to undertake, were undertaken. Insofar as the employer disposes of much more information about potential risks, he has to undertake more than average number of measures for their prevention. Respectively, he has the duty to evaluate risks in the light of potential injuries and undertake adequate preventive measures. In the case of failure to do so, it is considered that is a negligence in employer's actions.[126]

The scope of the statutory duty to care is established on the basis of the wording of the provision itself. Respectively, the degree of care may be difference and in some cases means provision for safety measures and in others - the existence of safety guarantees. Higher is the care standard with regard to some specific jeopardy, lesser is the difference/boundary between fault-based and strict liabilities.

Generally, when there is no evidence of person's fault, and what is more, when all the reasonable measures were undertaken to minimise the risk of occurrence of injury, it is unfair to apply the principle of absolute liability. Hence, the strict liability is also subject to restrictions and is limited to cases, which are associated with abnormally high risk and it is reasonable to take this risk due to potential benefit.[127]

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122 "Industrial accident crisis" See: *Janutis R.M.,* The new Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009, 49, <http://heinonline.org>, [20.06.2017].

123 According to social law the procedure of granting compensation is different from the basic principles of civil law. The compensation system is very flexible and quick, and what is of paramount importance - for both parties. The compensation is paid irrespective of the conditions of occurrence of injury and the faulty party.

124 See: *Buckley W.R., Okrent C.J,* Torts & Personal Injury Law, New York, 2004, 263.

125 Benefit theory.

126 *Fordham M.,* A New Era of Employer Liability in Negligence, Singapore Journal of Legal Studies, 2010, 195, <http://heinonline.org>, [20.06.2017].

127 When describing abnormally dangerous activities Paragraph 520 of the Restatement (Second) of Torts also refers to the fact that such substances (e.g. noxious gases, chemicals, explosives), as a general rule, are not intended for common use, there are special rules for their use and it can be said, that the most part of the community does not use them. In contrary to the foregoing inflammable substances like gasoline are also the sources of abnormal danger, however, they are widely used. Hence it depends how the gasoline is used. If we compare the activities of oil processing company and the premises, where a specific person keeps gasoline for his lawnmower, it is evident that the first one is the source of abnormal danger, and the other is not. For details See: *Buckley W.R., Okrent C.J,* Torts & Personal Injury Law, New York, 2004, 265.

4. Conclusion

As a summary, it can be said, that there are special conditions in labour law relationships, taking account of which for the sake of balancing the interests of the employers and the employees, often results is substitution of standard liability scheme with the alternative one. Higher is the care standard with regard to some specific jeopardy, lesser becomes the difference between fault-based and strict liabilities.

The legislators and judiciary try to attain the aforementioned balance of interests through shifting the burden of proof from a plaintiff to a defendant (reversal of burden of proof). What is more, shifting of the burden of proof in labour law context, for the protection of an employee as a weaker party, is a very powerful defence. The scope of application of the reversal of burden of proof in Georgian legal space is far more limited than, say, in Germany. however, there still are some advancements in this direction. Finally, it can be said, that decisive in this situation is the opinion of a judge, who can ensure the striking of fair balance through correct interpretation of rules, taking account the interests of an employee, as a weaker party.

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