

LIABILITY FOR WORK ACCIDENTS

Author
Jonas LEMOS*

ABSTRACT: *The purpose of this article is to present the fundamentals of liability for accidents - Difficult to achieve this task - and to provide a comprehensive, holistic and systematic view of this responsibility, with particular emphasis on issues that have been poorly treated by the doctrine*

KEY WORDS: *Responsibility, Work Accident.*

JEL-CLASSIFICATION: K2 K31

1. FROM FAULT LIABILITY TO RISK LIABILITY

1.1.Preliminary considerations

The Romans built their law upon simple maxims within the reach of people, who were its recipients. One of them stated ‘*Do not harm anyone and you will not damage anyone*’, which is like saying that damaging constitutes, at least at first sight, an unlawful, unfair and sanction-worthy conduct. (*L, N.D.*)¹ The damage would either arise from the violation of a pre-existing relation, which imposes a duty, or to be on the fringes of any connection or liaison.

It is obvious that there are justifiable, lawful damages which do not come to a violation of the code². Truly, it seems that harming is innate to living³.

* Professor at the Instituto Federal de Educação, Ciência e Tecnologia do Rio Grande do Norte – IFRN. Currently engaged in a PhD in Law at the Centro di Studi sul Rischio della Facoltà di Giurisprudenza dell’Università degli Studi del Salento, Lecce, Italy. Doctor in Law at the Universidad de Salamanca, Salamanca, Spain

¹ According to the Italian FERRI, L. ((1959) *L’ autonomia privata*, Giuffrè Editore, Milano, p. 170), *the sanction is nothing more than an evaluation of one’s conduct by the Law, a positive or negative assessment of the conduct on the basis of its compliance or non-compliance with the legal system.*

² As SALVADOR CODERCH, P.; GAROUPA, N. y GÓMEZ LIGUERRE, C. pointed out ((2005) *El círculo de responsables - La evanescente distinción entre responsabilidad por culpa y objetiva*, Indret (<http://www.indret.com>), no. 309, p. 24), they are originally permissible risks or general risks of life. In his opinion, *human beings live in societies characterised by a more or less intense division of work and by different ways of interacting with their members. Both aspects are possible if we are ready to acknowledge that many at-risk conducts are actually allowed and that, as a consequence, the agent will not have to respond for the realization of the risk associated to its development.*

³ In this work we are only interested in the *human action – developing over time and involving an event-*, deriving from a conscious or unconscious and intentional or unintentional interference of an agent during the

Nevertheless, the idea about the inexistence of a right to harm still stands⁴. For this, according to SALVADOR CORDECH and GÓMEZ LIGUERRE, *the question is not really about whether the dangers of our scientific and technological era are more or less in the past, but it is about the fact that nowadays dangers are habitually attributed to human actions and decisions and, as a consequence, people are awarded the concept of risk for which someone has to respond (SALVADOR CODERCHP AND C. GOMEZ LIGUERRE, N.D.)*.

For that reason, since individuals are free, they respond for their own harmful actions deserving a fair sanction. This is because freedom imposes accepting the consequences of the adopted conduct⁵.

But, if a person expects a reparation for the damage caused by another person, they need to base their ambition on a sufficient reason which qualifies them for it, *since their ambition would otherwise be considered as arbitrary and unworthy of legal protection (REGLERO CAMPOS, 2006)*⁶. This is due to the fact that the imposition of an obligatory compensation involves a true interference with the freedom and patrimony of the obliged person⁷.

Therefore, the criterion of accusation⁸ for fault, which used to generate questions traditionally requiring answers in order to attribute damage to a person, is above all a criterion of accusation aiming to establish who takes on the risk of standing the damage deriving from the ordinary exercise of human freedom. The judgement of fault consists in assessing whether the damage deriving from the exercise of freedom could have been avoided by using it in an ordinary way; in other words, it is a judgement of damage preventability based on the parameters of the social conduct of the average man or ordinary citizen.

ordinary course of things. About action, omission and prevention see MOSTERÍN, J. (1987) *Racionalidad y acción humana*, Alianza Editorial, Madrid, p. 165 et seq.

⁴ As BUERES says ((1992) *Responsabilidad civil de los médicos*, Hammurabi, Buenos Aires, p. 57), this *enthronement of the no harming concept as a principle of law* has seen itself reflected in the search for mechanisms which facilitate the legal possibility for damaged parties to obtain reparation, make precautions to prove casual relations more flexible, declass unlawfulness as an essential element in responding and give access to compensation for unintentional damages.

⁵ Of course, the present legislative configuration of subjective law which entitles workers to an effective protection against work-related risks or accidents turns out to be also functional to the fulfilment of the employer's main interest in terms of financial and asset business relations, although this is not its first or main aim, since the achievement of quality makes workers improve their performances and so all of them, as a whole, level up the company's productivity and competitiveness on the market.

⁶ Here, as in note 2, the author follows the approach of LARENZ y CANARIS (1194) *Lehrbuch des Schuldrechts*, II.2, Munich, Bes. Teil., 13 Auflage.

⁷ Here, the conflict of interests between those who have the right to develop at-risk activities and those who have the opposite right not to stand the risks is solved by the Law by sacrificing one of the two parties: either the victim, who, in such a case, has to stand the damage, or the originator, who would have to stand it as a transferred charge, which implies the arising of an obligation to compensation.

⁸ Obviously, it is to be considered that liability is not to be confused with the actual causing of a damage, as there are cases in which the actual originators of damage are the damaged persons themselves –the workers– and, however, the obligation to reparation falls on a third-party to whom the law system assigns the duty to watch over or take care of the damaged party – it is about an assumption of *in vigilando* fault. About this matter, see GORELLI HERNÁNDEZ, J. (1996) “Obligaciones y responsabilidades del trabajador en materia de seguridad e higiene en el trabajo”, en AAVV, *La prevención de riesgos laborales*, Arazandi, Pamplona, p. 189 et seq.

The criterion used by the Law is that of whether legal protection exists for affected or damaged interests. If such protection does not exist, either because it is about interests that the Law does not take into account, or because it condemns them, the originator of the damage has not acted *contra ius* and, since they have no obligation to compensate it, the damage has to be stood by the person who has suffered it. On the other hand, a protection for the damaged interest exists and is transferred through the corresponding reparatory obligation by its originator.

It is pondered whether the person who caused the damage could have prevented it by acting, under the particular circumstances affecting them, as an ordinary citizen. If the damage could have been prevented by adopting such conduct and this has not happened, then there is liability. On the other hand, if the damage could not have been prevented, even adopting such conduct, then there is no liability.

For this, the damaged party was required to provide evidence that the agent was at-fault or, in their case, acted in a negligent way. In the end, according to the famous aphorism coined by Domat, there is no liability without fault.

At the beginning, however, what mattered was establishing the monism of fault, marginalizing other possibilities of establishing the agent's liability. Once fault had been set as the accusation criterion par excellence, the reparative function of the institutes of civil liability was designed as a sanctioning reaction against the reproachful damaging fact⁹.

Basically, what mattered was sanctioning a damaging fact which was, absolutely, reproachful for its being at fault (*ALGOZ, 2003*)¹⁰. Notwithstanding, neither the extent of the reparation, nor the damage itself were of great concern, thus leaving the matter of the assessment to the discretionary power of the judge¹¹.

However, nowadays we can say without doubt that such institutes have proved to be insufficient with reference to the reparation for personal damages.

According to REGLERO CAMPOS, during the industrial revolution of the 19th century the civil liability began an evolution process characterized by three key aspects:

- a) *the predominance of its reparative/compensatory function;*
- b) *the progressive introduction of objective accusation criteria;*

⁹ The evolution of the Anglo-American law is amazing in the eyes of the Napoleonic-inspired systems. In fact, the 19th century Anglo-Saxon law was characterized by a regime of *strict liability*, which must not be confused with *absolute liability*. Somehow unexpectedly, since the second half of the 19th century such regime has progressively given way to a regime called *negligence*, which means proved fault, regardless of the onus of proof being exceedingly facilitated out of force of the known *res ipsa loquitur* rule. About the characterization and evolution of the Anglo-American system of civil liability for damages to persons, refer to SHAMPS, G. (1998) *La mise en danger: un concept fondateur d'un principe général de responsabilité. Analyse de droit comparé*, Bruxelles, pp. 408-417.

¹⁰ According to MEDINA ALGOZ ((2003) *La culpa de la víctima en la producción del daño extracontractual*, Dykinson, Madrid, p. 39), as at-risk activities increased, individuals quitted resigning before the suffered damages, *the magic belief in the hand of God disappeared* in order to set out the search for a responsible party who would take on the caused damage.

¹¹ The Judge's freedom is confirmed by the fact that jurisprudence has limited to a large extent the possibility of having recourse against his assessment. Clearly, the damaged person and plaintiff is to be the one who establishes the amount or extent of the damage, since the law gives them a comfortable margin of assessment freedom. In this sense, refer to IGARTUA MIRÓ, M. T. (2004) *Reflexiones sobre la actual problemática (sustantiva y procesal) derivada de la concurrencia de responsabilidades en materia preventiva*, Alcor de MGO, no. 1, p. 83.

c) *the introduction and development of civil liability insurance (REGLERO CAMPOS, 2002).*

The emerging new society poses new problems to which the traditional subjective system could not respond properly.

In the present era, the sudden increase in the number of work accidents due to the introduction of new production techniques and machinery raises questions about the weaknesses of the individual and subjective liability systems conceived by the authors of the Civil Code (VINEY, N.D.).

In front of all these harmful assumptions, mostly suffered by the socially weakest individuals, the traditional system allowed, in many cases, to leave the victims without any kind of reparation. Negligence remained unclear, when it did not totally fade in the chains of industrial production or in the casual failure of mechanical devices.

Nevertheless, the doctrine's reception of the dogmatic and systematic premises of objectivism¹² does not mean that the fault-based subjectivism falls into neglect – the exhaustion of the new subjectivism of the 20th century was proved by the impossibility of finding in fault the true, actual foundation of civil liability.

In fact, since then, two different wide areas have emerged within the field of civil liability. One is dominated by the principle of fault, the other disregards it¹³.

Such division poses two problems. The first is that of tracing the limits for the fields of applicability for each of the two principles, the second is about its articulation. The doctrine has tried to solve the problem by using all kinds of combinations, but according to legal texts there is no suitable solution. All this seems to suggest that the general system of civil liability needs to be deeply revised (REGLERO CAMPOS, 2006)¹⁴.

1.2. The rigidity, abstraction and supposed crisis of fault liability

Conceived by an individualist society (VINEY, 1977)¹⁵ and demanding, in its classic conception, fault as the presupposition for attributing the right to reparation, the classic system of civil liability becomes unable to face the extraordinary quantity of work accidents occurring in industrialized societies.

Nevertheless, the problem is complex, since fault is at the same time the foundation

¹² What is certain is that the arising of objective liability cases through the legislative way is inseparable from the running of an activity that the legislature wanted to charge with a liability that disregards fault. Another feature of this liability is the clear identification of the liable parties through what we may call canalization of liability by a determined person whose aim is the actual pretension of a compensation for the victim. About the concept of pretension and its legal framing, refer to TEIXEIRA DE SOUZA, M. (1998) *O curso de títulos de aquisição da prestação . Estudo sobre a dogmática da pretensão e do concurso de pretensões*, Coleção Teses, Almedina, Coimbra, p. 19 et seq.

¹³ According to PEÑA LOPEZ ((2002) *La culpabilidad en la responsabilidad civil extracontractual*, Comares, Granada, pp. 77-78), another distinction is possible. Therefore, *objective liability*, in the author's opinion, is a transit area between fault liability and the adoption of social security techniques, between the maximum expression of individualism and socialization.

¹⁴ In this sense, REGLERO CAMPOS, F. ('*Conceptos ...*', en *Tratado ...*, cit., p. 67 et seq.), maintains that *at present, little of the classic conceptual structure of civil liability*.

¹⁵ According to liberalism, fault perfectly responded to all the political and financial demands that it expected to settle, since it was an individualist criterion which respected the equality principle before the law and limited the charges on the liable parties by reducing for them the damages that the dynamic conduct of the commercial bourgeois class would have to compensate as a consequence of its business.

and the limit of the agent's liability.

Although *some criteria belonging to the objective system are often applied, they become pretences of fault, suppositions which acquire an absolute character*, thus obliging Courts to *extend the element that turns to it in a few cases in which there are no traces at all* (REGLERO CAMPOS, 2006).

Despite the construction of the fault liability system being rigid and, at the same time, abstract, there are some mechanisms allowing its adaptation to the different hypothesis of the legal field.

Additionally, it prevents the solutions provided for each case from fitting in with the concrete circumstances affecting it. For each different hypothesis there is a corresponding sub-concept which tries to approach the legal solutions of the effective configuration of the specific case.

In this way the mentioned classic conception of civil liability corresponds, indeed, to a liberal economic order and settles in a balance of interests:

a) those of the agent, for not being liable for the damage caused, except if he has adopted a diligence inferior to that of an average man, this doctrine being included in some civil codes;

b) those of the damaged party, who will be entitled to the reparation if they manage to establish the agent's liability. If not, they will be subject to the principle of *casum sentit dominus* since, according to HEINECCIO, *if nobody had caused the damage, nobody would be obliged to a compensation, nor the damage could be attributed to anybody else so that the damage that cannot be attributed to anyone is to be stood by the damaged person* (HEINECCIO, 1837)¹⁶.

In the first hypothesis, this conceptual construction widens the comprehension of the concept of fault. For that reason, the agent is obliged to adopt a negligent conduct. With reference to what was said, the agent who acts diligently – just as a good father of a family – cannot be held liable for any possible failure.

In the second hypothesis, given the premises about the conception of fault, the impossibility of attributing the damage always entails the agent's exoneration, regardless of the nature of their provision or its circumstances, since what is relevant here is that the accident is not characterized by the at-fault conduct of the agent – who can then be freed from liability for the absolute causal impossibility.

Nevertheless, some authors do not accept this statement. According to REGLERO CAMPOS, *what needs to be answered is not the question about whether the person who caused the damage was at-fault, but whether there is any reason for which the victim is to stand the damage*. In this sense, a general rule ventures that *a person causing damage to another person will be obliged to reparation when there is not a sufficient reason to justify that the damaged person is to stand it* (REGLERO CAMPOS, 2006)¹⁷.

With reference to what has been said, behind any unfair damage there is a conduct which deserves to be and must be sanctioned. However, if the code considers extreme assumptions in which the intentional causing of a damage is disregarded, it does not mean that fault has disappeared.

¹⁶ Undoubtedly, a damage which may be irrelevant to the effects of civil liability may be relevant to Social Security or to the effects on an insurance contract.

¹⁷ This rule entails in its definition the victim's exclusive fault and the force majeure.

Obviously, at least in the Law, behind any principle there is always an exception that proves the rule, but the exception cannot be set up as a principle. In this sense, although the legislation has included objective liability, it does not mean, absolutely, that fault has been neglected¹⁸.

Additionally, a mechanistic vision about giving answers may even provide reparation for the damage suffered by the damaged party, but its possible effectiveness will diminish should it fail to consider fault, since damages are caused in complex ways, according to various hypothesis ranging from direct or indirect liability to damages caused by things. Thus, such different facets need to be distinguished in order to impose solutions which are compatible with the aspirations of justice.

1.3. Towards an objective model of liability

Society's industrialization and the considerable increase in the number of work accidents that it caused came to break the balance to the detriment of the injured. This context, nowadays called *risk society*¹⁹, is affected by dangers, insecurity and insufficiency and produces inequality, considerations and privileges.

The insufficiency and excesses of the causal principle led jurists to formulate normative criteria of objective accusation allowing to modulate it, i.e. to widen or restrict it as appropriate. Starting from then, the settlement of lawsuits has been requiring the protection of the worker's interests to be widened with the consequent restriction of the hypothesis of discharging the employer²⁰.

In the subjective model of liability the conduct which caused the damage is assessed²¹. Nevertheless, the objective model of liability assesses the agent's and the victim's assets. Thus, the unlawful conduct proves to be the heart of the former model of liability, while the latter is based on the idea of lawfulness.

¹⁸ When the objective liability systems disregarding the element of fault were introduced, the objective liability itself lost its centrality since it was no longer essential to the operating capacity of such legal institution, especially in highly at-risk activities. In this sense, according to GÓMEZ POMAR ('El sudor de la frente...', ob. cit. p. 07), the fault liability rule results unable to cause in the originator those levels of activity which are socially desirable. For this reason, *the liable party or originator only need to reach the minimum required level of care, i.e. being diligent, in order to avoid the payment of compensation*. In this case, *by reaching the required diligence he does not face the risk of corresponding any compensation at all for the damages resulting from his business, so that the fault rule will not stimulate them to adopt the amount of work which is the most appropriate from the point of view of the effective reduction of damages caused by it*.

¹⁹ Original definition from the book *Risk Society*, written in 1986 by Professor Ulrich Beck, Munich University. In his book, he made it clear that within the paradox of globalisation, privileges and accumulation of fortunes arise in favour of the most powerful ones as well as the poverty democratization and the despair of great portions of society, who react by mobilizing the internationalization of hope and looking forward to a new, reasonable equality.

²⁰ As SALVADOR CODERCH, P., N. GAROUPA, C. GÓMEZ LIGUERRE ('*El círculo de responsables ...*', ob. cit. p. 7), correctly pointed out in practise, in many *legal systems of compensation (based on pure objective liability – without fault), damages are compensated and who actually caused them or who was negligent is legally irrelevant*.

²¹ In MEDINA ALGOZ's words (*La culpa de la victima...*, ob. cit. p. 42), at the beginning, *civil liability lay in an assessing, even psychological, judgement of both the fact and the conduct of the originator of the damage. In it, a repressive dimension used to operate, although in a vague and undeclared way*. Later, the author states that *nowadays, the damaged integrity being the main focus, the most meaningful and justifying consideration about obligatory compensation is to be found primarily in the reality of the damage itself, in its identity, character and circumstances*.

In this sense, there was an attempt to settle the situation by means of the contractual or binding liability based on the civil doctrine expressed by SAUZET Y SAINCTELETTE²².

According to this theory the employer was bound to guarantee the health and safety of the employee or worker and thus an accident would represent a failure to fulfil such obligation, being impossible for the victim to prove any kind of negligence.

In the 20th century a doctrinal movement to make civil liability more objective²³ begun in France and Italy. The movement corresponds to denying the criterion of fault as the only foundation of liability. In it, any moral assessment is irrelevant since fault is no longer the exclusive foundation of liability.

With this movement, the search for liability becomes something of secondary importance, since the running of modern companies makes participants' errors inevitable in the frame of industrial work. An accident is nothing more than a fact, unfortunately banal and foreseeable and thus a risk connected to the course of any profession.

Some damage reparation alternatives follow here, such as social security systems, through the so-called socialization of risks, or private insurance²⁴, although defending an objective liability system in one or more fields of the socio-economical activities does not mean praising the elimination of the principle of fault.

It is not, as JOSSERAND says, about *rejecting the fault system, but it is about establishing the risk system next to it in order to create a more perfect balance between interests and law* (BORDA, 1994).

1.4. Premises of fault liability, objective liability and risk liability

In the early 19th century, referring to the evolution of the French civil law over the last fifty years, RIPERT stated that '*contemporary Law stands on the side of the victim, not of the originator*' (RIPERT, 1951).

The basic idea is that the damage caused in an unfair way must be responded to as well as the damage unfairly suffered, i.e. when it is unfair that the damaged party is to stand it, regardless of the possible unlawfulness in the work of the person who has to respond.

These facts hit consciences and open illuminating debates. The supposedly damaged parties try to increase the list of possible liable parties in an alarming explosion of controversies. Additionally, there is a social worrying about the increase in the number of accidents, which leads to an increase in damaged parties being left with no compensation at all.

Referring to this, they talked about the socialization of damages to introduce an objective perspective about responding which charged the employer for the damage

²² It is possible to learn about the mentioned doctrine in VINEY, G. 'La responsabilité: conditions', in J. GHESTIN (ed.) *Traité de Droit Civil*, LGDJ, IV, Paris, pp. 62-75.

²³ In Spain, refer to JORDANO FRAGA, F. (1987) *La responsabilidad contractual*, Civitas.

²⁴ By adopting civil liability insurance, caused damages are covered by such system without the need to investigate which the relation between originator and damage is. According to the eminent French author CARBONNIER ((1971) *Derecho Civil*, volume II, book III, Editorial Bosch, Barcelona, p. 59), *this would cause an excessive increase in liability considering the lack of connection between the damage and the obligation to compensate it.*

compensation. According to this doctrine, there are no more at-fault parties but only liable parties.

The so-called liability without fault²⁵, which is described also as liability for objective damage or for objective fault, is especially called *ubi emolumentum ubi onus* or theory of risk-benefit²⁶ in work accidents and professional diseases and in based on the following premises:

a) all human activities have their own risks and may cause damage to others, being it impossible in the majority of cases to prevent accidents. It is also impossible to prove the fault of their originators;

b) risks are often a source of profit and, for this, it is fair that the damage is stood by the person gaining more profit²⁷;

c) being not socially accepted, the criterion of the employer's subjective fault is theoretically not safe since it is not possible to establish where minor fault, justifying liability, ends and casual act begins;

d) the worker is a strength, a means of production just like the company's machinery or tools. Being sure that the employer is responsible for the damage to the company's building and accessories, he similarly must take on the risks regarding the staff, and both the former and the latter can be prevented through insurance.

One person who carries out an activity involving a permissible and socially useful risk, has to face the consequences caused by it, since the objective liability makes the actual originator of the damage become liable, disregarding whether their conduct is at fault or not. In this way, maintaining a source of risk –permissible, lawful and useful- is a manifestation of a far intentional act of the originator or, in the specific case, employer.

The first characteristic, therefore, is the charge for liability on the basis of the activity carried out, regardless of the liable party being at fault or not, since they are obliged to compensate those damages for which they would not respond if the fault liability principle was applied.

Nevertheless, according to PLANIOL this doctrine, *far from meaning progress, constitutes a regression leading us back to the barbarian age before the Lex Aquilia law, when they had to abide by the materiality of facts (PLANIOL, 1921).*

Similarly, ALTERINI (*ALTERINI, 1992*) maintains that the theory of risk-benefit dissociates liability from the censorship which the sanctioned conduct may be worth of and accepts the liability of someone who is not at fault on the basis of the activity carried out. All this implies a return to primitive forms of accusation for liability in order to charge someone for the consequences of an act that they have not actually originated.

²⁵ According to DIEZ-PICAZO ((2000) *Derecho de daños*, Civitas, p. 109) this theory was the subject of strong criticism. PLANIOL, for instance, stated that *if liability without fault was admitted, social injustice would occur since for the Civil Law it would be the equivalent of what in the Penal Code is the accusation of an innocent*. However, DIEZ-PICAZO maintains that *it is not possible to generalize the ideas created by the regime of work accidents as in it theory is a piece of a special system*.

²⁶ According to CASTEJÓN MARTÍNEZ DE ARIZALA ((1912) *Ensayo sobre las notas de diferenciación e integración de los Derechos penal y civil*, RGLJ, p. 449), *the first author who spoke about the theory of risk-benefit was Raymond SALEILLES in his work 'Les accidents du travail et la responsabilité civile', dated 1897.*

²⁷ In REGLERO CAMPOS's opinion ("*Los sistemas ...*", ob. cit, p. 222), this Theory is known as Utilitarian. Thus, *those who undertake activities generating risks for third-parties with the only aim of gaining profit must stand the damages that may arise from such activities, even without fault.*

However, what is sure is that risk liability is responded to with or without fault, excepting if the causal connection results broken by a cause which is external or not related to the caused risk, such as force majeure, victim's fault or third-party-caused fact²⁸.

Nevertheless, it is important not to confuse objective liability with a *iuris et de iure* alleged fault that does not allow to prove the contrary, since the former is a liability not needing fault and the latter is a liability for alleged fault, although in both cases liability derives from the causing of a damage.

Additionally, according to DIEZ-PICAZO, this liability must not exceed the limits of the risks inherent to the *running of the company's activity*, that he calls *risks typical and notoriously connected to the running of a company, not risks which may result unforeseeable*²⁹.

However, in my opinion the key to risk liability lies not in the benefit but in the triggering, since the accusation occurs on the basis of the triggered risk instead of the benefit-producing risk.

As a consequence, objective liability is not about compensating the benefit obtained by the person who triggers the risk, but it is about compensating the risk itself.

With objective liability the person who causes damage to another person is obliged to a compensation regardless of the level of precaution he would have adopted.

This objective nature of liability can be appreciated not only in the objective cause that justifies it, but also in the terms according to which it is applied, which are the provisions outlined by the law, since such liability is valued or priced (*ALONSO OLEA, 1958*).

Nevertheless, a value-assessed reparation reduces the damage that can be compensated as, excluding health care, the compensation focuses on the ability to work and generally leaves out of coverage the damages ranging from aesthetic to biological³⁰.

Moreover, within the compensation for earning capacity, the value assessment of coverage tends to remain below the effective level of damage, leading to the under-protection of the injured worker³¹.

For this, it is important to underline that the peculiarity about objective liability is the setting of a maximum quantitative limit, usually accompanied by the need for an obligatory insurance guaranteeing the effectiveness of liability. In this way, the occurring of damage and its causal connection to the at-risk activity described by the law will be

²⁸ This is another peculiarity of risk liability that imposes strict limitations to the admission of lawsuits discharging or disregarding liability or, in other words, to originators who guarantee that the only causes discharging liability are the acts of God or force majeure (BONVICINI, E. (1971) *Responsabilità soggettiva ed oggettiva contrattuale ed extra contrattuale- Responsabilità per fatto altrui*, Guiffré Editore, Milano, pp. 246-263).

²⁹ *Derecho de Daños*, ob. cit, pp. 116-117.

³⁰ Therefore, according to DUPEYROUX ((1990) "Faux problèmes et vraies impases", *Droit Social*, no. 9-10, p. 684), *the rules that initially protected workers have turned out to protect employers*.

³¹ Nevertheless, this evolution has transcended the flattening of the way towards compensation as it is an insufficient instrumental setting for the materialization of a true liability. The charging, due to its own nature, includes the frustration of integral reparation, although protection is extended to an increasing number of very personal rights, as the classic outline that prevented the extension of the damage beyond its typical frame are abandoned (ZANNONI, E. (1982) *El daño en la responsabilidad civil*, Astrea, Buenos Aires, p. 94). Additionally, its aim brings about the need for a necessary integration with other liability systems to reach the reparation for the interests affected by the damaging event.

enough to originate a compensation which, in any case, will not exceed the limits fixed by law.

Truly, this limitation to reparation, pre-established by law, served as an instrument to prevent, on the part of the employer, the integral reparation for the victim of a work accident³².

Nevertheless, the elimination of such compensation limit and the possible accumulation of compensations may lead to over-protection, thus producing an increase in the injured party's assets which would not be justified, in principle, by the accident-caused damage, as it happens with the application of the so-called *punitive compensations*³³.

On the other hand, nothing prevents the employer from assuming, by pact or collective agreement, the obligation to improve the provisions related to work accidents, since he may subscribe optional insurance apart from the compulsory legal insurance (*ALONSO OLEA, M. AND J.L. TORTUERO PLAZA*, 1997). But, here, the value of the employer's response to the insured or beneficiary is established in the mentioned insurance and does not exclude the provisions established by law, as these compensations are compatible with what is due for Social Security matters.

Finally, some Spanish authors, such as RICARDO DE ÁNGEL predicts that in the near future all caused damages will be covered through insurance up to the time when there will be no civil liability lawsuit, exception made for those specific to the insurance companies as a consequence of their part of the subrogation in the rights of the insured (*DE ÁNGEL YÁGÜEZ*, 1993). However, this view is not shared by all Spanish authors³⁴.

But, in our opinion, the even indirect lifting of civil liability through insurance, in cases like these, may result in a huge injustice for the workers, who would find themselves limited both in their right to demand civil liability debt payment and, thus, and in their assets, as a consequence of the damages caused by the running of the business³⁵.

The general principle of compensations, that is to say, the integral reparation of the damage – which will be possible only if the liable party is solvent- needs to be

³² For sure, there is an underlying financial aspect in this matter: the integral reparation. Hence, it is about a conflict of interests: if on the one hand there are the damaged parties and their aspiration to be integrally compensated, on the other hand there are the liable parties worrying about the chance that the total reparation for the damage may turn them into the new victims of the system – although insurance help prevent the impact of compensations on their own assets.

³³ According to DIEZ-PICAZO (*Derecho de...*, ob. cit., p. 46), *if one wants to punish and is authorized to punish, it does not seem right nor fair to supply compensations exceeding the damage to the damaged parties since this would make them richer.*

³⁴ According to DIEZ-PICAZO (*Derecho de...*, ob. cit., p. 189 et seq.), the existence of risk insurance and civil liability insurance is important in order to guarantee compensation to the victims and produce the so-called *damage pulverization*. He states, however, that in Spain the true success of the socialization system was prevented by some aspects such as:

- a) the consecutive financial recessions;
- b) the considerable increase in the number and amount of compensations to pay, without the existence of certain and in advance pre-determined criteria to abide by.
- c) the refusal of such insurance companies, in some cases, to cover those activities which present high risks of damage.

³⁵ On the other hand, according to GARCÍA MURCIA (*Responsabilidades y sanciones...*, ob. cit., p. 132) we need to take into account that this assurance has an absolutely private nature and an aim which is completely different from that of Social Security, which is compulsory.

safeguarded from any attack inspired by matters that are external to the sphere of civil liability.

This will be the basic premise that, by virtue of its unquestionable justice, cannot be modified. Any kind of balanced solution of the disputes about the game of interests will have to be developed starting from it, although distancing from the financial aspect, namely the incidence of the compensation charge on the assets of the liable party, would more or less equal putting victims in a new state of unemployment, as such distraction would help make legal credit to a fair compensation return to be usually illusory.

2. SOCIAL SECURITY, ITS CONVERGENCE INTO CIVIL LIABILITY AND ITS CONSEQUENCES

Human beings live in societies characterized by a more or less intense division of work and by different ways of interacting with their members. Both aspects are possible if we are ready to acknowledge that many at-risk conducts are actually permitted and that, as a consequence, the agent will not have to respond when the triggered risk takes the form of an accident causing damage to third parties.

Nevertheless, if the protection of the worker against the risks deriving from the professional contingencies is achieved through the social security coverage, the question will be about conjugating this protection mechanism with the employer's civil liability deriving from the work accidents suffered by the persons working at his service, since it does not constitute a contingent function of the State but it has become an essential purpose for it, through which a specific public demand is satisfied.

In this way, the constitutional mandate about the maintenance of a public regime of Social Security means, according to PALOMEQUE LOPEZ, the acknowledgement of the social protection of citizens within social security as a function which is typical and exclusive to the State (*LOPEZ, 1980*).

All this supposes that if there is a primary principle for which public powers are responsible for the payment of provisions³⁶, the employer's liability takes shape in view of the failures regarding certain legal bonds and, as a consequence, the disappearance of work accident insurance allows to keep intact the scheme of civil liability based on the techniques of the Civil Code. It is the different foundation of the Institutions which allows us to state so.

In other cases, when the reparation established through those systems is incomplete, civil liability is used to obtain reparation for the suffered personal damages, just like in those situations in which its assumptions traditionally would not take place³⁷.

³⁶ In this matter it must be pointed out that, in principle, the liable party will not be the employer but the Managing Organisation of the Social Security. However, there are exceptions: the statement of the entrepreneur as the party liable for failing to comply with the contract obligations or the assumption of provision surcharge which do accuse the non-complying employer and that is going to be analysed later on.

³⁷ It could be stated that the employer is left with the residual compensatory duty, i.e. taking on only what is not covered by the provisions of the Social Security or the damages exceeding the coverage of such provisions. But, in my opinion, this is not the right focus. Let's consider the protection of the Social Security as the *minimum*, according to DIEZ-PICAZO ("La distribución social de los daños y la Seguridad Social", in AA.VV. (2003) *Liber amicorum. Economía, empresa y trabajo. Estudios en homenaje a Manuel Alonso Olea*, Civitas, 2003, p. 184) starting from which the compensation for damages may be accessed by Civil Liability claims. In brief, the aim of the Social Security's provisions is to cover a situation in need.

The traditional equation between reparation and liability thus disappears and brings about the need for revising the institutes which acquire a subsidiary or complementary character, as in Spain, where civil liability and public systems of care keep this relation in themselves (*REGLERO CAMPOS, 2006*), despite the other schemes of damage reparation.

The consequence of this convergence³⁸ is the sublimation of the reparative function. The increasing number of objective liability lawsuits being admitted has led the doctrine to reformulate the traditional concept of liability in an attempt of unitary construction.

In this sense, the route followed by the doctrine before the problem of the constant alteration of the institutes' assumptions, was that of abandoning the analytical concept to opt for a shorter formulation such as the restriction of civil liability to two assumptions: the damage and the accusation criterion (*HEREDERO HIGUERAS, 1964*).

Additionally, there is a growingly marked tendency to facilitate compensation for damage by applying new concepts, like the accentuation of the demanded diligence, the inversion of the burden of proof and the application of solidarity to the traditional techniques of civil liability for all those individuals causing damage.

Finally, so constructed, the role reserved to civil liability will be that of covering those damages that cannot be covered by social guarantee³⁹, that is to say, those damages to property for which a reparation is, without any doubt, absolutely legitimate. Also, the different rules of civil liability pursue two goals: on the one hand, compensating victims for suffered damages; on the other hand, encouraging the potential originators of damage to adopt excellent precautions. However, in our opinion, civil liability is a very imperfect compensation system, especially when the victims suffer from serious personal damage, since in such cases it is hard to calculate the compensation. For this reason, victims are often under- or over-compensated.

In this work, which was usual in the doctrine of civil law, starting from the accident, different kinds of compensation can be found. They may give rise to provisions which are independent from each other, considering that the Social Security provisions which the worker has right to would not exhaust liabilities and would be a minimum coverage for the insured damages.

However, civil liability nowadays has to justify its existence by proving that it constitutes a suitable reparation mechanism before such a system, even through a

³⁸ Both mechanisms are oriented towards the protection of workers involved in work accidents by providing reparation for the consequences of the damage but, while civil liability is linked to the specific situation of the noncomplying employer's victim, the provisions of Social Security have a clear collective character since they compensate the lack of wages or the increase in medical expenses, regardless of a possible employer's non-compliance. About Social Security provisions, refer to APARÍCIO TOVAR, J. (1994) 'Sobre la responsabilidad civil del empresario por infracción de las obligaciones de seguridad y salubridad en el trabajo', RL, vol. 1, p. 542.

³⁹ It is known that Social Security provisions do not reach complete damage reparation as the protection completely neglects non-pecuniary damage that victims may have suffered. On the other hand, from the point of view of lost profits, it does not even cover the material damage that the victim may have suffered; it is sufficient, in the first place, that the Social Security provisions do not equal the no-longer-earned wage but are usually lower. As to connected damages, not all of them are protected – the damages regarding the worker's personal belongings which have been affected by the work accident are out of coverage; the health care provisions do not cover 100 per cent of the possible medical and chemical treatments which may be required for a full recovery; there is no provision dedicated to defray the expenses connected to family members or hired professionals giving assistance to the injured person.

temporary function⁴⁰. For this, the social response will have to take into account both interests, though giving priority to the damaged parties' requirements since *the Law of damage does not admit limitations to the extent of compensation*⁴¹.

Therefore, what matters is focusing on *what* needs to be compensated, without neglecting *who* must compensate and *who* must be compensated, considering that the key to the awaited compensation is the occurring of an unfair damage (LÓPEZ JACOISTE, 1990).

Finally, in my opinion, compatibility is important as far as the basic pillars of civil liability, the victims' interests –who would maintain the immanent right to compensation as well as be very likely to obtain effective compensations-, do not get altered by the interests of the liable parties –remarkably reducing the risk of loss rooted in the compensatory burden- and of the Social Security.

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⁴⁰ On this matter, CAMOS VICTORIA, I. (2001) “La no compensación del recargo de prestaciones con cantidades abonadas en concepto de indemnización por los daños y perjuicios sufridos a consecuencia de un accidente de trabajo”, AS, vol. V, p. 435 et seq.

⁴¹ About this, refer to contribution presented in 1989, in Buenos Aires, at the *I Congreso Internacional de Derechos de Daños*, comisión no. 3 on Limits to compensation in objective liability, by PIZARRO, R.D., *Atribución objetiva del deber de resarcir e indemnización limitada (a propósito del art. 1113 del proyecto de unificación legislativa civil y comercial)*.

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