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## Regimes of Liability for Damages Caused by Abnormally Dangerous Activities

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The present paper examines certain aspects of liability for the damages caused by abnormally dangerous activities, mainly viewing them in the context of Latvian law. It addresses the questions which activities (and due to which particularities) shall be treated as abnormally dangerous, what kind of liability models could be applied for the compensation of damages caused by such activities, what is the role of insurance in this respect, to what extent strict liability or stricter forms of liability should be applied, as well as who shall be held liable for these damages.

**Keywords:** abnormally dangerous activities, strict liability, fault liability, absolute liability, liable person.

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### Introduction

Nearly none of us can imagine our life today without use of things like trains, planes, mechanical motorized vehicles, different chemicals, electricity and products, created in complex and sophisticated processes. All of these make our life more comfortable and our work more effective. However, very few of us remember that at least a part of these things has invoked and some still may invoke processes and situations, causing the risks above the usual everyday level.

Use of these things and also production thereof in certain situations are called abnormally dangerous activities due to the risks they may cause. Hence, these activities, for instance, the use of nuclear energy for production of electricity, are creating contradictive sentiments. On the one hand, the significant benefits brought by the use of these things and relevant processes to certain individuals, as well as to society in general can hardly be dismissed. Yet, on the other hand, no one should forget, that taking advantage of these things and relevant processes may create highly significant, even 'abnormal' danger, which may cause damages not only to some, but sometimes also to a significant part of society. Therefore, also from legal perspective one of the important questions is how to deal with the situation, when such abnormally dangerous activity has caused damages. What kind of liability model should be applied? How to properly apply insurance in order to obtain damage compensation? Who should perform precautionary measures and who should be held liable for the damages caused? Moreover, what exactly is 'abnormally dangerous activity' and which activities could be treated as abnormally dangerous and which not? These are the questions, which have been discussed between lawyers for quite a while and they will also be analysed in the present paper.

## 1. Context of Development of Relevant Theories

Historical examples, how these things and products entered our lives, may serve as explicit illustrations of relevant risks.

The opening of the Liverpool and Manchester Railway at 1830, although it was a truly remarkable moment in technical achievements of its age, is also known for world's first widely reported railway passenger casualty – the death of British political leader, financier and Member of Parliament William Huskisson.<sup>1</sup>

Several serious dangers are associated with mining processes. For example, on the 22<sup>nd</sup> of October, 1877 the so-called Blantyre Mining Disaster happened, where, due to ignition of firedamp, over 200 people were killed in coalmines. It is known as the worst-ever Scotland's mining disaster.<sup>2</sup>

The dynamite today is widely used for military, as well as civilian purposes, for example, construction and mining. However, its active substance, nitroglycerin, is extremely explosive both in transportation and use.<sup>3</sup> Even experiments with nitroglycerin have taken lives of many people, including Emil Oskar Nobel,<sup>4</sup> the brother of the famous Alfred Nobel, who later invented dynamite as the solution to utilizing the explosive qualities of nitroglycerin in a safer manner.<sup>5</sup>

Finally, yet importantly, nuclear energy, which is highly efficient, yet at the same time involves extremely high risks, which have been expressly manifested

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<sup>1</sup> *Fyfe, P.* On the Opening of the Liverpool and Manchester Railway, 1830. BRANCH: Britain, Representation and Nineteenth – Century History. Ed. *D. F. Felluga*. Extension of Romanticism and Victorians on the Net. Available: [http://www.branchcollective.org/?ps\\_articles=paul-fyfe-on-the-opening-of-the-liverpool-and-manchester-railway-1830](http://www.branchcollective.org/?ps_articles=paul-fyfe-on-the-opening-of-the-liverpool-and-manchester-railway-1830) [last viewed 08.01.2018].

<sup>2</sup> Blantyre mining disaster. Available: <https://nationalminingmuseum.com/news/blantyre-mining-disaster/> [last viewed 15.01.2018].

<sup>3</sup> Nitroglycerine. Available: <https://www.britannica.com/science/nitroglycerin> [last viewed 15.01.2018].

<sup>4</sup> Emil Oskar Nobel. Available: <http://enacademic.com/dic.nsf/enwiki/3733568> [last viewed 15.01.2018].

<sup>5</sup> Nitroglycerine. Available: <https://www.britannica.com/science/nitroglycerin> [last viewed 15.01.2018].

by some disasters, including infamous Chernobyl. Inter alia, still after more than 30 years, the debates about the real causes of this accident still continue.<sup>6</sup>

It is not surprising that such events do create a debate as to how legal treatment of such situations often associated with so-called abnormally dangerous activities and damages caused thereof. One may say that general rule, requiring fault, as regular condition of liability,<sup>7</sup> might not be appropriately applied in such cases, because it might be too complicated to examine the existence of misconduct in such cases. Others, even as far back as the nineteenth century, expressed the opinion that if in certain case there is no fault, no liability should be incurred and the loss should be left to lie where it fell.<sup>8</sup> In the first case, concerns could appear as to whether it is appropriate to distribute civil liability without finding fault. Moreover, even if it might be appropriate in some cases, to what extent the application of such approach should be reasonably limited. In the other case, it could be said, that if the loss should be left to lie, where it fell, then it means that in many cases victims would be left without a chance to have their damages compensated. However, we must keep in mind that tort law is about balancing the freedom of conduct on the one hand, and the protection of rights and interests on the other hand.<sup>9</sup> Inter alia, it means that, if the provisions of tort law are too strict, despite providing good prospects for the victims to obtain compensation of their damages, these provisions may prevent the use of most innovative technologies and hence, slow down economic progress. Such considerations show that the question of distribution of civil liability in case of damages, caused by the so-called abnormally dangerous activities, have not only legal, but also moralistic, economical and even philosophical aspects. Therefore, establishing the most reasonable solution is not an easy task, which explains, why different countries have applied different solutions, and why the debates for the most appropriate regime continue to this day.

Latvian legal practitioner Mr. Dmitrijs Skačkovs has noted six concepts to be applied or suggested for application in cases, where abnormally dangerous activities have caused damages:

- 1) The principle that generally civil liability is distributed pursuant to fault, but with exemptions, providing that in some cases liability could be applied without the fault;
- 2) The concept, which accepts the distribution of civil liability on two separate, equal grounds – as pursuant to the fault as without fault;
- 3) The concept of ‘objective moments’, providing that the fault is not a necessary requisite of civil liability, but the lack of fault may only serve as the reason, which may release from liability;
- 4) The concept of fault, which provides that civil liability could be applied only in case of fault;

<sup>6</sup> *Emburry-Denis, T.* Scientists might be wrong about cause of Chernobyl disaster, new study claims. Available: <http://www.independent.co.uk/news/world/europe/chernobyl-disaster-cause-scientists-wrong-nuclear-power-plant-accident-ukraine-study-a8067026.html> [last viewed 15.01.2018].

<sup>7</sup> *Bar, C. von.* The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences. Oxford: Clarendon Press, 2000, p. 234; *Bar, C. von.* The Common European Law of Torts. Vol. 1. The Core Areas of Tort Law, its Approximation in Europe, and its Accommodation in the Legal System. Oxford: Clarendon Press, 1998, p. 23.

<sup>8</sup> *Markesinis, B. S., Unberath, H.* The German Law of Torts. A Comparative Treatise. 4<sup>th</sup> edition, entirely revised and updated. Oxford, Portland: Hart Publishing, 2002, p. 714.

<sup>9</sup> *Dam, C. van.* European Tort Law. Oxford: Oxford University Press, 2007, p. 181.

- 5) The concept applying civil liability only for fault, however, providing that in absence of anyone's fault the loss should be compensated via insurance;
- 6) The concept of fault, providing that the existence of fault is not necessary for application of civil liability in case of damage caused by abnormally dangerous activity. The mere fact that someone's activity has breached other persons rights and have caused damages, is sufficient in order to apply civil liability.<sup>10</sup>

Most likely this list is far from being exhaustive and the most precise one. However, it gives a good demonstration on variety of theories, which are suggested to be applied if abnormally dangerous activity has caused the damage. These theories, as well as the meaning of abnormally dangerous activities and the search for person, who would be most appropriate to be held liable for the damages, caused by abnormally dangerous activities, will be examined in the following sections of the present paper.

## 2. Activity or Object

The readers of this paper might have a question: why, so far, the author discusses abnormally dangerous activities without explaining the meaning of the term 'abnormally dangerous activity'. The answer lays in the fact that this legal term is among the hard-to-define concepts. As Latvian legal scholar Professor Kalvis Torgāns explains, it is difficult to provide a comprehensive, general definition for abnormally dangerous activity, because usually the objects may impose increased level of danger only in particular circumstances, for instance, in case of certain concentration of active substance.<sup>11</sup> Legislators of different jurisdictions provide two alternative regimes for regulation of the abnormally dangerous activities and the damages caused by them. One option is to legislate for general provisions that usually are included in civil code of certain country. The examples are Belgium, France, Italy, Luxemburg, the Netherlands, Portugal<sup>12</sup> and Latvia. Another option is to stipulate special provisions, included in special norms, regulating railway carriage, use of nuclear energy or another particular area, – the solution adopted by Germany and Greece.<sup>13</sup>

A discussion is also present as to whether abnormally dangerous activity should be understood as literally an 'activity' or it can also denote an object, basically, the thing or substance, which might be used in a way causing damage to another person, or the total sum of activities and objects.<sup>14</sup> The author is of the opinion that abnormally dangerous activity is an activity (interaction of person with a certain object – thing or substance), but not such an object itself. Paragraph 2, article 2347 of the Republic of Latvia Civil Law<sup>15</sup> regulates the liability for damages caused by abnormally dangerous activity. Unlike most of the provisions of the Republic of

<sup>10</sup> *Skačkovs, D.* Par civiltiesisko atbildību, kad zaudējumus nes paaugstinātas bīstamības avots [On civil liability, when the damages is caused by object of enormous danger]. *Jurista Vārds*, No. 32(225), 2001. Available: [www.juristavards.lv](http://www.juristavards.lv) [last viewed 18.01.2018].

<sup>11</sup> *Torgāns, K.* Saistību tiesības [Law of Obligations]. Part II. Rīga: Tiesu namu aģentūra, 2008, p. 282.

<sup>12</sup> *Bar, C. von.* The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences. Oxford: Clarendon Press, 2000, p. 376.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Torgāns, K.* Saistību tiesības [Law of Obligations]. 2<sup>nd</sup> extended edition. Rīga: Tiesu namu aģentūra, 2018, p. 478.

<sup>15</sup> Latvijas Republikas Civillikums [Civil Law of the Republic of Latvia]. *Ziņotājs*, No. 1, 1993.

Latvia Civil Law, it is based on equivalent provisions of article 469 of the Civil Code of the Socialist Soviet Republic of Latvia, instead of Local Civil Laws of the Baltic Provinces of the Russian Empire (*Baltijas Vietējo likumu kopojums* – in Latvian). Hence, it is reasonable to take into account the also commentaries provided by legal scholars of Soviet era in respect to article 469 of Civil Code of the Socialist Soviet Republic of Latvia. Professor Jānis Vēbers as early as in 1969 has emphasized that abnormally dangerous activity is not the object itself, but the object ‘in move’ or activity with this object.<sup>16</sup> Legal scholars from other countries state a similar opinion today.<sup>17</sup> The wording of paragraph 1, article 5:101 of the Principles of European Tort Law also suggests that ‘abnormally dangerous activities’ mean ‘activities’ carried out by a particular person.<sup>18</sup> At the same time, Professor Kalvis Torgāns does mention the said discussion as to whether the abnormally dangerous activity could be an ‘activity’ or ‘object’ or the total sum of activities and objects. He expresses an opinion, suggesting that all three options are possible.<sup>19</sup> However, the author of present paper does not agree with such opinion. As already mentioned above, he adheres to the opinion that the activity, not the object or its sum with an activity, is the abnormally dangerous activity. The arguments below substantiate this position.

First of all, it should be kept in mind, which qualities might make something ‘abnormally dangerous’. Paragraph 2, article 5:101 of Principles of European Tort Law gives probably the most precise description of the qualities. This provision suggests that

*an activity is abnormally dangerous if:*

- a) *It creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management, and*
- b) *It is not a matter of common usage.*

In other words, an abnormally dangerous activity is an activity associated with significant risks, which still exist even if due precautions are exercised and the activity is of the kind that may be exercised by particular persons, not by everyone. Other sources also mention these qualities, especially emphasizing the impossibility to reduce all risks, even exercising due care.<sup>20</sup> Usually it falls within the scope of court’s duties to examine, whether the activity under question in particular case is abnormally dangerous. Such examination quite often requires a deep analysis. For instance, in one case court examined the storage of fuel and other oil products in underground tanks in circumstances, when leakage occurred from these tanks and caused damage to other persons. The court emphasized that a possible abnormal danger should be examined not from perspective that certain damage has been done (i.e. from negative consequences), but from the perspective, whether the storage of the said products involves risks, which cannot be removed even by exercising due care. As in that particular case the court found that fuel and oil products could be

<sup>16</sup> Vēbers, J. Saistības no kaitējuma nodarīšanas [Obligations from Causing the Damage]. Rīga, 1969, pp. 39–40.

<sup>17</sup> Boston, G. W. Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier. *San Diego Law Review*, No. 597, 1999, p. 650.

<sup>18</sup> European Group on Tort Law. Principles of European Tort Law. Available: <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf> [last viewed 12.02.2018].

<sup>19</sup> Torgāns, K. Saistību tiesības [Law of Obligations]. Part II. Rīga: Tiesu namu aģentūra, 2008, p. 281.

<sup>20</sup> Boston, G. W. Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier. *San Diego Law Review*, No. 597, 1999, pp. 650–652.

stored and also transfused and transported without the risk of damage, if due care is exercised, no abnormally dangerous activity could be found in that particular case.<sup>21</sup> In another case, the court examined demolition of buildings, using explosives. In order to explore the matter properly, the court summoned a team of experts to provide their opinion. It is worth to mention that even the experts arrived at different opinions. However, the majority of experts came to the conclusion that significant risks of causing damage to other persons and their property could not be removed even if due care is exercised during the demolition works. Therefore, the court in that particular case ruled that performance of particular demolition works should be regarded as abnormally dangerous activity.<sup>22</sup>

Latvian legal scholar and practitioner Dr. Jānis Kubilis has suggested that in every case, when the damage is caused by abnormally dangerous activity, certain activity or inactivity of some person could be found, at least indirectly.<sup>23</sup> Although a certain result, for instance, leakage of chemicals or explosion of some substance and the damages caused thereof may not be intended by that particular person, the result would not have come about, if this person in some manner did not interact (i.e. was not subject to some activity) with the particular substance, at the very least, storing this substance. Uranium (U) is a substance of such nature. This substance, namely, metal, could be found naturally as an oxide, which historically was used for colouring purposes.<sup>24</sup> If its concentration does not exceed natural level, it bears no particularities or risks associated with nuclear energy.<sup>25</sup> Such risks and properties uranium adopts only after performance of certain chemical procedures.<sup>26</sup> Therefore, the opinion that *activity* is what could be *abnormally dangerous* in certain circumstances, is rather correct.

A certain misunderstanding may be caused by the fact that some jurisdictions provide stricter and sometimes even a strict liability for damage, the cause of which is related to some object, usually movable or immovable thing. For example, article 1386 of the French Civil Code provides strict liability for the damage caused by collapse of buildings, if this is the consequence of inadequate maintenance or a defect in construction.<sup>27</sup> At the first glance, it might appear a proof that also the objects might be abnormally dangerous themselves. However, such impression cannot be supported. The devil hides in details and no less so, if the matter relates to the law. Initially, in such a case not only the object, but also some activity or inactivity could be attributed to the cause of damage, for instance, inadequate maintenance or an error, which has led to the defect in construction. For instance, German legal scholar Christian von Bar speaks about liability on the basis of article 1386 of the French Civil Code as about the liability for dangerous status

<sup>21</sup> *Boston, G. W.* Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier. *San Diego Law Review*, No. 597, 1999, p. 650.

<sup>22</sup> *Cobb, M.* "The Wrong Approach at the Wrong Time?": Maine Adopts Strict Liability for Abnormally Dangerous Activities in *Dyer v. Maine Drilling and Blasting, Inc.* *63 Maine Law Review*, No. 331, 2010, p. 346.

<sup>23</sup> *Kubilis, J.* Latvijas deliktu tiesību modernizācijas galvenie virzieni. Promocijas darbs [Main Issues Regarding Modernisation of Tort law in Latvia. Doctoral thesis]. Rīga: University of Latvia, 2016, p. 225.

<sup>24</sup> Uranium. Available: <http://www.chemistryexplained.com/elements/T-Z/Uranium.html> [last viewed 18.01.2018].

<sup>25</sup> Uranium – U. Available: <https://www.lenntech.com/periodic/elements/u.htm> [last viewed 18.01.2018].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Dam, C. van.* *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, pp. 462–463.



of immovable property (*Haftung für den gefährlichen Zustand von Immobilien* – in German),<sup>28</sup> which thereby leads to the thoughts that behind every dangerous status of movable or immovable thing lays a certain activity (or inactivity), which has made the object dangerous and therefore this activity, and not the object, is the decisive factor of the danger. Then, taking into account such activity or inactivity, there is no reason to conclude that the said object comprises particularities of abnormally dangerous activity. Secondly, it should be emphasized that, since certain activity or inactivity, inadequate maintenance or an error has been in place, which has led to the defect in construction, there is no reason to conclude that the object under question contains risks, which cannot be eliminated even with exercising due care. Thirdly, as a certain activity or inactivity, which has caused damage, could be established, there may be a reason to conclude that liability for the caused damages is not a strict liability, but instead a fault liability, just possibly with some modifications, which in some sense make it stricter. Consequently, it may be concluded that the legislator of certain jurisdiction may provide a stricter or strict liability also for the damages, which are related to some particular objects, not only to the activities, however, it does not give the reason to conclude that these objects could be treated as ‘abnormally dangerous objects’.

Unlike the jurisdictions with general provisions, applicable to all kinds of potential abnormally dangerous activities, several other jurisdictions, for instance, Germany and the United Kingdom, have chosen to regulate each type of activity by special provisions.<sup>29</sup> Also historically, the first attempt to regulate the liability for damage caused by abnormally dangerous activity was made by special provisions – Prussian Railway Act of 1838 or, to be more precise, “The Law on Railway Undertakings” (*Gesetz über die Eisenbahn-Unternehmungen* – in German).<sup>30</sup> One may say that certain activities, regulated by such particular provisions, may not always be abnormally dangerous in the sense of lack of reasonable possibility by eliminating all the potential risks via exercising due care. Such statement might be correct. However, the benefit of such special provisions is a greater extent of certainty about the particular activity, which is the subject of these special provisions, and also a greater extent of certainty about particular model of liability and the potentially liable person. As appositely noted in Latin proverb, too general provisions in law are hazardous – *omnis definitio in lege periculosa est*. Hence, general provisions regarding liability for abnormally dangerous activity contain greater risks of incorrect interpretation and/or application. On the other hand, general provisions are better suited for application in the situation when the understanding of some activity as abnormally dangerous is outdated, or there is some new activity, which is not particularly regulated yet, but which, in fact, may appear to be abnormally dangerous. Dr. Jānis Kubilis also has provided similar considerations, stating that the provisions of law should be dynamic and interpreted not only according to the factual circumstances of certain case, but also according

<sup>28</sup> Bar, C. von. *Gemeineuropäisches Deliktsrecht. Erster Band. Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen*. München: C. H. Beck'sche Verlagsbuchhandlung, 1996, S. 235.

<sup>29</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 440.

<sup>30</sup> Gesetz über die Eisenbahn-Unternehmungen vom 3 November 1838. Available: <https://www.lwl.org/westfaelische-geschichte/que/normal/que1030.pdf> [last viewed 01.04.2019].

to the progress of science and technology, as well as according to the other factors.<sup>31</sup> In the light of such considerations, the author of present paper arrives at the conclusion that possibly the best option for regulating the liability for damages caused by abnormally dangerous activity, is to include in the law general provisions, as well as particular provisions applicable to each specific activity. However, these general provisions should be treated as *lex generalis* and applied only to the extent, where the matter is not covered by particular provisions.

In context of models to regulate the liability for damages caused by abnormally dangerous activity, a few words should be said about the provisions of Latvian Civil Law. Paragraph 2 article 2347 of the Latvian Civil Law could be treated as general provision, imposing an increased liability on persons, whose activity is associated with an increased risk to other, surrounding persons. However, by amendments to the Latvian Civil Law, adopted on 29 November, 2012, some examples for the said activities, such as transport (transportation), enterprise, construction and dangerous substances were added to the wording of the said provision of Latvian Civil Law.<sup>32</sup> Although such amendments were guided by the noble intention to make that provision, in fact, it yielded the exactly opposite result. As Dr. Jānis Kubilis has validly indicated, the consideration that each transport during its use or each construction process create increased risk, could not be supported. The answer to the question, whether an activity should be treated as particularly dangerous, could be obtained only in the light of particular circumstances.<sup>33</sup> The author of the present paper completely supports such opinion and would like to emphasize that the same type of activity in certain circumstances may impose increased danger, while in others – not. However, the said amendments to the law may create a misleading impression, that listed activities could be treated as dangerous without analysis of particular circumstances. Hence, the author of the current paper also agrees with other critical remarks, expressed by Dr. Jānis Kubilis and stating that it is not advisable for the legislator to emphasize some potential abnormally dangerous activities.<sup>34</sup> If the legislator desires to apply an increased liability to all activities of a

<sup>31</sup> Kubilis, J. Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [The Current Issues and Modernisation of Liability for Damage Caused by Abnormally Dangerous Activity]. In: Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums. Rīga: University of Latvia Press, 2014, p. 203.

<sup>32</sup> After the amendments from 29 November, 2012 the second paragraph of article 2347 Civil Law of the Republic of Latvia provides: “A person whose activity is associated with increased risk for other persons (transport, undertakings, construction, dangerous substances, etc.) shall compensate for losses caused by the source of increased risk, unless he or she proves that the damages have occurred due to force majeure, or through the victim’s own intentional act or gross negligence. If a source of increased risk has gone out of the possession of an owner, holder or user, through no fault of theirs, but as a result of unlawful actions of another person, such other person shall be liable for the losses caused. If the possessor (owner, bailee, user) has also acted without justification, both the person who used the source of increased risk and its possessor may be held liable for the losses caused, having regard to what extent each person is at fault.”

<sup>33</sup> Kubilis, J. Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [The Current Issues and Modernisation of Liability for Damage Caused by Abnormally Dangerous Activity]. In: Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums. Rīga: University of Latvia Press, 2014, p. 203.

<sup>34</sup> Kubilis, J. Latvijas deliktu tiesību modernizācijas galvenie virzieni. Promocijas darbs [Main issues regarding modernisation of tort law in Latvia. Doctoral thesis]. Rīga: University of Latvia, 2016, p. 226.



certain type, it is advised to include the relevant provisions in the specific provision of law, regulating certain type of activities, like certain means of transportation, use of certain type of energy or other.

The author of the present paper found particularly interesting the provisions, implemented by the Estonian legislator. The provisions, set down in the articles 1056–1060 of the Estonian Law of Obligations Act could be treated as a quite successful attempt to merge all the above-mentioned theoretical approaches in order to provide legal environment, which would be at least for the major part clear and avoiding the said theoretical discussions. Thus, article 1056 of the said act avoids the discussion about a ‘thing’ or ‘activity’ by referring to the ‘major source of danger’, which, pursuant to the first paragraph of the said article may be a thing as well as an activity. The said act does not refer to the exhaustive list of ‘major sources of danger’, but rather provides a description of particularities, which the certain thing or activity should have in order to be found as the major source of danger. At the same time, the said act also explicitly mentions certain objects, which involve stricter or strict liability – use of motor vehicle, dangerous structure or thing, or other structure or animals. However, unlike the Latvian law, the Estonian act does not merely mention these objects, but also provides separate preconditions for application of liability, if the damage has been caused by one of these objects.<sup>35</sup>

### 3. Models of Liability

As it was mentioned earlier in this paper, Mr. Dmitrijs Skačkovs listed six different models of liability, which can possibly be applied in cases when the damages are caused by abnormally dangerous activity. However, such a detailed list probably is overly sophisticated. Instead, the major debate exists between two major models of liability – strict liability and liability for fault, probably with some modifications. The present paper also will adhere to these two models and analyse them. The modifications of liability for fault usually may exist as raising of the standard of care or shifting the burden of proof.<sup>36</sup>

A certain model of liability shall be chosen by the legislator of particular country. In this respect, the German Supreme Court *Bundesgerichtshof* has validly emphasized that ‘it was not at liberty to pre-empt the legislature and to undertake an extension of the liability criteria structures without a specific statutory basis’.<sup>37</sup> Even in the United Kingdom the House of Lords has given a similar statement: ‘as general rule it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament than by the courts’.<sup>38</sup>

However, the Dutch legal scholar Cees van Dam has voiced the opinion that there is no exact borderline between liability for fault and strict liability. Elements of *stricter* liability can be found inside the framework of fault liability and elements of fault can be found within the framework of strict liability.<sup>39</sup> Moreover, strict liability as a concept is far from clear, – the phantom of fault still hides in the shadows of

<sup>35</sup> Estonian Law of Obligations Act. Available: <https://www.riigiteataja.ee/en/eli/506112013011/consolide> [last viewed 07.04.2019].

<sup>36</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, pp. 302–306.

<sup>37</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, p. 382.

<sup>38</sup> *Ibid.*, p. 390.

<sup>39</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 297.

fault liability or, to coach it in more legal terms, the elements of negligence still play a role in rules of strict liability.<sup>40</sup>

The origins of strict liability, also called risk liability, objective liability or indirect liability,<sup>41</sup> are a bit controversial. Some legal scholars have given an opinion that the origins of strict liability may be traced back even to Roman Law, where *lex Aquilia* may be treated as the first example of strict liability.<sup>42</sup> However, other legal scholars as from the common law countries,<sup>43</sup> as well as the Continental Europe legal system,<sup>44</sup> have criticized such opinion. Other authors provide opinion that *lex Aquilia* is actually the first known historical example of fault liability.<sup>45</sup> However, such opinion is difficult to support. Roman lawyers have provided comments regarding *lex Aquilia*, suggesting a rather careful examination of the fault of every person and the respective causality. For instance, Roman lawyer Celsus wrote that, if the slave was attacked by two persons and died as a result, then the attacker, who inflicted a mortal wound upon the slave, would be liable only for wounding, not killing of the slave. The second person will be liable for killing of the slave, as the slave actually perished as a result of another wound. It seems thus to Marcellus, and it is the more likely option.<sup>46</sup> Such opinion is also similar to the subsequent *causa superveniens* theory.<sup>47</sup>

A greater substantiation seems to support the opinion that strict liability was actually invented by the said Prussian Railway Act of 1838. Contrary to the French Civil Code (and later German Civil Code *Bürgerliches Gesetzbuch*), famous for all-embracing, general provisions of law, the Prussian Railway Act stipulated specific provisions of liability to be applied in the very specific area – railway transportation.<sup>48</sup> Regarding the origins of strict liability, German legal scholar Dr. Christian von Bar emphasized that invention of strict liability was related to the new objects, use or other actions with whom were related at the time uncontrollable risks.<sup>49</sup> It is an important aspect to be taken into account – the existence of uncontrollable risks as a necessary precondition of strict liability. It shall be kept in mind during examination, whether particular activity should be treated as abnormally dangerous and hence, whether the rules of strict liability

<sup>40</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 297.

<sup>41</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, p. 338.

<sup>42</sup> Richard, A., Epstein, A. A Common Lawyer Looks at Constitutional Interpretation. 72 *U.L.REV.*, 699, 704, 1992. Quoted from: Getzler, J. Richard Epstein, Strict Liability, and the History of Torts. *Journal of Tort Law*, Vol. 3, Issue 1, 2010, art. 3. Oxford: University of Oxford, 2010, p. 1.

<sup>43</sup> Getzler, J. Richard Epstein, Strict Liability, and the History of Torts. *Journal of Tort Law*, Vol. 3, Issue 1, 2010, art. 3. Oxford: University of Oxford, 2010, p. 1.

<sup>44</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, p. 367.

<sup>45</sup> Markesinis, B. S., Unberath, H. *The German Law of Torts. A Comparative Treatise*. 4<sup>th</sup> edition, Entirely Revised and Updated. Oxford, Portland: Hart Publishing, 2002, p. 714.

<sup>46</sup> D. 9,2,11,3 (Ulp. 18 ad ed.). Quoted from: Sirks, A. J. B. The slave who was slain twice: causality and the *lex Aquilia* (Iulian. 86 dig. D. 9,2,51). *The Legal History Review*, 79, 2011. Brill Academic Publishers, p. 315.

<sup>47</sup> Sirks, A. J. B. The slave who was slain twice: causality and the *lex Aquilia* (Iulian. 86 dig. D. 9,2,51). *The Legal History Review*, 79(2011). Brill Academic Publishers, p. 313.

<sup>48</sup> Markesinis, B. S., Unberath, H. *The German Law of Torts. A Comparative Treatise*. 4<sup>th</sup> edition, entirely revised and updated. Oxford, Portland: Hart Publishing, 2002, p. 715.

<sup>49</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, pp. 344–345.

should be applied (and, if so, is it prescribed by applicable law). Such uncontrollable risks are more inherent to activities with objects, which at actual time are new for the mankind, as with time flow humans learn how to control these risks. Therefore, it also should be kept in mind that activities, which were found to be objects of enormous danger some time ago, should not necessarily be found as such in the present time. For instance, at present time, new risks and, consequently, the substantial alterations of liability rules are considered in respect to the various types of artificial intelligence<sup>50</sup> and robotics,<sup>51</sup> especially regarding the use of autonomous vehicles<sup>52</sup> as a form of robot that is capable of, through the use of a computer, making decisions about some or all of the vehicle's movements with little to no human intervention.<sup>53</sup> Although the author does not want to expand this topic, as it deserves its own, separate discussion, it is worth to mention that probably after some time humankind will learn how to eliminate the risks associated with the use of artificial intelligence, robotics and autonomous vehicles, and the necessity for strict or stricter liability in this respect will cease to exist. Moreover, the difficulties, which are of legal importance, sometimes might be solved more suitably with technical, not legal remedies. For instance, it is suggested that to solve the difficulties related to gathering evidence that the damage has been caused with the defect of autonomous vehicle, a particular tracing system should be implemented.<sup>54</sup>

Paragraph 1, article 7:102 of the Principles of European Tort Law characterizes strict liability with two features: (1) examination of respondent's fault has no importance in this model of liability and (2) respondent can use for his defence only certain circumstances, if such are in place, for instance, force majeure. Latvian legal scholar and practitioner, Associated Professor Dr. Jānis Kārklīņš mentions the list of catalogues of excuses provided by law, that might be different in each particular area. The excuses in cases when the damage is caused by abnormally dangerous activity generally include force majeure, gross negligence or intent of injured person, loss of possession over the respective object as the result of unlawful activity of the third party.<sup>55</sup>

Strict liability could be divided into three types. Liability with an extra debtor provides that someone is jointly liable with the person, who actually caused the damage by this negligent conduct. Liability for a defective object may be applied

<sup>50</sup> Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Artificial Intelligence for Europe, p. 17. Available: <https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence-europe> [last viewed 07.04.2019].

<sup>51</sup> European Parliament resolution with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)); European Economic and Social Committee opinion on AI (INT/806-EESC-2016-05369-00- 00-AC-TRA). Available: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN> [last viewed 07.04.2019].

<sup>52</sup> Rosenberg, A. Strict Liability Imagining a Legal Framework for Autonomous Vehicles. *Tulane Journal of Technology and Intellectual Property*, Vol. 20, Fall 2017. Tulane University School of Law, p. 224.

<sup>53</sup> Ibid., p. 207.

<sup>54</sup> A Common EU Approach to Liability Rules and Insurance for Connected and Autonomous Vehicles. European Added Value Assessment. Accompanying the European Parliament's Legislative Own-Initiative Report. (Rapporteur: Mady Delvaux). Study. EPRS/European Parliamentary Research Service. February 2018, p. 27. Available: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/615635/EPRS\\_STU\(2018\)615635\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/615635/EPRS_STU(2018)615635_EN.pdf) [last viewed 07.04.2019].

<sup>55</sup> Kārklīņš, J. Stingrās atbildības izslēdzošie apstākļi [Exceptions of Strict Liability]. In: *Ārvalsts investīcijas: kad tiesības mijiedarbojas*. Latvijas Universitātes 74. zinātniskās konferences rakstu krājums. Rīga: University of Latvia Press, 2016, p. 123.

to someone in case when a product (goods or service) produced, distributed or provided by this person turns out to be defective and causes damage to other persons.<sup>56</sup> It is also called a 'product liability' and may be traced back to several court cases of common law countries, for instance, the famous *Donoghue v. Stevenson* case, where the claimant discovered a snail in the bottle of drink, which later defined by the court as a defective product. Interestingly, the commentators from the common law countries refer to this case as an example of liability for negligence, not strict liability.<sup>57</sup> Liability with a limited defence is mentioned as "perhaps the most classical and genuine form of strict liability". This liability is independent of the defendant's conduct and independent of the considerations whether the defendant has acted as the reasonable person and has performed sufficient precautionary measures. As already mentioned, only certain excuses, exhaustively prescribed by law, for instance, negligence or intent of injured person, may serve as defence in this form of liability.<sup>58</sup>

Legal scholars have mentioned several objectives of strict liability. One of the opinions is that the purpose of strict liability is to provide balance between the interests of involved persons. On the one hand, these are the interests to operate in and to obtain benefit from the situation of increased risk. On the other hand, there is an impossibility to exercise complete control over relevant risks. In such circumstances, compensation of the damages has a priority.<sup>59</sup> However, this balance is not the only objective of strict liability. Other objectives include (a) imposing liability on person, who, due to his or her knowledge and life experience is better equipped to foresee risks, associated with the use of particular object, and (b) increasing the level of public safety. These objectives may be illustrated with an example, when parents can be held liable for the damage caused by use motor vehicle (for instance, moped), belonging to a minor under the age of sixteen.<sup>60</sup> Parents are better equipped to foresee the risks, associated with the use of this vehicle, and imposing stricter liability upon them may increase the level of public safety.

Since strict liability, especially the strict liability with limited defence imposes liability without examining whether the defendant has acted reasonably, the application of this form of liability should be narrow. First of all, its application should be limited by certain provisions of law determining in which cases and to which persons this form of liability should be distributed. This objective could be better achieved, if the liability for damages, caused by abnormally dangerous activity and application of strict liability are provided is enshrined in special provisions of law, instead of stipulated by general rules. Secondly, for instance, in Germany, the application of strict liability is limited also with a certain monetary amount. The injured person or the person who has suffered damages may claim compensation according to the rules of strict liability within the given limitation. If this person would like to receive the compensation above the given limitation, he

<sup>56</sup> *Dam, C. van.* European Tort Law. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, pp. 300–302.

<sup>57</sup> *Giliker, P., Beckwith, S.* Tort. 4<sup>th</sup> edition. London: Thomson Reuters, Sweet & Maxwell, 2011, p. 261.

<sup>58</sup> *Dam, C. van.* European Tort Law. Oxford: Oxford University Press, 2007, pp. 258–259.

<sup>59</sup> *Kārklīņš, J.* Conditions for Tort Liability. In: *Torgāns, K., Kārklīņš, J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Issues of Torts and Contracts in EU and Latvia]. Rīga: Tiesu namu aģentūra, 2017, p. 299.

<sup>60</sup> *Bar, C. von.* The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences. Oxford: Clarendon Press, 2000, p. 328.

or she may claim it on the basis of fault liability.<sup>61</sup> Such limitation is reasonable, because in the areas subject to provisions of strict liability insurance is expected to be obtained<sup>62</sup> and such limitation provides more appropriate possibility for liability insurance. German legal scholar Christian von Bar has also provided opinion that paragraph 1, article 29bis of the Belgian law on obligatory liability insurance for motor vehicles, provides *liability* of insurer, who has insured the liability of the owner of keeper of the vehicle.<sup>63</sup> In general, such opinion could not be supported, particularly with the reservation about Belgian law, and the author of the present paper does not regard himself as fully competent to participate in discussion. Although insurance undoubtedly plays an import role in tort law,<sup>64</sup> it has a rather complementary purpose, as the obligation of the liability insurer to pay the insurance indemnity generally depends at least on two additional aspects: (a) whether the insured person is held liable for particular damage and (b) whether the particular damage falls within the scope of insured risks.

There is one more legal term – ‘absolute liability’, which should be discussed in the context of strict liability. According to Dr. Jānis Kārklīņš, absolute liability is present in case when even the force majeure event cannot serve as the excuse from liability. However, it is not a separate liability model in any of the legal systems. The closest to this is the model of liability set down in Vienna convention on civil liability for nuclear damage.<sup>65</sup> The first paragraph of article IV of this convention provides that liability of the operator for nuclear damages are absolute, and force majeure cannot be an excuse exempting operator from liability. However, further paragraphs of the same article provide several exemptions releasing the operator from liability. To a certain extent, similar provisions, according to Dr. Jānis Kārklīņš, could be found in article 7:102 of the European Principles of Tort Law. Therefore, Jānis Kārklīņš suggests that this model could be named ‘quasi-absolute liability’.<sup>66</sup> The author of present paper does not agree that this ‘quasi-absolute liability’ is something different from strict liability. In fact, the ‘quasi-absolute liability’ in this sense is the same strict liability with a limited defence as defined by Cees van Dam and noted above. Although force majeure is not always the valid excuse under the said Vienna convention, the paragraphs 2, 3 and 5 of the article IV of the said convention provide its own catalogue of excuses for liability of the operator of the nuclear installation. Finally, yet importantly, it shall be kept in mind that article 7:102 of the European Principles of Tort Law, mentioned by Jānis Kārklīņš, also are addressing strict liability, not any other separate form of liability.

As regards fault liability for abnormally dangerous activities, interesting provisions could be found in Spanish law. Spanish Civil Code does not provide general regulations for liability for abnormally dangerous activities. It provides instead narrowly defined list of such activities, where the liability for risk or ‘use

<sup>61</sup> Dam, C. van. *European Tort Law*. Oxford: Oxford University Press, 2007, p. 257; *Markesinis, B. S., Unberath, H.* *The German Law of Torts. A Comparative Treatise*. 4<sup>th</sup> edition, entirely revised and updated. Oxford, Portland: Hart Publishing, 2002, p. 717.

<sup>62</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, p. 324.

<sup>63</sup> *Ibid.*, p. 403.

<sup>64</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 221.

<sup>65</sup> Vienna convention on civil liability for nuclear damage. Available: <https://www.iaea.org/sites/default/files/infcirc500.pdf> [last viewed 29.01.2018].

<sup>66</sup> Kārklīņš, J. *Conditions for Tort Liability*. In: *Torgāns, K., Kārklīņš, J., Bitāns, A.* *Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Issues of Torts and Contracts in EU and Latvia]*. Rīga: Tiesu namu aģentūra, 2017, pp. 299, 301.



of things' is applicable. Among others this list includes regulation of liability for use of motorized vehicles. However, this liability for risk is not the strict liability. In Spanish it is called *culpa quasi objectiva*, literally – 'quasi strict liability', which, in fact, is the same as fault liability with shifted burden of proof.<sup>67</sup> It provides that within the limits exists the presumption of the fault of the person, who operated with increased level of risk or performed some abnormally dangerous activity. In addition, there is also a presumption of causality, i.e. that the presumed fault of particular person has caused certain damage. Therefore, this model of liability provides a twofold presumption. It is illustrated with the following example from the case law. The cyclist was killed during a road traffic accident in unexplained circumstances. Spanish Supreme court ruled that, at first, it is presumable that motorist has infringed road traffic rules, secondly – that it is presumable that the cyclist has been killed by such infringement of motorist.<sup>68</sup> In other words, the presumption refers to the fault of respondent, as well as to the causality between fault and the actual damage. However, the respondent may escape the liability by rebutting either both presumptions, or at least the presumption of causality, proving that the damage was caused by other circumstance and/or by another person. On this ground, 'quasi-objective liability' should be distinguished from strict liability. Although in quasi-objective liability the examination of respondent's fault in fact plays just a secondary role, the respondent may defend himself not only with an exclusive list of defences, such as a force majeure circumstances, but with any facts, which may help him to rebut the said presumptions. However, here comes also at least one of the uncertainties in distinction between strict liability and fault liability mentioned by Cees van Dam.<sup>69</sup> Rebutting of causality usually will lead to conclusion that fault or at least activity of someone else's rather than respondent's has caused the damage. Hence, such defence will be based on arguments about the third party's conduct, which, pursuant to point 2, paragraph 1, article 7:102 of the Principles of European Tort Law is one of defences in case of strict liability.

Also, one can ask whether this quasi-objective liability, which is based on rebutting of the said presumptions, should not be distinguished from fault liability with shifted the burden of proof. The author of the present paper is of the opinion that both these sub-models of fault liability are actually the same as rebutting of the aforementioned presumptions, inter alia, presumption of fault, in fact, includes the shifted burden of proof. Dutch legal scholar Cees van Dam explains that shifted burden of proof is often applied in cases, where the defendant possesses more information about the cause of the damage than the claimant.<sup>70</sup> The author of the present paper adheres to the opinion that it may be so in some cases, while in other cases such considerations would not hold true. For instance, if the damage is caused by the use of motorized vehicle, the defendant will not always be better informed about the cause of damage than the claimant.

Another form of stricter fault liability is the liability with raised standard of care. Usually it refers to the duty of defendant to prove that he has taken sufficient precautionary measures as some kind of objective standard for defendant's

<sup>67</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 304.

<sup>68</sup> Bar, C. von. *The Common European Law of Torts*. Vol. 2. *Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences*. Oxford: Clarendon Press, 2000, pp. 362–363.

<sup>69</sup> Dam, C. van. *European Tort Law*. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 297.

<sup>70</sup> *Ibid.*, p. 305.



particular activity.<sup>71</sup> Therefore, it includes some elements from shifted burden of proof.

Different models of liability also may be applied regarding different types of damages. Latvian legal doctrine provides that in case when the damage is caused by abnormally dangerous activity, it is a strict liability case.<sup>72</sup>

However, one more important distinction is provided by Latvian Supreme Court in judgment from 5 March 2015 in case No. SKC-250/2015 C04327108.<sup>73</sup> The claimant was a public transport passenger, injured during traffic accident while she was riding in public transport. As a result of collision, she experienced pain and suffered several bodily injuries. The respondent was the public transport operator. Traffic accident was caused by another person, not by the driver of the particular public transport vehicle (bus). In paragraph 15 of the said judgment, Latvian Supreme Court stressed that wording of paragraph 2, article 2347 of the Civil Law of Republic of Latvia regulating liability for damages caused by abnormally dangerous activity, provides a regulation regarding pecuniary damages (*zaudējumi* – in Latvian) only, as the wording of this provision suggests, whereas paragraph 1, article 2347 of the Civil Law of the Republic of Latvia, after amendment on 29 November 2012, explicitly regulates the liability for pecuniary, as well as non-pecuniary damage. However, this paragraph 1 does not provide for a strict liability for these damages. In such circumstances, Latvian Supreme Court concluded that the will of the legislator was that only pecuniary damages caused by abnormally dangerous activities, should be compensated on strict liability basis. If the abnormally dangerous activity has caused non-pecuniary damages, they should be awarded on the basis of the fault liability. Taking into account that the choice of applicable liability model falls within the exclusive competence of legislator, the author of the present paper is of the opinion that the Latvian Supreme Court's findings are correct. Latvian Supreme Court re-confirmed similar findings in judgment from 3 June, 2016, case No. SKC-143/2016 C28244808.<sup>74</sup>

#### 4. Liable Person

A further question of significance concerns the person who should be held liable for the damages caused by the abnormally dangerous activity, if the strict liability model is applicable in such case.

Generally, tort law adheres to the opinion that everyone shall be held liable for his/her actions, that have harmed other persons.<sup>75</sup> The general rule regarding liability for abnormally dangerous activities provides a similar view. The liable person should be the keeper of the object, who has performed a certain abnormally dangerous activity with this object, in other words, 'keeper of substance' or

<sup>71</sup> *Dam, C. van.* European Tort Law. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 302.

<sup>72</sup> *Torgāns, K.* Conditions for Tort Liability. In: *Torgāns, K., Kārklīņš, J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Issues of Torts and Contracts in EU and Latvia]. Rīga: Tiesu namu aģentūra, 2017, p. 131.

<sup>73</sup> Latvijas Republikas Augstākās tiesas Civillietu departamenta 2015. gada 5. marta spriedums lietā Nr. SKC-250/2015 C04327108 [Judgment of the Civil Department of the Supreme Court of the Republic of Latvia in case No. SKC-250/2015 C04327108 from 5 March, 2015]. Not published.

<sup>74</sup> Latvijas Republikas Augstākās tiesas Civillietu departamenta 2016. gada 3. jūnija spriedums lietā Nr. SKC-143/2016 C28244808 [Judgment of the Civil Department of the Supreme Court of the Republic of Latvia in case No. SKC-143/2016 C28244808 from 3 June, 2016]. Not published.

<sup>75</sup> *Raz, J.* Responsibility and the Negligence standard. *Oxford Journal of Legal Studies*, Vol. 30, Issue 1, 2010, p. 11.

‘operator of the installation’.<sup>76</sup> The legal doctrine provides that the ownership of the thing is naturally a significant indicator of the status of keeper, but it is not decisive, as there are many cases, in which someone other than the owner has been held to be the keeper.<sup>77</sup> Paragraph 1, article 5:101 of the Principles of European Tort Law also suggests the distinction between the ‘keeper’ who does not necessarily is an owner, and ‘owner’, who does not necessarily is the ‘keeper’. This provision speaks about “a person who carries on an abnormally dangerous activity”. Therefore, it places a greater emphasis upon the fact of who has performed particular activity rather than who is the owner of the object used to perform the abnormally dangerous activity. Such interpretation is supported also by point a), paragraph 2, article 1:101 of the Principles of European Tort Law, providing that “damage may be attributed in particular to the person [...] whose abnormally dangerous activity has caused it”, accentuating the question of who has actually performed the abnormally dangerous activity. The Soviet era Latvian legal scholar Professor Jānis Vēbers has noted that liability for the damage caused by abnormally dangerous activity shall be applied, taking into account who has operated the abnormally dangerous activity. For instance, if the owner has transferred the particular object to another person, who can exploit this object or carry out some activity with this object, this other person, not the owner, shall be held liable, if abnormally dangerous activity will cause damage.<sup>78</sup> It means that the actual carrying out of abnormally dangerous activity, instead of the title or other rights to the object that is involved in abnormally dangerous activity, is the decisive factor in determining the liable person. Contemporary Latvian legal scholar Professor Kalvis Torgāns indicates that the legislator wishes to attribute the liability for the damage caused by the person whose abnormally dangerous activity has caused the damage.<sup>79</sup> Therefore, he also places the main emphasis on the question, who performs the abnormally dangerous activity, rather than who has title or other rights to the object involved in the abnormally dangerous activity. As performing of the abnormally dangerous activity usually involves possession of the object of abnormally dangerous activity, paragraph 2, article 2347 of the Civil Law of the Republic of Latvia strongly underscores the actual possession of this object with a reference not only to the owner (who will not always be the possessor of the said object), but also to the keeper, custodian or user of the said object. Moreover, if the legitimate possessor has lost the possession over the said object without his fault, the liability for potential damages, caused by abnormally dangerous activity, also transfers to the actual possessor of the said object.

The previous section of paper gave the opinion that the model of liability stipulated in article IV, Vienna Convention on Civil Liability for Nuclear Damage, is actually just another example of strict liability instead of absolute or quasi-absolute liability. However, this liability is applied to the operator, who, pursuant to the definition given in point c), article I of Vienna Convention, with regard to a nuclear installation means the person designated or recognized by the installation state as

<sup>76</sup> *Bar, C. von.* Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another. Stämpfli, Bruylant, Sellier. European Law Publishers, 2009, p. 720.

<sup>77</sup> *Bar, C. von.* The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences. Oxford: Clarendon Press, 2000, p. 360.

<sup>78</sup> *Vēbers, J.* Saistības no kaitējuma nodarīšanas [Obligations from Causing the Damage]. Rīga, 1969, p. 44.

<sup>79</sup> *Torgāns, K.* Saistību tiesības. II daļa. Mācību grāmata [Law of Obligations. Part II. A coursebook]. Rīga: Tiesu namu aģentūra, 2008, pp. 282–283.

the operator of that installation. Therefore, also for such operator the decisive aspect is operation with nuclear installation and thus exercising an abnormally dangerous activity, not the title or other rights to the installation.

Exercising the abnormally dangerous activity as the decisive factor may be linked to the following aspects. First of all, it is useful to remember the statement of Cees van Dam about blurred borders between fault liability and strict liability, which includes the elements of fault liability.<sup>80</sup> This aspect could be found in attribution of liability for damages, caused by the abnormally dangerous activity. Via this attribution, the fault of keeper is to some degree presumed, because, as this person has directly carried out the relevant abnormally dangerous activity, it may be presumed that he or she has acted at least with negligence, if abnormally dangerous activity has caused damage. Secondly, although one of the decisive characteristics of abnormally dangerous activity is the inability to exclude risks even by exercising due care, the person who directly carries out the relevant abnormally dangerous activity, is in the best position in comparison with all the other persons in preventing at least those risks, which may be prevented. In this context, the ratio of holding the keeper liable may be compared with the ratio, why in Germany the liability for failure to maintain the building, which has collapsed and caused damage, is applied to the actual possessor of the particular building, not always an owner. For instance, this liability may also be applied to the person who takes over the maintenance of the building or a structure. Such allocation of liability is justified with better possibilities to avert the risks.<sup>81</sup> Thirdly, legal doctrine pointedly emphasises that the liability should be distributed to the person, who benefits from the particular activity, which is not necessarily the owner of the object involved in this activity. For instance, as stated in legal doctrine, the owner of the building benefits from his building only when the construction process is finished. While construction is in progress, the construction company is the person, who benefits from it and, hence, shall be held liable, if particular construction process shall be treated as abnormally dangerous activity and if it has caused particular damage.<sup>82</sup>

Therefore, if the legislator has provided strict liability for damages caused by abnormally dangerous activity, the decisive factor in allocation of this strict liability is who should be considered as the 'keeper' of the object, with whom the abnormally dangerous activity has been performed, or, to be more precise, who has performed the actual abnormally dangerous activity.

## Summary

The research reflected in the current paper has yielded the following most important aspects, as well as brought the following conclusions:

1. To grasp the essence of the concept of abnormally dangerous activities, it is crucial to take into account the historical context of the time and situation, when the said concept was developed – i.e., the time of great technical innovations and creation of various objects, whose operation brought numerous advantages along with risks not yet known and, hence, not entirely controllable.

<sup>80</sup> *Dam, C. von.* European Tort Law. 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2013, p. 297.

<sup>81</sup> *Ibid.*, p. 466.

<sup>82</sup> *Bar, C. von.* The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality and Defences. Oxford: Clarendon Press, 2000, pp. 359–360.

2. The most distinctive feature of abnormally dangerous activity is the impossibility to eliminate the relevant risks even with exercising of due care.
3. Abnormally dangerous activity is an activity, not an object (thing or substance), nor the sum of object and activity, because, basically, the performance of activity with the certain object, not the object itself is what may cause abnormal danger, which cannot be eliminated even with exercising of due care.
4. The fact that in some countries the legislator has decided to apply stricter or even strict liability to the damages relevant to certain objects does not prove that these objects should be treated as abnormally dangerous equally with abnormally dangerous activities. In fact, even with respect to these objects that the decisive moment for the liability with respect to these objects is activity (or the lack of necessary activity) performed with these objects.
5. Liability for damages caused by abnormally dangerous activities may be regulated either by special provisions of law, applicable to each certain activity, or/and by general provisions, applicable to all kinds of abnormally dangerous activities. However, several types of certain abnormally dangerous activities may have important particularities and special provisions might be more suitable for taking into account these particularities. Therefore, to extent possible, it is advisable to provide special legal provisions for each type of abnormally dangerous activity. General provisions should be provided and applied only for the cases and extent, not covered by special provisions.
6. Liability for the damages caused by abnormally dangerous activities usually is regulated by one from two following models – a strict liability or a stricter fault liability with increased standard of care, or shifted burden of proof. It is up to legislator of each country to decide which model will be applied in respective country.
7. The opinion that strict liability could be traced back to Roman law and *lex Aquilia* could not be supported. Even the commentaries provided by Roman lawyers, for instance, Celsus, suggests to examine separately the fault of each person, involved in causing the damage, and causality related to the fault of each particular person. Such approach, therefore, rather suggests application of fault liability than strict liability.
8. In order to provide better prospects for persons, which may be held liable for the damages caused by abnormally dangerous activities, to insure their liability, it is advisable to provide in law that, similarly to the approach taken by Germany, the strict liability is limited also with certain monetary amount, i.e., the person, who has suffered damages, may claim the compensation according to the rules of strict liability within the given limitation. If the claimant would like to claim the compensation in amount, exceeding the given limitation, such claim could be made on the basis of fault liability.
9. The mandatory insurance plays an important role in liability for the damages caused by abnormally dangerous activities, if strict liability is applied to these damages, because only the requirement of mandatory insurance, applicable to the potentially liable person, insures the persons, ensuring real prospects to receive the compensation of their damages. However, it does not mean, that the insurer has his own separate liability for these damages.
10. Liability of the operator of nuclear installation stipulated in Vienna convention on civil liability for nuclear damage is just another example of strict liability with limited defences, not an absolute or quasi-absolute liability.

11. Within the present wording of paragraphs 1 and 2 of the article 2347 of the Civil Law of the Republic of Latvia, the Supreme Court of the Republic of Latvia has validly explained in its judgment from the 5<sup>th</sup> of March, 2015 in case No. SKC-250/2015 C04327108 that strict liability is applicable only to pecuniary damages, caused by abnormally dangerous activity. If abnormally dangerous activity has also caused non-pecuniary damages, the injured person may claim these damages on the basis of fault liability.
12. If the liability for the damages caused by abnormally dangerous activities is regulated by general provisions via strict liability, such liability shall be applied to the person, who has directly carried out the activity which has caused the damage, because (a) it may be presumed that this person has acted at least with negligence, if abnormally dangerous activity has resulted in damage; (b) the person, who directly carries out the relevant abnormally dangerous activity is in the best position in comparison with all the other persons to prevent at least those risks, which may be prevented; (c) this person benefits from exercising the particular abnormally dangerous activity.

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