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Idea of Strict Liability in Private Law

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The article contains analysis of several aspects of strict liability and the criteria of its application, providing an insight into this complex concept of liability. The article contains analysis and opinion about the meaning and the role of strict liability and its differences with other models of liability. The author also explores the role of fault in the strict liability doctrine, as well as causation as a fundamental question of strict liability. The examined issues are analysed from the standpoint of theoretical sciences, thus allowing other legal scholars to use the conclusions outlined in the article in their scientific work.

Keywords: strict liability, fault, direct liability, objective liability, non-fault liability, liability for risk, presumption of fault, absolute liability, civil liability, exclusions of civil liability, source of increased danger, abnormally dangerous activity, fortuitous event (*cas fortuit*), causation, foreseeability, negligence.

Content

<i>Introduction</i>	176
1. <i>Systems of Liability Models</i>	176
a) <i>Model of General (Fault-based) Liability</i>	176
b) <i>Model of Presumption of Fault</i>	180
c) <i>Strict Liability Model</i>	182
d) <i>Model of Absolute Liability</i>	184
e) <i>Differences Between Models of Liability</i>	185
2. <i>Identifying Regulation on Strict Liability</i>	186
3. <i>Exceptions to Applying Strict Liability</i>	187
4. <i>Role of Fault in Model of Strict Liability</i>	190
5. <i>Role of Causation in Model of Strict Liability</i>	192
6. <i>Differentiating Model of Strict Liability</i>	195
<i>Summary</i>	196
<i>Sources</i>	198
<i>Bibliography</i>	198
<i>Normative Acts</i>	199
<i>Other Sources</i>	199

Introduction

The view that strict liability is understood as non-fault liability has become enshrined in legal science and doctrine. In the model of general (fault-based) liability manifestation of fault is closely linked, even identified with negligence and intent. Whereas strict liability is liability, which sets in irrespectively of the existence or non-existence of a person's negligence, i.e., liability sets in even if the slightest negligence cannot be discerned in a person's conduct. However, numerous examples from practice have led to the question set forth by legal science – can the model of strict liability be, indeed, differentiated from the model of general liability or fault-based liability with scientific precision? This question arises, in particular, considering the fact that regulation on strict liability occasionally even directly and immediately operates with the concept of fault. For example, the concept “fault” is found in the second part of Article 2347 of the Civil Law¹ (CL), which regulates liability for source of increased danger and, thus, strict liability.

1. Systems of Liability Models

The analysis of the idea of strict liability is impossible without examining different models of civil law liability. Examination of each of these models and identification of different principles leads to a better understanding of the strict liability idea.

a) Model of General (Fault-based) Liability

The model of general civil law liability or the model that envisages fault-based liability is included in CL Article 1635 in interconnection with CL Article 1640, which defines the degrees of fault. The content of the aforementioned articles envisages that civil law liability may set in only as a consequence of an act for which a person may be held at fault, whereas negligence or the minimum degree of fault applies, if lack of an honest manager's care can be identified in actions that have led to unlawful infringement upon other person's rights² (theory of the outcome of wrongdoing³). Since the idea of general civil law liability, which includes the principle of fault, is based upon the standard of an honest and careful manager (a reasonable person), accordingly, the model of liability inevitably comprises the idea that liability may set in only for such tort that an honest and careful manager would preclude. This, in turn, means that liability may not set in for unforeseeable tort, since the requirement to foresee and, thus, also to prevent it may not be imposed upon anyone (even an honest and careful manager), and consequently, this person also cannot be held at fault for negligence (fault is absent), which is a mandatory pre-requisite for applying civil law liability. Thus, upon establishing that the tort could not have been foreseen (even if it is causally related), it cannot be concluded that a person's acts did not comply with the standard of an honest and careful manager. This idea, for example, is clearly reflected in the regulation of CL Articles 1773 and 1775, which provide that loss that has occurred due to *force majeure* or

¹ Civillikums. *Valdības Vēstnesis*, 41, 20.02.1937.

² See in more detail about the model of general liability (fault-based liability): *Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls Juridiskā Zinātne*, No. 8, Rīga, 2015, pp. 169–173.

³ See in more detail about interaction between culpability and wrongdoings and the theory of outcome in *Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls Juridiskā Zinātne*, No. 8, Rīga, 2015, pp. 169–173.

cas fortuit must not be compensated for. However, these two institutions of law are not the only ones that comprise the idea that “inability to foresee a tort” does not cause liability, as situations that do not qualify as *force majeure* or *cas fortuit* may be possible, and yet the tort was equally unforeseeable and therefore liability does not set in.⁴ “Inability to foresee” and “honest and careful manager” are two inseparable concepts. At this point any reader might have a question – why does unforeseeing of a tort exclude liability? Is it not fair to compensate for any damage caused by a person’s act, which is in causal relationship with the consequences thereof? Why does the legal system protect the one who is unable to foresee rather than the one who has suffered harm? The idea of liability mentioned above is understandable, if the thesis that liability sets in only for an action that is incompatible with the standard of an honest and careful manager is accepted as a dogma. However, there is a deeper question – why is the borderline in applying liability exactly the standard of an honest and careful manager, which simultaneously includes also the seemingly confusing quality “ability to foresee a tort”? Numerous publications dedicated to the concept of an honest and careful manager (reasonable person) are found in legal literature,⁵ and yet almost none can be found that would explain the idea, why the quality of “ability to foresee” is included in this concept.

The idea that “ability to foresee” is a classical prerequisite in applying general civil law liability, can be found also in the commentaries on Principles of European Tort Law: “a person cannot be held liable for a consequence of her behaviour if, notwithstanding all due caution, she was not able to foresee it”.⁶ Likewise, this principle existed in the Roman law – if the damage has occurred and the person has shown the care of *bonus pater familia*, then liability does not set in even if it is established that a particularly shrewd master with good forecasting abilities would have been able to avoid causing the damage.⁷ This approach, sparing of the tortfeasor, as it were, is found in the fundamental theses of philosophy (order of things), which could be characterised, as follows – “any damage that a person suffers from during his life-time, he also assumes himself; no one has the obligation to compensate for anything to anyone else, the nature has not created life without harm and hardship. And only in exceptional cases a person may impose the consequences of damage upon another person”. That is to say, imposing the consequences of damage upon another person is an extraordinary exception to the order of things. This thesis also includes Aristotle’s statement that injustice is understood as voluntary offence, for which liability sets in not only as the consequence of objective activities, but as the consequence of the tortfeasor’s will, allowing that these consequences set in.⁸ Here, the word “allowing” is significant, as it is to be linked with the ability to prevent the consequences; thus, something that could be foreseen and prevented. On the basis of this fundamental thesis, for example, a uniform opinion exists that no one has the obligation to compensate

⁴ See in greater detail: Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls *Juridiskā Zinātne*, No. 8, Rīga, 2015.

⁵ Miller, A. D., Perry, R. The Reasonable Person. *Law Review*, Vol. 87, No. 2, New York University, 2012, pp. 323–392. Lucas, R. J. The Philosophy of the Reasonable Man. *Philosophical Quarterly*, No. 13(51), 1963, pp. 97–106. Ripstein, A. Reasonableness and Law. Vol. 86. Springer. 2009, pp. 255–281. Grueber, E. The Roman Law of Damage to Property. The Clarendon Press, Oxford, 1886.

⁶ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 78.

⁷ Grueber, E. The Roman Law of Damage to Property. The Clarendon Press, Oxford, 1886, p. 154.

⁸ Aristotle. *Nicomachean Ethics*. New York: the Bobbs-Merrill Company, Inc., 1962, pp.133–140.

for the damage that has been caused by *force majeure* or *cas fortuit* (unless a person has assumed this risk voluntarily or otherwise). Therefore, the victim himself must suffer the damage caused by a coincidence, *cas fortuit*, for which no person can be blamed, because in the concrete circumstances it has not been objectively foreseeable and preventable. The aforementioned leads to the conclusion that civil law liability is an exception to the natural order of things, and not to the contrary – any person has civil law liability, unless he can prove a justification referred to in the law for not applying liability. On the basis of this particular approach, the idea of legal theory becomes understandable – liability sets in only for a person, who by his *careless actions* or failure to act disrupts the natural order of things. The natural order of things does not comprise the dogma that an average person (which reflects the standard of an honest and careful manager) should be able to foresee unforeseeable torts. Therefore tort, which was objectively unforeseeable, does not create liability, since it was impossible to prevent it. The standard of an honest and careful manager comprises the idea that this person is knowledgeable and experienced, knows all laws and the aim of the legal system – to protect the material and immaterial benefits of persons. Thus, if it is established that a person of this standard, knowing all the laws, was unable to foresee and infringement upon benefits protected by this system, then such unforeseeing is not contrary to the aim of the legal system and therefore does not bring about liability. Undoubtedly, violation of the standard of an honest and careful manager is manifest, as a minimum, in the fact of negligence; however, to establish negligence, it must be determined that a person could have acted with greater care, and, in turn, it is possible to act with greater care only if the consequences of one's actions can be foreseen. It is important to note here that the concept of an honest and careful manager also comprises the idea that one must foresee within a reasonable scope – i.e., not whether theoretically it was possible to foresee a tort, but whether an average reasonable person could foresee and should have foreseen that his action would cause the particular tort. It is impossible to avoid something that a person cannot objectively foresee. If an event is unforeseeable, then a person cannot be accused of negligence, as it is not even known, what from and in what way one should beware. Therefore, in such situations it is impossible to accuse one of negligence (fault), even in the slightest degree. Because of this, *inter alia*, the theory of law does not provide for liability also for a damage that has been caused due to an *cas fortuit*, since an honest and careful manager can neither foresee, nor prevent it, thus, to beware of such consequences.

The foreseeability of tort as a mandatory criterion for applying liability has been consolidated, for example, in the provisions of criminal law. The fourth part of Article 10 of the Criminal Law,⁹ which defines committing a criminal offence due to negligence, provides that “an offence shall not be criminally punishable if the person did not foresee and should not and could not have foreseen the possibility that harmful consequences of his or her act or failure to act would result in”. Although this provision is not applicable in civil law, it should be taken into consideration that relationships of tort law in the Roman law, the concepts of extra-contractual tort and crime initially were not separated and were subject to united commitment – tort

⁹ Kriminālikums. *Latvijas Vēstnesis*, 199/200 (1260/1261), 08.07.1998.

(*delictum*).¹⁰ Consequently, the prerequisites for identifying negligence, consolidated in criminal law, may not be ignored in assessing application of the civil law liability also in the case of tort. Article 4:102 of the Principles of European Tort Law, *inter alia*, points to this, by characterising the standard of a person's behaviour, the foreseeability of the tort (damage) is mentioned as one of the criteria. In this regard, the systems of criminal law and civil law are concerted.

The aforementioned causes, thus, explain the idea that unforeseeable tort does not create liability. Moreover, pursuant to the aim of the civil law regulation it would not be right to establish that liability, nevertheless, sets in for unforeseeable torts, since that would decrease civil turnover. Law has the aim to promote and alleviate interactions between persons, not to set it against the natural order of things. Essentially, the legal concept "honest and careful manager" ensures a perfect balance between persons' freedom and safety. Abiding by this balance, in turn, ensures fairness.

At this point the reader might ask, how to assess precisely, whether a person could and should have foreseen the particular tort? In assessing the setting in of liability in the general model of liability according to the feature of foreseeability, a two-stage test must be performed. First of all, an answer must be found to the question, whether the person could have subjectively foreseen the tort. If the answer is negative, then the second step in the test is conducted, establishing, whether tort had been objectively foreseeable. Subjective inability to foresee tort does not release from liability. If the answer to the first or the second question is positive, then the person has allowed, at least, negligence.

However, even an objective possibility to foresee tort does not always create liability. Instances can be found in case law when liability for the tortfeasor does not set in, even if tort could have been reasonably foreseen. Thus, for example, in the English court case *Bolton v. Stone*, a ball struck by the defendant during a cricket match flew outside the field and hit a passer-by, causing damages to his health. The court rejected the victim's claim for damages, noting that during the last 30 years a cricket ball had flown outside the field only 6 times, thus, although tort was theoretically foreseeable, a probability as low as that precluded from describing this action as negligence.¹¹ This court case is not the only one, where liability does not set in, if the court establishes that the case, as the result of which someone has suffered, is an extraordinary exception from the natural order of things.¹²

Unforeseeing as an element excluding liability is also known in contractual law. Since 2009,¹³ it has even been enshrined in CL Article 1779¹. This Article confirms the idea expressed in this article that the legal system takes into account unforeseeability in determining the possible liability of the tortfeasor. However, foreseeability in contractual law, defined in CL Article 1779¹, should not be mistaken for foreseeability in tort law. Contractual law comprises the idea that in the presence of an infringement, the infringer cannot be required to compensate for the damage that he could not have envisaged at the moment of infringing upon the contract. Thus, in contractual law foreseeability restricts the maximum amount

¹⁰ *Janecek V. Exemplary Damages: A Genuine Concept?* *European Journal of Legal Studies*, Vol. 6, No. 2 (Autumn/Winter 2013/14), pp. 189–206. Available at <http://ssrn.com/abstract=2401622> [last viewed 09.06.2016].

¹¹ *Van Dam*, C. *European Tort Law*, 2nd edition. Oxford: Oxford University Press, 2013, pp. 236–237.

¹² *Ibid.*, p. 237.

¹³ *Grozījumi Civillikumā. Latvijas Vēstnesis*, 94(4080), 17.06.2009.

of damage (liability) that can be demanded from the infringer, whereas in tort law any amount of damage, which is causally related to tort must be compensated for, even if the amount was unforeseeable. Foreseeability in tort law does not apply to foreseeing the amount of damage, but to foreseeing tort. Thus, in contractual law, the unforeseeing only decreases the scope of liability, because the breach of contract and, thus, the fault is already identifiable, but in tort law the unforeseeability of the tort excludes liability as such, because the fault cannot be identified.

The model of the presumption of fault is similar to the model of liability for fault and, in terms of strictness, is located somewhere between the model of general liability and the model of strict liability. This model of liability should be perceived as a separate system of liability and may not be equalled to the model of general liability.

b) Model of Presumption of Fault

Pursuant to this approach, fault is presumed, i.e., it is presumed that a person has acted contrary to the standard of an honest and careful manager, unless he is able to refute this assumption. The plaintiff has to prove only that damage has occurred and that the defendant has a legal connection to this tort. The legislator usually establishes the presumption of fault in those relationships, where information about the infringement and facts related to it are with the infringer or are unclear, and therefore he has been imposed the task of refuting. For example, the presumption of fault is found in CL Article 2363, which provides that “the keeper of a domestic or wild animal shall be liable for losses caused by such animal, unless the keeper can prove that he took all safety measures required by the circumstances, or that the damages would have occurred notwithstanding all of the safety measures [...]” Thus, the law presumes that the keeper is liable, but at the same time grants the keeper the right to refute this presumption by proving absence of fault. Likewise, the presumption of fault is found in CL Article 2352¹⁴: “each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.” If the information is true, but the disseminator cannot prove it, the court will presume that the information was incorrect and can grant also a moral damage in favour of person according to the Article 1635 of CL, whereas in the Commercial Law¹⁴ the presumption of fault is found in the third part of Article 169 – a member of the board and the council is not liable for losses, if he proves that he has acted as an honest and careful manager. CL Article 1998 and 2233 are to be mentioned as unclear as to their wording, and regarding their structure they comply with the model of strict liability, because they do not envisage assessment of fault (negligence of the subject himself) as an exception from liability. From the systemic perspective, the regulation included in these articles should, however, be included into the model of the presumption of fault,¹⁵ but the unclear wording of these articles should be explained from the historical aspect,¹⁶ when, indeed, in such cases liability was envisaged without taking into account the aspect of fault.

The model of presumption of fault is a stricter model of liability vis-à-vis the tortfeasor compared to the model of general liability, since the law imposes an obligation upon him to refute this presumption. In fact, the idea of justifying

¹⁴ Komerclikums. *Latvijas Vēstnesis*, 158/160(2069/2071), 04.05.2000.

¹⁵ *Sinaiškis, V.* Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības. Rīga. 1996, 150. lpp.

¹⁶ *Čakste, K.* Nejaušība un nepārvarama vara Latvijas Civillikumos. Jurists. 1937, 14.–16. lpp.

oneself (presenting justification) starts functioning in the model of presumption of fault, when a person, who is accused of being liable for consequences, has to refute this accusation. If the person does not refute this assumption, then liability sets in, if other pre-requisites for applying civil law liability are present. Thus, in the case of the model of presumption of fault, the court does not have to establish, whether a fault can be discerned in the actions by the person, but rather, whether the defendant has submitted sufficient evidence proving that no fault can be identified in his actions. This model of liability can cause a situation, where liability is applied to a person, who cannot be held at fault for the tort, but the reason for applying liability is the fact that he is unable to refute the presumption due to lack of evidence. Due to this reason some sources of legal doctrine designate this model of liability as “quasi-strict liability”.¹⁷ Since this model of liability is an exception to the model of general liability, it may be applied only in those private law relationships, where the legislator has directly envisaged it. An arbitrary extension of the model of presumption of fault with respect to various legal relationships would decrease legal certainty¹⁸ and therefore is not allowed.

In the model of presumption of fault, similar to the model of general liability, objective unforeseeing of tort excludes civil law liability. It means, both in the fault-based model of liability and the model of presumption of fault that the tortfeasor has an access to all exceptions from applying liability, *inter alia*, acting in compliance with the standard of an honest and careful manager.

The question, whether presumption of fault does not exist in contractual law, should be examined separately. An opinion has been heard that in the case of breach of contract a fault should be presumed, because the victim cannot prove that the breach of contract has occurred due to negligence or intent. However, the opinion that presumption of fault exists in contractual law is not correct. The breach of contract can be manifested in two ways – as the failure to act, for example, by not repaying the loan, or as an action, for example, by selling a commodity with hidden defects, which has caused damage to the victim. In the first case, indeed, a situation characteristic of the presumption of fault occurs, where the plaintiff must only claim at the court that the loan has not been repaid, which, at the same time, imposes the burden of proof upon the defendant as the debtor. However, in this case, the reversed burden of proof is not linked to the existence of the presumption of fault in contractual law, but to the fact that the plaintiff reproaches the defendant for not performing certain activities. Thus, the plaintiff cannot at all prove a negative fact, which then reverses the burden of proof just as in the case of presumption of fault. If the defendant is unable to prove that he has repaid the loan, the court will satisfy the claim, even if the loan has been repaid, but the defendant is just unable to prove it. However, in the case, when the breach of contract has been manifest as an action, the plaintiff will have to prove the defendant’s fault. In the example of sale of defective goods, the plaintiff will have to prove that such a defect exists, and he will not be able to make do with a bare statement that the goods are defective and therefore the defendant should prove that it is not the case. If the presumption of fault operated in contractual law, then the plaintiff would always have to prove the breach of contract or of law. Finally, the presumption of fault in contractual law cannot be substantiated with any legal provision, since general regulation

¹⁷ European Group on Tort Law, *Principles of European Tort Law, Text and Commentary*. Springer, Vienna/New York, 2005, p. 67.

¹⁸ Compare: *Looschenders, D. Schuldrecht Besonderer Teil*. 11. Auflage, München, 2016, S. 541.

establishing the existence of the presumption of fault in contractual or tort law cannot be found in CL.

The opinion that general presumption of fault exists in civil law is rooted in the Soviet law,¹⁹ where such a presumption was established in the first part of Article 229 of the Civil Code of the Latvian SSR (with respect to contractual law) and in Article 465 (with respect to torts). Later, after CL was reinstated, other authors assumed this position uncritically,²⁰ although as to the content, no articles similar to Article 229 or 465 of the Civil Code of the Latvian SSR can be found in CL. Moreover, the assumption of fault as a general provision in civil law does not exist in any country of the Romano-Germanic system of law, including Latvia. Likewise, nothing can be found about the presumption of fault as peculiarity of the civil law liability in the pre-war legal literature or case law. Quite to the contrary, for example, K. Čakste has noted that in accordance with general principles – “*onus probacionis incumbit actori*, and therefore pursuant to our Civil Law the plaintiff must prove the grounds of the claim and, consequently, also the fault”.²¹ Thus, the statements that general presumption of fault is enshrined in CL are unfounded.

c) Strict Liability Model

In contrast to the models of fault and the presumption thereof, unforeseeing a tort cannot be an exception to liability within the idea of strict liability. This, undoubtedly, is linked to the fact that within this model, the fault is assessed as a legal category and, consequently, the aim of this model is to expand the possibility of applying civil law liability to persons, who in accordance with the model of general liability would not be considered being at fault.

The approach of strict liability is based upon the idea that a person is liable for tort, irrespectively of whether the person has allowed any lack of care, thus – negligence or intent. This means that pursuant to the idea of strict liability, the person will be responsible for consequences also if he in his actions have ensured appropriate care and his actions fully comply with the standard of an honest and careful manager. To put it differently, this liability arises irrespectively of the person's conduct, since it is not analysed (it is not the required pre-requisite for applying liability). The fault is rarely designated by synonyms “lack of care”, “negligence”, “intent”, and since these legal institutions are not analysed in the context of strict liability (contrary to the model of general liability), this is the reason why this model of liability is called non-fault liability or strict liability. In legal literature, this model of liability is frequently also called objective liability or liability for risk.

Historically, the idea of strict liability appeared relatively recently, only in the 19th century. Its origins are linked to industrialisation of society, which demanded searching for new models of liability for effective protection of civil rights. Professor V. Sinaiskis, examining this peculiar model of liability, wrote that this approach was similar to “a system of grammar, in which over time more and more exceptions from the general rules appear, i.e., the language has developed in two directions – grammar and syntax – and therefore grammatical exceptions are nothing else

¹⁹ Vēbers, J. (red.). Latvijas PSR Civilt kodeksa komentāri. P. Stučkas Latvijas Valsts Universitātes profesora juridisko zinātņu doktora J. Vēbera vispārīgā redakcijā. Liesma, Rīga, 1979, 306. un 597. lpp.; Vēbers, J., Torgāns, K., Šulcs, V. Padomu tiesības. II. daļa. Saistību tiesības. Zvaigzne, Rīga, 1986, 71. lpp.

²⁰ Bitāns, A. Civiltiesiskā atbildība un tās veidi. Izdevniecība AGB. Rīga, 1998, 72. lpp.

²¹ Čakste, K. Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijā un ārzemju civiltiesībās. 1939. gads. Čakste, K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 336. lpp.

than crystallisation of the language, which reflects the traces of many-sided development”.²² Similarly, one might say that strict liability as an exception to the general liability model is crystallisation of the legal system, characterising its many-sided development.

Examination of the pre-war period in Latvia reveals that strict liability did not exist in the general civil law, although it was discussed, for instance, in publications by Professors K. Čakste and V. Sinaiskis.²³ For a short period, this liability was established for drivers of vehicles²⁴ (1923–1931). Admittedly, to a certain extent approximation to application of strict liability occurred, envisaging presumption of fault in some specific laws,²⁵ however, strict liability was not introduced systematically. It is well-known that strict liability was introduced into the Civil Law in 1993, when the Civil Law was reinstated.²⁶

The term “strict” is found in the model of strict liability because this liability model is very strict towards the tortfeasor and rather favourable towards the victim, since the tortfeasor’s fault is not the criterion to be analysed, and, thus, to be proven.

The aim behind the idea of strict liability is to ensure a fair balancing of interests. On the one hand, a person is interested in gaining benefit by acting under conditions of increased risk, and, on the other hand, impossibility of total control over this risk increases the possibility of inflicting damage upon someone. A preference is given to compensating for the damage, although from the tortfeasor’s perspective, he sometimes may not be accused of negligence.

Due to the fair balancing of interests unforeseeing of tort does not release a person from the liability in the model of strict liability, since the fields, where this liability model is applied, *per se* disrupt the natural order of things, as noted in the article above. In this field, the risks have been created and, moreover, are managed by a person with the aim of benefitting, and therefore he should be also liable for those consequences that are not foreseeable. In other words, a person may justify himself with a statement that he was unable to foresee tort, if the very field, where the strict liability is applied, is of the kind where tort as such is a foreseeable phenomenon. This person, of course, often is unable to foresee the particular tort, which has occurred; however, tort as such is foreseeable as a phenomenon with a sufficiently high probability.

Each system uses the idea of strict liability with different intensity, for example, in England this liability model is narrowly applied, whereas in France the model is quite extensively used, *inter alia*, court rulings can be found to state that parents carry a strict liability for tort committed by their children,²⁷ although such approach

²² *Sinaiskis, V.* Tiesību pārkāpuma ideja senatnes un tagadnes civiltiesiskā sabiedrībā. *Jurists*, 1928., 144.–150. lpp. Note: V. Sinaiskis in his article, though, does not uphold the idea that strict liability is crystallisation of the model of liability, because he considers this model to be essentially wrong.

²³ *Čakste, K.* Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijas un ārzemju civiltiesībā. 1939. gads. *Čakste K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 334.–335. lpp.*; *Sinaiskis, V.* Tiesību pārkāpuma ideja senatnes un tagadnes civiltiesiskā sabiedrībā. *Jurists*, 1928., 144.–150. lpp.

²⁴ *Čakste, K.* Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijas un ārzemju civiltiesībā. 1939. gads. *Čakste, K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 334.–335. lpp.*

²⁵ See, for example, Article 97 of Railway Law of 1 September 1927.

²⁶ Likums “Par atjaunotā Latvijas Republikas 1937. gada Civillikuma saistību tiesību daļas spēkā stāšanās laiku un piemērošanas kārtību”. *Ziņotājs*, 1, 14.01.1993.

²⁷ European Group on Tort Law, *Principles of European Tort Law, Text and Commentary*. Springer, Vienna/New York, 2005, pp.103–104.

is criticised.²⁸ Considering that the model of strict liability is an exception from the concept of general liability, in some countries, the maximum limits of liability have been defined, up to which liability can be applied on the basis of the strict liability model. If the victim wishes to claim a larger compensation, he has a right to receive it only from the person who is genuinely at fault, i.e., by proving the tortfeasor's fault.²⁹ In any case, it is a matter of legislator's discretion to choose the field, where it wishes to apply this model of strict liability, or to limit the liability.

d) Model of Absolute Liability

The fourth model of liability, apart from the models of liability referred to above, exists in theory – the absolute liability. Pursuant to this approach, a person is liable for tort and has no right to use any justification, *inter alia*, *force majeure*. This model of liability as an independent basis of legal relationships does not exist in any legal system; however, theory allows it. In practice, the field of nuclear energy has been approximated to the model of absolute liability to a maximum extent. The first paragraph of Article IV of the 1963 Vienna Convention on Civil Liability for Nuclear Damage³⁰ provides that “the liability of the operator for nuclear damage under this Convention shall be absolute”. And yet, the remaining part of the Article lists those cases, when the liability of the operator of a nuclear facility is excluded. The following are noted as exceptions to liability – an act of armed conflict, hostilities, civil war or insurrection. Thus, there are no grounds to include the field of nuclear energy into the model of absolute liability. However, this model should be regarded as a specific model of strict liability. Para 2 of Article IV of the Convention also points to this, by providing that

“if the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person”.

Obviously, those exceptions that serve as justification in the model of strict liability in the case of a source of increased danger may be applied also in the field of nuclear energy; however, the court is not obliged to do so, whereas *force majeure* as an exception from liability is not recognised. Thus, the operator's liability in the field of nuclear energy complies with the model of “quasi-absolute” liability, but cannot be recognised as being a pure model of absolute liability.

A similar regulation of “quasi-absolute” liability is found in the Principles of European Tort Law (PETL³¹), Article 7:102, providing that a strict liability may be excluded or reduced, if the injury was caused by *force majeure*. Thus, PETL regulation on strict liability approximates the regulation of absolute liability, if it does not automatically define *force majeure* as a justification for excluding liability.

²⁸ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 3303.

²⁹ Van Dam, C. European Tort Law, 2nd edition. Oxford: Oxford University Press. 2013, p. 90.

³⁰ Vienna Convention on Civil Liability for Nuclear Damage. Available at <https://www.iaea.org/sites/default/files/infirc500.pdf> [last viewed 03.11.2016].

³¹ Principles of European Tort Law. Available at <http://www.egtl.org/> [last viewed 26.02.2016].

In Latvian civil law, the model of absolute liability may be discerned in Article 1349 of the Civil Law, which provides that “if, during such use as is not in accordance with an agreement, a pledged property becomes damaged or destroyed, the pledgee is also liable for the losses caused in cases, where they are caused by *cas fortuit* or as a result of force majeure.” V. Sinaiskis has also pointed out that this Article provides for absolute liability.³² Although this provision does not give the right to refer to an unforeseeable event, which habitually in an exception to liability, this provision does not exclude the right to refer to cases mentioned in CL Article 1636, for example, a justified self-defence against the pledgee, as the result of which the pledged property is damaged. Thus, the liability model established by the aforementioned legal provision should be included in the model of “quasi-absolute” liability rather than that of absolute liability.

e) Differences Between Models of Liability

The comparison of all four models of liability leads to the conclusion that absence of negligence (thus, including inability to foresee tort) is a condition that prohibits applying civil law liability in the model of fault and presumption of fault, whereas the absence of negligence is not an obstacle to applying liability in the models of strict and absolute liability.

By summing up the findings of this section, in legal theory civil law liability on the basis of *fault* is to be reflected in 4 models:

- 1) **Model of fault** – CL Article 1635, a pre-requisite for satisfying the claim is the defendant’s negligence or intent that has been proven by the plaintiff. In some cases referred to in law, gross negligence must be established;
- 2) **Model of presumption of fault** – a pre-requisite for refusing the claim is the proof of absence of defendant’s fault (intent or negligence);
- 3) **Model of strict liability** – a pre-requisite for rejecting the claim is the presence of justifications proven by the defendant and precisely indicated in law;
- 4) **Model of absolute liability** – no pre-requisites justifying rejection of the claim exist, the defendant’s legal connection to the damage must be established.

In addition, the plaintiff must prove all the other pre-requisites for applying liability under civil law.

The legislator establishes the aforementioned models of liability depending upon the degree of the potential risk to cause damage. The greater the risk of causing damage, the stricter the model of liability that is applied (the fewer justifications a person may use). Application of the four models of liability referred to above depending upon the degree of risk to cause damage, is reflected in the following table:

Degree of risk of causing damage	Model of liability
Low degree of risk	Model of fault
Average degree of risk	Model of presumption of fault
High degree of risk	Model of strict liability
Extremely high degree of risk	Model of absolute liability

³² Sinaiskis, V. Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības, Rīga, 1996, 95. lpp.

2. Identifying Regulation on Strict Liability

Usually, legal systems do not have a special law enumerating all those fields, where civil law liability should be applied in accordance with the model of strict liability. However, following certain criteria, it is possible to identify those fields of life, where the legislator has wished to establish stricter regulation upon the liability in private law relationships.

To establish, when the model of strict liability should be applied to a person, the two following features must be cumulatively identified:

- 1) special subject of law is indicated in the legal provision, for example, *possessor* of a source of increased danger, *producer* or *seller* of goods to consumers, *carrier* in the field of environmental law, etc., as well as
- 2) legal provision imperatively finds that this special subject of law is liable, unless concrete exceptions can be established, which have been precisely defined in law.

With respect to the first feature, it should be taken into account that the fact that the special subject has been indicated in the legal provision *per se* does not give grounds for concluding that the legislator has established the model of strict liability in the particular legal relationship. CL comprises a number of articles that regulate civil law liability and refer to the circle of special subjects; however, there are no grounds for stating that these articles also comprise the idea of strict liability. Such are, for example, Article 1639 (parents' liability for damage caused by their children), Article 1782 (employers' liability for damage caused by their employees, which is sometimes denoted by the concept "vicarious liability"), etc. These articles cannot be included in the regulation on strict liability, since the absence of negligence as one of the conditions excluding liability does not follow from them, or, to put it differently, fault is a criterion to be analysed for applying liability.

Apart from the aforementioned articles, other articles can be found in CL that might create a misleading impression that CL establishes a strict liability. An example of this is CL Article 2158, which provides that "a lessee shall maintain the leased farm in a condition suitable for use [...]", or CL Article 1084, which provides that "every owner of a structure shall maintain their structure in such condition that no harm can result from it". The two aspects point to the fact that these articles do not comprise a strict liability regulation. Firstly, although the articles comprise a specific subject of law, they do not refer to specific circumstances that exclude liability, which means that all arguments for excluding fault can be used, including *cas fortuit*, absence of negligence, etc. Secondly, a provision on strict liability must always grant to the victim the subjective right of claim against the special subject or should envisage obligation to compensate for the damage. Therefore, provisions of strict liability will always indicate, which special subject of law "is liable", or who "has the obligation to compensate for the damage". CL Article 2347 serves as example here, as it establishes an obligation to compensate for the damage addressed at a concrete subject.

With respect to the second feature, it must be noted that these concrete exceptions, referred to in law, are always exhaustively listed (the enumeration principle), and they never comprise such justification for not applying liability as the absence of fault (absence of negligence). At the same time, it must be admitted that a uniform catalogue of justifications that exclude strict liability does not exist. The legislator may envisage different justifications in each kind of legal relationships.

3. Exceptions to Applying Strict Liability

A case of *force majeure* is to be mentioned as a typical circumstance that excludes strict liability. This justification is encountered in all types of legal relationships, where the legislator has envisaged the model of strict liability and is typical of all legal systems. However, it cannot be excluded that the legislator has envisaged this circumstance as optional, leaving it in the discretion of the court, similarly to PETL.

Other circumstances that exclude liability in the case of strict liability model depend upon the field of legal relationship. Examination of various legal acts in Latvia that comprise the model of strict liability, allow identifying in addition to *force majeure* other circumstances that exclude liability. For example, in case of source of increased danger, gross negligence or intent of the victim will be an exception, as well as the object leaving possession due to illegal activities of a third person. In the field of environmental law – armed conflict, hostilities, civil war, insurrections., while in the sphere of maritime traffic – actions by a third person, if conducted with the aim of inflicting losses; the fault of the institution that is responsible for the maintenance of technical means of navigation. On the other hand, in the field of *consumers' rights* – a person has not put goods in circulation; the defect of goods has arisen after they have been put into circulation; goods were not produced with the aim to be put in circulation, or another type of distribution to gain profit, and were not produced or distributed in the framework of commercial activities, the level of scientific and technical development at the time, when goods were put in circulation, was not sufficiently high to allow detecting its defect or deficiency; the deficiency of goods arose because the producer abided by the requirements set by the state or municipality.

As these exceptions show, a part of them can be attributed also to *cas fortuit* (CL Article 1774) or an event that has occurred as an outcome of unforeseeable and unavoidable events, for example, “armed conflict” in the field of environmental law or “actions by a third person” in the sphere of maritime traffic. However, in the area of consumers' rights, for example, in case of liability for deficiencies in goods or service, “actions by a third person” is not an exemption from strict liability – “a manufacturer or a provider of services shall be held liable also for the loss that has resulted [...] from some action of a third person”³³ (this, however, does not mean that the seller of goods would be responsible for a wallet stolen from the customer at the store, because the seller's strict liability applies only to deficiencies of goods or services provided). As shown by the regulations of legal provisions on strict liability examined above, *cas fortuit* as an exception from strict liability is not an absolute exception, i.e., the legal system may recognise a regulation that envisages strict liability, irrespective of the fact that the damage has been caused by a fortuitous event (*cas fortuit*). However, at the same time, the legal system may comprise a regulation, pursuant to which a fortuitous event is to be considered as an exception to strict liability. Defining *cas fortuit* as an exception to strict liability is the legislator's free choice.

In assessing CL regulation on strict liability that is included in the second part of CL Article 2347, a fortuitous event as an exception to liability cannot be found there, because the article includes the concept of “*force majeure*”, which is

³³ Likuma “Par atbildību par precēs un pakalpojuma trūkumiem” 8. panta pirmā daļa. *Latvijas Vēstnesis*, 250/251(2161/2162), 05.07.2000.

a narrower concept compared to a fortuitous event. However, it should be noted that using the concept “*force majeure*” in the text of the article does not mean that the concept does not comprise also *cas fortuit*. A number of articles in the Civil Law indicate that the concept “*force majeure*” in the Civil Law should sometimes be read more broadly, covering also *cas fortuit*, these articles grammatically comprise the narrower term “*force majeure*”, but in the legal doctrine and practice this term has been construed more extensively, i.e., including also *cas fortuit* as an exception to civil law liability. Thus, for example, the situation described CL Article 2220, where a thing provided to the contractor is destroyed, lost, or damaged due to *force majeure*, should be designated as “the risk of accidental perishing of a thing”, thus including the concept of “*cas fortuit*” or “a fortuitous event” in the concept of “*force majeure*”.³⁴ The same conclusion has been made by K. Erdman:³⁵ “an entrepreneur is released from liability not only by force majeure, but also by any fortuitous event” and V. Bukovskis: “a fire as an exception to an entrepreneur’s liability exists, if the fire could have been neither foreseen, nor prevented, by making reasonable human effort.”³⁶ The author of this article and Prof. K. Torgāns have already noted previously, – “the issue whether also *cas fortuit*, a chance obstacle, a fortuitous event may serve as a justification in strict liability similarly to force majeure remains to be disputed” (CL Article 1774).³⁷ To provide an answer to this question, it should be noted that looking at it from the perspective of historical origins of CL Article 2347, there are no grounds to assert that the article contains regulation providing that also a fortuitous event is an exception to strict liability. However, on the other hand, it cannot be maintained that over time the case law is not going to attribute the concept of *force majeure* also to a *cas fortuit*. Two aspects prove that move towards such an understanding could happen. Firstly, in many legal systems a fortuitous event is an exception to strict liability, this exception is recognised also by the Draft Common Frame of Reference³⁸ (VI – Article. 5:302) and the Principles of European Tort Law (Article 7:102). Secondly, already now Latvian case law anticipates the approach taken by the Supreme Court, i.e., for example, that unlawful actions by third persons (thus – a fortuitous event) could exclude strict liability. The Department of Civil Cases of the Supreme Court ruled in case No. SKC-250/2015 that the owner of a passenger bus (a vehicle) was not responsible for the damage inflicted upon passengers, which occurred because the driver had to brake rapidly due to a unlawful manoeuvre of an unidentified third person – another driver, as a result of which a passenger fell in the bus and was injured.

And yet, notwithstanding these erroneous conclusions, the general understanding that only *force majeure* or the actions by the victim himself are exceptions to strict liability is, possibly, changing and approximates the understanding observed in other countries. Thus, it cannot be excluded that over time through case

³⁴ Latvijas Republikas Civillikuma Komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. Torgāna vispārējā zinātniskā redakcijā. Rīga: Mans īpašums, 2000, 529. lpp.

³⁵ Jerdman, K. Objazatel'stvennoe Pravo Gubernij Pribaltijskih". [B.v]: Izdanie pochetnogo mirovogo sud'i F. Je. Kamkina, 1908, c. 473.

³⁶ Bukovskij V. (Sost.) Svod' grazhdanskih" uzakonenij gubernij Pribaltijskih" (s" prodolzheniem" 1912-1914 g.g. i s" raz"jasnenijami) v" 2 tomah". T. II., soderzhashhij Pravo trebovanij. Rīga: G. Gempel' i Ko, 1914.

³⁷ Torgāns, K., Kārklīšs, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

³⁸ Draft Common Frame of Reference. Available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf [last viewed 26.02.2016].

law the concept included in the second part of CL Article 2347 *force majeure* will be interpreted more broadly, including in it also *cas fortuit*. This path was chosen by Germany, which in its case law developed the approach that the exception to strict liability included in the law – *force majeure* (in German, *höhere Gewalt*) – should be understood in a broader sense, including also *cas fortuit*,³⁹ including actions by third parties.⁴⁰

And yet, if *cas fortuit* is envisaged as an exception to strict liability, this might lead to a question – what is the difference between the model of general liability, where *cas fortuit* is a circumstance that excludes liability, and strict liability? Are these models of liability not made as radically equal that separation thereof is no longer substantiated? The answer is negative. In the model of general liability, the exception from liability is granted by the absence of negligence, which never is and could not be justified in a model of strict liability. However, it must be taken into account that separation of both models might cause certain difficulties, as the exception to strict liability is a *cas fortuit*, which manifested itself as a third person's action, but which, possibly, could have been prevented by paying more attention to it. Thus, in assessing *cas fortuit*, it may be necessary to consider a person's conduct, which is seemingly contradictory to the understanding of the model of strict liability. However, the opinion that within the model of strict liability the actions (conduct) of a person are never assessed, but it is sufficient to establish a causally inflicted damage and the liable person defined by law is wrong. Although the second part of CL Article 2347 envisages only certain cases as exceptions to strict liability, the case law of other countries also establishes the absence of general delictual capacity as an exception to applying liability. These are the cases, where tort has been committed by a person with the capacity to act, and who has committed it while unconscious or being unable to understand the meaning of his actions, or being unable to control his actions (second part of CL Article 1637). In the English court, the case *Waugh v. James K. Allan* was heard, where a driver experienced a heart attack, due to which he was unable to drive the vehicle and inflicted damage upon third persons. The court did not recognise the driver's liability.⁴¹ Here it must be noted that the Anglo-Saxon legal system is rather dismissive towards applying the model of strict liability, thus, this finding cannot be automatically attributed to the Romano-German legal system. However, it cannot be ignored that also in Latvia, in addition to the exceptions referred to in the second part of CL Article 2347, there are general cases of delictual incapacity – a child below the age of 7, persons with mental or other health disorders, due to which they have been unable to understand the meaning of their actions and to control them (CL Article 1637), etc. Therefore, it would be premature to maintain that the findings made in the English court case *Waugh v. James K. Allan* are incompatible with the Latvian legal system.

As regards *cas fortuit* as an exception to liability, it must also be noted that from the perspective of the party applying a legal provision it is sometimes difficult to differentiate between *cas fortuit* as a justification for applying strong liability and *cas fortuit* that creates no causation (at all) and, thus, cannot be even examined

³⁹ Hentschel, P., König, P., Dauer, P. *Straßenverkehrsrecht*. 42., neu bearbeitete Auflage, C.H.Beck, 2013, S. 32

⁴⁰ BGHZ 62, 351, 354, 109, 8 14 f, NJW 86, 2319.

⁴¹ *Van Dam*, C. *European Tort Law*, 2nd edition. Oxford: Oxford University Press. 2013, p. 276.

as justification. Legal literature⁴² notes that absence of causation cannot be called “justification” that would exclude liability. The absence of it simultaneously is an absence of pre-requisite for liability, but not a justification for excluding liability. Justification should also be presented in cases, where adequate causal consequences have set in, but liability is excluded by justifications for the action presented by the tortfeasor. Looking for justifications is a part of pre-requisites for an unlawful action and cannot move outside it. This will be examined in greater detail in Section 5, which is dedicated to issues of causation in the model of strict liability.

4. Role of Fault in Model of Strict Liability

The opinion that strict liability is a non-fault liability is widespread, i.e., the fault is not analysed, it has no significance in applying strict liability. This opinion is only partially founded, since there are, nevertheless, cases, when a person’s conduct is analysed and, thus, – whether a person could not have acted differently, with greater care and prevented damage (aspect of fault). One of such instances is the case of *force majeure*, referred to in the second part of CL Article 2347. According to the theory of law, a person may refer to *force majeure* only if he was unable to foresee, prevent or overcome it. In evaluating, whether the particular person has a right to refer to *force majeure* as an exception to strict liability, a formal assessment of the subjective side of this person is needed, comparing it to the standard of an honest and careful manager, i.e., whether a person could have foreseen, prevented or overcome this obstacle. This analysis is based upon examination of this person’s conduct and is closely linked to the concept of negligence. If the person could be held at fault for not foreseeing *force majeure* because of the negligence he has allowed, then the person will not have a right to refer to *force majeure* as a justification against strict liability. Thus, it is obvious that sometimes application of strict liability is firmly linked to the concept of fault.

Likewise, the concept of fault is of decisive importance in connection with the second sentence in the second part of CL Article 2347, which provides – “*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*”. This provision comprises the possibility to free oneself from strict liability by proving that the source of increased danger has gone out of the possession without the holder’s fault. In assessing fault in this case, such concepts as “an honest and careful manager”, “showing reasonable care”, “negligence” should be used, which are classical concepts that fall within the concept of “liability for fault”. The court would always assess, whether the holder’s carelessness (negligence) plays no part in losing possession. For example, in case of leaving the car with its door open and engine running, as a result of which a third person steals it and causes damage to other persons, the owner of the car, probably, would not free himself from strict liability solely by stating that his fault in losing the possession cannot be discerned. In such a situation, the court, inevitably, would have to assess the holder’s fault and depending upon its presence or absence strict liability would be or would not be applied. If the absence of fault for losing control over a source of increased danger is proven, then strict liability will not set in.

⁴² Torgāns, K., Kārklīņš, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

The justification of a producer against applying strict liability included in Article 13 of the law “On Liability for Defective Goods and Deficient Services” – “*the producer has not put the goods in circulation*” – is closely linked to analysis of the producer’s behaviour. The producer will not be held liable, if goods were put into circulation by a third person, which had unlawfully stolen goods from the producer’s warehouse. However, to apply this justification, it should be assessed, whether the producer took all the necessary safety measures to prevent goods from entering the market. In certain circumstances, it could be concluded that the producer did not comply with the criterion of an honest and careful manager (for example, did not lock the warehouse), and therefore it should be recognised that goods entered the market due to the producer’s fault. Thus, application of strict liability will be based upon the finding that blameworthy actions (lack of care, negligence) can be discerned in the producer’s activities, not granting the producer the right to refer to an exception to liability that he had not put the goods in circulation. Likewise, the exception “*the producer has not put the goods into circulation*” may be subject to an assessment of the producer’s fault, if goods had been put into circulation by the producer’s employee without the employer’s permission, because goods were still in development stage. Pursuant to CL Article 1782 the producer will not be liable for the employee’s actions, if he is able to prove that his fault in selecting the employee cannot be found (*culpa in eligendo*). By proving an absence of fault in selecting the employee, strict liability cannot be applied, as it cannot be concluded that goods had been put into circulation by the producer.

Likewise, it would be wrong to state that fault does not play any role in a case of strict liability. In a case of strict liability, it might be possible that identification of fault is required and it carries legal “weight” within the issue of establishing liability. A case like this is, for example, when a person uses a source of increased danger, being aware that it comprises an abnormally increased risk of inflicting damage, for example, using a car with defective brakes or inappropriate tyres, etc. The role of fault here appears in case, if the source of increased danger has caused damage due to the victim’s own gross negligence. On the one hand, the victim’s gross negligence excludes strict liability, but, on the other hand, in using the source of increased danger the user also would have been grossly negligent. In such a case, there would be grounds to assess liability in accordance with the model of general liability, because strict liability could not be applied due to the victim’s own gross negligence. In certain cases, when damage has been caused to another person, there are grounds to analyse where solidary or several liability sets in *vis-à-vis* another victim. The European principles of tort law in such a case envisage a solidary liability of both persons who are at fault.⁴³

In those legal systems, where *cas fortuit* is an exception to strict liability, it is not sufficient to establish the fact that the cause of damage is a third person’s action in order for liability not to set in. It is always also examined, whether this action by a third person is an essential (self-sufficient) cause of the damage, compared to the risk caused by a source of increased danger. In this case, establishment of liability will be based upon analysis of causation, therefore, causation as a pre-requisite for applying strict liability is no less important aspect within the idea of strict liability.

⁴³ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 129.

5. Role of Causation in Model of Strict Liability

Causation is an important pre-requisite, which may be an exception to strict liability because causation as a mandatory pre-requisite for applying strict liability is absent. In the model of general liability, causation between the subject's action to be held at fault (unlawful) and the damage is assessed, whereas in the model of strict liability – between the field of responsibility of the special subject and the damage inflicted. Thus, in the model of strict liability establishment of unlawful action by the special subject of law from the perspective of culpability is not necessary. For example, selling goods to a consumer *per se* is a legal activity, whereas liability of the seller will set in, if it is discovered that goods have a production defect, which the seller did not know about and objectively could not have known (fault is absent) and that has caused damage to the consumer.

It is not always easy to establish causation, since quite often in the model of strict liability (but not solely) the cause of the damage can arise as a result of a number of events, among which it is difficult to discern the real cause.

Distancing of causation is one of the exceptions to application of liability both in the case of strict and of general liability. Undoubtedly, in all the models of liability, the theory of *conditio sine qua non* is applicable, in the framework of which “theory of adequate causation” has evolved. This theory envisages that a circumstance or an act is a cause of the damage only if it objectively is able to cause the resulting damage itself and only when the action in connection with the damages caused can be characterised as “normal subsequent consequences” (adequate consequences). This view is supported also by the pre-war and contemporary legal science.⁴⁴ The fact that causation includes only adequate, habitually expected and foreseeable consequences is determined also by PETL Article 3:201. PETL commentaries to this article refer to a case, where a person with his car crashes into a taxi carrying 3 best industry managers of the world, each of them earning 25 million dollars annually. Because of the accident, these persons lose their capacity to work. As the authors of the commentaries have noted, these consequences do not comply with the habitually expected consequences of a car accident.⁴⁵ Hence, although the actual causation can be established, the legal causation is absent. A similar case is mentioned as an example in the summary of European Tort Law in the book “Digest of European Tort Law” – a person, driving a car on the road, exceeds the allowed speed limit, after a while a drunken person appears in the middle of the road and stumbles, a collision occurs and damage is inflicted upon the pedestrian. Investigation establishes that even if the driver had been complying with the speed limit, he would have been unable to avoid the collision.⁴⁶ It can also be concluded that, had the driver moved at a slower speed, the collision would not have occurred, because the pedestrian would have stumbled before the car had reached him. Scholars of law note that in this particular case it can be established that the actual cause of the damage is exceeding the speed limit; however, exceeding of the speed limit cannot be considered as being the legal cause of the damage, since in these particular circumstances it was impossible to avoid the collision, and the main cause

⁴⁴ Čakste, K. Civiltiesības. Lekcijas. Raksti. Rīga: Zvaigzne ABC, 2011, 196. lpp.; Torgāns, K., Kārklīņš, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

⁴⁵ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 62.

⁴⁶ Winiger, B., Koziol, H., Koch, B. A., Zimmermann, R. (eds.). Digest of European Tort Law. Vol. I. Essential Cases on Natural Causation. EST/ELT. Springer, Wien, New York, 2007, pp. 96–97.

of the damage had been the victim's presence on the road and stumbling in front of a car in motion. Thus, adequate consequences to exceeding the legal speed limit while driving do not include a drunken man suddenly stumbling in front of the car. Therefore, the legal causation and, hence, liability, are absent. These examples, where a person linked to the damage has committed an unlawful activity, are most difficult to assess from the perspective of causation, since it seems clear to everyone that unlawful actions create liability and that causation can be identified automatically. Precise identification of legal causation is an intellectually complex process and, occasionally, parties applying legal provisions mistake it for actual causation, without separating legal causation.

The criteria consolidated in the theory of causation must be applied in all models of liability, where a person's liability for the inflicted damage is assessed. In the model of general liability a person will not be liable for damage that was in adequate causal connection with the tort, but this tort could not be foreseen and he was not required to foresee it. However, in the case of strict liability, liability for the special subject of law will set in for all causally *adequate* consequences, irrespectively of the fact, whether he could or could not foresee these consequences as an honest and careful manager. For example, an operator of children's merry-go-round has just received from the factory a new merry-go-round, which as to its operations is classified as a source of increased danger, since it is run by internal combustion engine. However, already on the first day of its operation the engine explodes due to an internal defect, injuring clients. Although the operator could not have foreseen a defect like this, nevertheless, in view of the idea of strict liability, operator's liability will set it. Moreover, the consequences that set in are adequate, i.e., when an engine of a merry-go-round explodes, usually injuries are caused. The next example, in turn, characterises a case, where liability does not set in due to inadequacy of consequences. The seller sells unsafe goods, as a result of which a consumer suffers hand injury. While he is on his way to an out-patient clinic to have the injury treated, unknown persons inflict bodily harm upon the victim and rob him. On the one hand, it could be asserted that the seller should be liable for these consequences, because from the perspective of actual causation –had he not sold the defective goods, further consequences, i.e., robbery, would not have arisen, since the victim would not have needed to go to the out-patient clinic. However, in this case, strict liability is not applied to the seller, since causation is missing. The robbery is not an adequate consequence of selling unsafe goods. Here chronological sequence of events, but not legal causation, can be identified.

Likewise, with respect to a source of increased danger it is not enough only to identify an actual link between the source of increased danger and damage to establish the existence of causation. To apply strict liability for the damage caused by such a source, it must be established that it was exactly the use of this source that led to the respective tort and that control over this source fell within the person's "sphere of responsibility". For example, car B crashes from behind into car A, which has stopped at the pedestrian crossing, and car A, in turn, is pushed upon a pedestrian. Although the damage has been caused by the impact of a source of increased danger⁴⁷ (car A), A's liability will not set in, since the cause, why car A

⁴⁷ In the current article, the author does not deliberate as to whether cars still are to be considered as sources of increased danger, because, regardless of the conclusion, the use of a car is subject to strict liability regulation.

ran over the pedestrian were B's actions.⁴⁸ Stopping before a pedestrian crossing was not the cause of the damage, and it is not sufficient to establish that car A was involved in an accident to apply liability to its driver. In this case, the reason for not applying strict liability to A would not be exceptions defined in the second part of CL Article 2347 (since such do not exist), but the absence of causation. In cases like that, strict liability sets in only if there is a causal link between using the source and the tort caused. In other words, strict liability will set in only if the source of increased danger causes damage in connection with the risk that it creates in habitual circumstances. If a third person lifts by a crane a car owned by another person and throws it upon another, then the strict liability of the car owner will not set it, since such unusual risk of damage occurring does not fall within the habitual use of the car. An example that characterizes this understanding can be found in the common model – an explosive placed by a terrorist in a bus will not create strict liability of the bus owner, since this accident does not pertain to the risk, for which law envisage strict liability in connection with having in possession a source of increased danger.⁴⁹

The same approach is found also in PETL regulation (Art. 5: 101), which points out that strict liability sets in only if the damage characteristic to the risk presented by the activity of the object of increased danger occurs, not for the setting in of any possible risks that are typical of all objects. For example, if a box with dynamite falls upon a person and causes head injuries, then strict liability will not set in, since the cause of this damage is not a source of increased risk, typical of a box with dynamite (explosion),⁵⁰ but the risk of an object falling, which is general and typical of all moveable objects. This case of a falling box with dynamite should be assessed in accordance with the general regulation on civil law liability (CL Article 1635), not the regulation on strict liability (CL Article 2347).

The above analysis allows a critical assessment of an opinion once expressed by Prof. J. Vēbers,⁵¹ that in case if someone pushes a man in front of a driving car and he, consequently, perishes, then the owner of the car would be liable for the death as the possessor of a source of increased danger. This opinion is difficult to uphold, as in this case legal causation between possessing a source of increased danger (the typical sphere of risk) and the tort that was caused cannot be established, since the cause of death is not the risk caused by the source of increased danger, but unlawful actions by a third person, which totally disrupts the chain of causation between the use of the car and the consequences that have set it. In examining whether an external circumstance excludes strict liability, it must be established that this cause is adequate/ habitual/ necessary in connection with the use of increased source of danger. Thus, strict liability will set in for a biker, who causes a road traffic accident because a fly suddenly got into his eye, as a situation

⁴⁸ A similar example is indicated in the comments to the Model: Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, pp. 3384–3385.

⁴⁹ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 3539.

⁵⁰ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 128.

⁵¹ *Gilmanis, J., Grebņickis, P., Krauze, R., Narkevičs, G., Naumovs, V., Rozenfelds, J., Strautmanis, J., Šulcs, V., Torgāns, K.* Latvijas PSR Civiltkodeksa komentāri; Vēbers, J. (red.). Rīga. Liesma, 1979. 602. lpp.

like this falls within the expected risk connected with the use of such source of increased danger, whereas it can be expected that the typical risk in using a car would not be another person suddenly pushing a pedestrian in front of the vehicle.

It is difficult to accept the examples mentioned above, in which it is noted that strict liability will not set in, as excluding strict liability, because, from the victim's perspective, he is not to be blamed for anything and therefore it would be fair to receive compensation. The idea about receiving a compensation is, indeed, well-founded; however, the right to receive compensation does not always mean that the law allows claiming it from the person, in whose activities legal connection with the occurrence of the situation cannot be found. The fact that liability does not set in for a special subject of strict liability, in the examples examined above, is easier to understand, if we keep in mind the aims, for which strict liability was created. The idea of the liability was not to establish that in all cases the possessor of the source of increased danger would be liable only because he had some actual link to the event, which caused damage to a person, or only because he possessed a source of increased danger. Likewise, the idea of this liability is not weakening the criteria for applying causation. Pursuant to theory of law, liability is always assumed by the person at fault, whereas strict liability is an anomaly within the legal system,⁵² which should be applied with great caution. Incorrect application of strict liability may cause a violation of the principle of justice. Application of strict liability to the possessor of a source of increased danger is substantiated if: (a) damage has been caused by the risk that is characteristic of the source of increased danger, and (b) causation between the characteristic risk and the damage has an adequate connection.

The analysis provided above proves that correct application of causation is of fundamental importance within the framework of the strict liability concept for identifying correctly the person at fault for tort. Although strict liability is aimed at decreasing the tortfeasor's right to be released from liability due to applicable justifications, with respect to causation, however, the concept of strict liability does not envisage a different (stricter) approach compared to the model of general liability, which is based upon establishment of fault.

6. Differentiating Model of Strict Liability

The findings of this article lead to an obvious conclusion that it is not even possible to strictly differentiate between the models of general liability and strict liability. To rephrase it, pure liability independently of fault does not exist, and *vice versa*. Likewise, sometimes it is impossible to separate the model of general liability from the model of presumption of fault, or strict liability from quasi-absolute liability.

As noted in this article, strict liability comprises justifications that sometimes require assessing the issue of holding at fault, i.e., a person's actions in compliance with the clause of an honest and careful manager in a case of tort.

All the aforementioned examples characterise the fragile line that separates all the models of (approaches to) liability and, at the same time, allow to conclude that all the models of liability are not different systems existing in isolation one

⁵² Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 2992.

from another, but are interacting and overlapping. All approaches to liability, irrespectively of the model, are based upon the same idea, i.e., liability does not set in, if exceptions (justifications) referred to in the law can be established. In the general model and the model of presumption of fault, absence of negligence is allowed as an exception to applying liability, whereas in the case of strict and absolute liability this justification is excluded. Likewise, differences between the models with respect to allocation of the burden of proof can be identified. Whichever model of liability we find in the law, we should keep in mind that none of them is an alternative type of civil law liability. In theory of law, the entire idea of civil law liability is based upon one fundamental assumption – to restore to the extent possible the victim's legal and material status, as it was before the tort, whereas models of liability only instruct, how to reach this aim.

Summary

1. In the model of general liability, which is based upon the principle of fault, liability cannot set in for unforeseen tort, since nobody (even an honest and careful manager) can be set the requirement to foresee such and, thus, also prevent, and, thus, neither can this person be held at fault for negligence (fault is absent), which is a mandatory pre-requisite for applying civil law liability.
2. Foreseeability in tort law should not be mistaken for foreseeability in contractual law, established in CL Article 17791. Contractual law comprises the idea that in the presence of an infringement, the infringer cannot be required to compensate for the damage that he could not have envisaged at the moment of infringing upon the contract. Thus, in contractual law foreseeability restricts the maximum amount of damage (liability) that can be demanded from the infringer, whereas in tort law any amount of damage, which is causally related to the tort, must be compensated for, even if it (the amount) was unforeseeable. Foreseeability in tort law does not apply to foreseeing the amount of damage, but foreseeing the tort.
3. Latvian Civil Law does not envisage a general principle of presumption of fault. Presumption of fault exists only in cases, where the legislator has directly established it. The model of presumption of fault is a stricter model of liability *vis-à-vis* the tortfeasor compared to the model of general liability, since the law imposes an obligation upon him to refute this presumption
4. The aim of the idea of strict liability is to ensure fair balancing of interests. On the one hand, a person is interested in gaining benefit, by acting in conditions of increased risk, and, on the other hand, impossibility of total control over this risk increases the possibility of inflicting damage upon someone. Preference is given to compensating for the damage, although from the tortfeasor's perspective, he sometimes may not be accused of negligence. In the model of general liability, an exception to liability is the absence of negligence, which never is and cannot be justification in the model of strict liability.
5. In the model of strict liability, unforeseeing of tort does not release from liability, because the fields, where this model of liability is applied, *per se* carry a high risk of inflicting damage. A person may not use as justification a statement that he was unable to foresee tort, if the very field, where strict liability is applied, is such, where tort as such is a foreseeable phenomenon.
6. Pursuant to the model of absolute liability a person is liable for tort and he does not have the right to use any justification, including *force majeure*. This model of

- liability as an independent basis of legal relationships does not exist in any legal system; however, theory allows it. The model of “quasi-absolute” liability is found in legal systems, *inter alia*, in Latvia.
7. To establish, when the model of strict liability should be applied to a person, the two following features must be cumulatively identified:
 - 1) special subject of law is indicated in the legal provision, for example, possessor of a source of increased danger, producer or seller of goods to consumers, carrier in the field of environmental law, etc., as well as
 - 2) legal provision imperatively finds that this special subject of law is liable, unless concrete exceptions can be established, which have been precisely defined in law.
 8. It would be wrong to assess that fault does not play any role in a case of strict liability. In a case of strict liability it might be possible that identification of fault is required and it carries legal “weight” within the issue of establishing liability.
 9. In those legal systems, where *cas fortuit* is an exception to strict liability, it is not enough to establish the fact that the cause of damage is a third person’s action, in order for liability not to set in. It is always also examined, whether this action by a third person is an essential (self-sufficient) cause of the damage, comparing to the risk caused by a source of increased danger.
 10. In addition to exceptions referred to in the second part of CL Article 2347 exceptions to strict liability are also cases of general delictual incapacity – a child below the age of 7, persons with mental or other health disorders, due to which they have been unable to understand the meaning of their actions or had been unable to control their actions, etc. (CL Article 1637. pants).
 11. Causation is an important pre-requisite, which may be an exception to strict liability because causation as a mandatory pre-requisite for applying strict liability is absent. In the model of general liability causation between the subject’s action to be held at fault (unlawful) and the damage is assessed, whereas in the model of strict liability – between the actions of special subject and the damage inflicted.
 12. Distancing of causation is one of the exceptions to application of liability both in the case of strict and of general liability. This theory envisages that a circumstance or an act is a cause of the damage only if it objectively is able to cause the resulting damage itself and only when the action in connection with the damages caused can be characterised as “normal subsequent consequences” (adequate consequences).
 13. It is not sufficient only to identify an actual link between the source of increased danger and damage to establish the existence of causation. To apply strict liability for the damage caused by such a source, it must be established that it was exactly the use of this source that led to the respective tort and that control over this source fell within the person’s “sphere of responsibility”.
 14. Liability is always assumed by the person at fault, whereas strict liability in an anomaly within the legal system,⁵³ which should be applied with great caution. Incorrect application of strict liability may cause a violation of the principle of justice. Application of strict liability to the possessor of a source of increased danger is substantiated if: (a) damage has been caused by the risk that is

⁵³ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 2992.

characteristic of the source of increased danger, and (b) causation between the characteristic risk and the damage has an adequate connection.

15. In the model of general liability and of presumption of fault, the absence of negligence is allowed as an exception to applying liability, whereas in the case of strict and absolute liability this exception is excluded.

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