

# THE NATURE OF THE OBLIGATION AND THE PRINCIPALS FOR CIVIL RESPONSIBILITY DERIVED FROM ACCIDENTS AT WORK

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**ABSTRACT:** *In this paper we will examine the meaning and scope of the nature of the obligation arising from accidents at work. In addition, we wish to clarify that the purpose of this research is not to resolve any issues that may arise from civil liability for accidents, but to offer a comprehensive, holistic and systematic view of this responsibility, with particular emphasis on those issues that have been poorly treated by the doctrine.*

**KEYWORDS:** *accidents at work, civil rights, civil responsibility, liability.*

**JEL CODE:** *K2, K31*

## 1. THE TWO SIDES OF WORK ACTIVITY

Accidents at work hurt their victims and society. Therefore, the concern for the health and safety of employees is one of the issues of greatest power of agglutination. Either way, the issue is of interest to multiple subjects and different stakeholders, especially employees<sup>1</sup> and employers, and the Government and, within it, to those who look, think and work through the lens of health and work.

All have reason to be concerned with the subject. Employees, especially because, suddenly, they may become victims of accidents, with varying degrees of incapacity to work, even of various lengths - if not perennial - in the case of fatalities.

Conscious and sensible employers are not interested in occupational risks much less whether such risks end up damaging the health of their employees. In addition to a humanitarian problem and respect for the basic rights of citizenship, health and safety at work, they also represent an economic problem.

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<sup>1</sup> It must be clarified that the concept of employer, adopted in our research, refers to the figure of the employer, such as natural or legal person, who owns a company that can have one or several workplaces, and performs autonomously a certain productive activity through the direct use of the services of a group of employees, employees who perform for him, and within its sphere of organization and control, their service delivery, and that under it, precisely, will be attributed a complex and comprehensive legal power of management, organization and control of work, single provision, each employee connected with him, as well as the performance of all staff working for him.

For the government, the problem of health and safety at work has interfaces with the production system and the development of the national wealth. In addition, direct concern to those who have the task of dealing with the formation and development of the workforce, labour or human resources; with labour relations, conditions and working environments; with health care workers, and those who observe the problem from the perspective of preventing the loss of ability to work, look for a speedy recovery or, at least, repair economic loss, so that the employee can be insured indispensable means of subsistence and their dependents.

However, there are no jobs which do not have risks. Nor work to suit everyone, because jobs which may benefit a particular person can damage another. Thus, it is possible to conclude that occupational risks are intrinsic to the various work activities.

Therefore, we believe our study is framed not only in a remarkable legal complexity but also a pressing social situation because the accidents at work figures are certainly worrying.<sup>2</sup>

Today, unfortunately, the high level of technology and complexity that characterizes the business production process there is always the existence of a margin of unavoidable risk, in the sense that neutralization is absolutely unachievable in the current state of the art and science.

But the duty of protection and prevention is directly situated within the contractual obligations to which the employer commits in the world of work, not only as agreed in the contract, but as a general duty imposed in regulatory sources in the employment relationship, which put the employer responsible for the debt security and, therefore, for its effective implementation, limiting as much as possible the risk of accidents.

However, in my opinion, it is not possible to create a duty of health and safety on the part of the employer to avoid all potential hazards arising from work activity. Although, in relation to the Prevention of Occupational Risks, it has for a long time been regarded as a minor element and costly for companies or institutions themselves. In most cases we have tried to implement measures to reduce accidents at work and in other cases, reduce exposure to different risk factors present in the workplace, through legislative, regulatory and policy matters.

Both institutions and companies have partially fulfilled their responsibilities by not implementing the provisions for the protection of elements of production, the first actions of a punitive nature or penalty, and second, most of the time, not generating interest in a comprehensive prevention.

## **2. MECHANISMS FOR LIABILITY FOR ACCIDENTS AT WORK**

Accidents at work are considered misfortunate, the dark side of progress and modernization, of which almost nobody takes responsibility, despite the existence and validity of many laws aimed at the protection of occupational health.

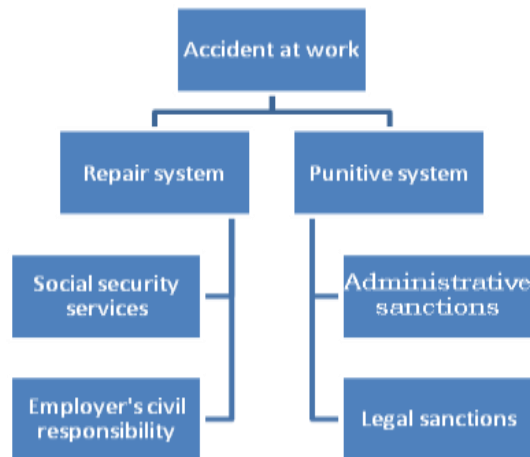
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<sup>2</sup> In Latin America, according to the International Labour Organization, there are approximately two (2) million accidents per year. Each worker in Latin America, has an accident between 2-4 times during their working life, and there is an underreporting of 90% of illnesses. There is information that is recorded each year 160 million new cases of occupational diseases in the world. The economic losses due to occupational illnesses and injuries, accounted for about 4% of gross domestic product (GDP) worldwide. In addition, the World Health Organization estimated that in Latin America that 1% to 4% of all occupational diseases have been reported.

However, the plurality of jurisdictional divisions for the same matter has led to a real procedural maze and a divergence in substantive solutions to the consequences that this entails in terms of legal insecurity and unequal application of the law.

Public or private services, fines and compensation liability have one common purpose: to repair the damage following an accident. In this way, the affected employee or, if deceased, his or her descendants, are entitled to compensation, the amount of which depends on the provisions of the law, the contract or a court order.

However, this situation is the product of a regulatory evolution in which successive and overlapping regulations have been defined, with varying degrees of success, different responsibilities without worrying too much about coordinating them. Thus, as demonstrated in the graph that we enclose below, in terms of accidents, we have a repair system - Supply of Social Security and Employer Liability; and a punitive or repressive system - which includes the administrative sanctions and penalties.<sup>3</sup>



Thus, the damage caused by an accident at work can lead to various repair mechanisms, generating the corresponding obligations for subjects which are also different.

Repair damage to the realization of a work service is therefore an intersection between various sectors of the legal system, which explains both the difficulty and interest of its study. The study of each of these legal fields, in particular the law of civil liability, must

<sup>3</sup> In most countries where there are programs on accidents at work, they are operated by a central public fund, which may or may not be part of the general social security system. All employers involved in the program, must pay contributions to public insurance, which pays benefits. The awards that private insurers or mutual companies charge for protection against accidents, generally vary according to the historical accidents in different areas and industries. Also, the cost of protection can vary greatly. In some countries, meanwhile, the historical accident of work left to be considered and all employers in the country, regardless of area, equal pay for the program, as in Spain and Brazil.

encounter the proportion of reciprocal adequacy, being careful not to deviate from the principles and logic themselves.

Here there is a momentous turning point: the regulatory law mechanisms compensation for accidents at work, interpreting the social consciousness, opens a new basis for attributing such damage as is the risk, giving rise to liability objectively or without blame. In that case, the conflict settlement requires the protection of the interests of the employee to be extended, with the restriction of the hypothesis release from the employer.

Then, these mechanisms, in turn, with time and the economic and social changes have come to show some signs of weakness, which opens the way for complementary social protection mechanisms disciplined, here, through the legal accident insurance work.

However, the knowledge set by the jurisdiction of civil order and social order in these proceedings, not only has the disadvantage of the uncertainty that the defendant suffers as to the judicial order that has to go, but carries an undesirable inequality treatment, due to differences in access to civil process and the work process and the very different reporting criteria of either system.

Therefore, trying to stay afloat in this issue with clear criteria, it could be argued that it is competent social order to deal with the damage caused to the employee, for all conduct of the employer in that it acts as such entrepreneur imputation of guilt, while this is raised as contractual, whether it arises in tort, it causes the damage.

Moreover, the letter and spirit of the Social Security Act attributes to the civil jurisdiction of any conduct or actions of the employer to be fully equivalent to the behaviours and actions of others outside the company, and produce damage to the worker, so this social jurisdictional order has no jurisdiction in such cases.

As a result of that darkness, doubt and absence of legal criteria, jurisprudence defend opposing views on whether or not accumulation of aid and compensation that the worker can perceive. Thus, it can be said that employment benefits and damages are two clearly distinguishable realities and therefore compatible and cumulative or, on the contrary, sees the various mechanisms as different ways of repairing the same damage and, therefore, not cumulative.

Thus, the remedial measures the damage caused by an accident at work, are not exhausted or are not exhausted with those mechanisms provided for in the social or labour law, referred to in response to the contract or employment relationship between the injured worker and the employer determine inclusion in protection systems, like Social Security, but outside or in addition to the above, it can demand compensation for damages to the company, through the mechanisms of civil liability.

Finally, it is virtually impossible in this work not to refer to matters which, although collateral to issue proposed here have great influence on it. However, these issues will be addressed only to the extent necessary for an understanding of the objectives, in order to avoid the risk of wandering, that would lead either to the surface treatment of some issues, either loss exposure sequence.

To address the proposed task naturally had to resort to the legal-positive instruments that currently recognize and regulate the employer's liability in accidents at work, using the inductive method, to have to undertake a complete interpretation, accurate and successful of all aspects of the law that should be appreciated in this article.

### 3 - NATURE OF THE OBLIGATIONS ARISING FROM THE WORKERS

#### 3.1. - The employer as the person responsible and safety debtor

With few exceptions, employers prefer not to bear the costs of liability risk and improving the work environment. Being them the main beneficiaries of state protectionism, through public social insurance now find it difficult to invest in the quality of the work environment through health, safety and prevention, and consequently improve productivity and quality.

In this sense, there are few employers who, on their own initiative, have launched programs for health, safety, hygiene and productivity where participation is comprehensive and employees play a participatory role and are not just mere observers.

However, changing the protectionism of public institutions of social security and new models to be used for prevention, companies have to comply with prevention methods or leave it in the hands of third parties.

However, the safety and health at work is a matter which aims to ensure that the conditions under which the work develops are safe for employees who are responsible for running it personally. Therefore, the labour law gives employees / workers the irrefutable right to effective protection in health and safety at work.

Obviously, the permanent and constant objective of the different regulations on accidents at work health and safety at work was always the protection of employees against working conditions that could somehow damage them personally - notably those related to life, integrity and health.

The search and subsequent satisfaction of those interests, reveals two sides of the same coin: the private interests of the employee / worker are not harmed as a result of work unfolded and general and public interests to achieve safe working conditions that allow for a reduction in accidents.

To achieve this goal, the law, taking into account existing social values in society and also interpreting the needs under those values – health and safety – considers that these values must be satisfied and protected and determines that the responsibility lies with the employer.

In any case, it is no doubt that this is one of the most complex and controversial subjects. Its significance is obvious and it is true that health and safety at work cannot be reduced, simplistically, the establishment and analysis of this binding relationship, since protection depends on a diverse set of factors, which also involved external parties to the contractual relationship, we can say that such protection revolves around a single element that is none other than the obligation on the employer to ensure good conditions of health and safety at work.

Furthermore, we address the issue there is every reason for the specific performance of the debt security and health, not exchangeable for financial compensation, mainly due to poor layout with safeguarding the legal interests at stake. Thus the centrality of this issue in the development of risk prevention accident necessitates an adequate picture of responsibilities to the defaulting subject therefore voluntary compliance of the obligation, characterized its essentially preventive arm. In that sense, the regulation on health and safety at work puts its centre of regulatory attention on the protection of employees, attributing to the employer for breach of their safety obligations, different responsibilities:

basically administrative, but also criminal liability and civil damages arising from such breach.

Therefore, workers are entitled to effective protection in health and safety at work, then there is a correlation between the generic right of employees to protection and the duty to facilitate it. Thus, if the employer is the principal subject in prevention (García Murcia, 1998)<sup>4</sup> will also be the main person responsible, but not the only one (García Salas, 2004) (Cabero Iglesias, 2004)<sup>5</sup>.

This is only a sample of the existence in the employment relationship, of a compulsory, basic and necessary relationship, in terms of accidents, where the employer is in a position of debtor and creditor employee safety and health the work.

Therefore, in my opinion, the great contribution of the LPRL ( Leis de Prevenção de Riscos Laborais) has been no recognition for employees to enjoy effective protection in safety and health at work but provide them with a new content. Now, the employee is entitled to his employer to prevent occupational risks in each case be submitted for further integrating prevention activities that make all the decisions and actions taken in the company. In short, employees are entitled to a right to effective protection against the risks of work-related accidents.

Ultimately, the employer is required to guarantee the safety of employees, when they are carrying out their duties, so, in principle, as creator of the risk attributable to it any damage or injury that may befall in their jobs.

### **3.2. - Scope and limits of protection against accidents at work**

The obligation on the employer is characterized by great difficulty in its compliance. In that sense, to carry out employee protection against accidents at work a performance is required that goes beyond the mere formal fulfilment of a more or less comprehensive, default set of corporate duties.

Meanwhile, the employee ranks as receiver of the actions it takes, becoming the beneficiary of corporate responsibilities. In other words, it becomes the owner of a set of inviolable rights, which cannot be compressed or nullified by the fact of working in a foreign organization.

In this regard, the employer as guarantor of effective protection of each and every employee in its service, is required to take all necessary measures to that end. Among them is that of requiring their employees to behave in a way that does not pose a risk for themselves or other employees in the company.

Obviously, this compulsory cooperation, imposed on each worker regarding their employer, in addition to serving as all other security measures, to the satisfaction of the individual interest of each employee, serves to meet the interests of the employer, on the one hand, to fulfil their duty to protect each and every one of the employees at your service in the terms required by the regulations in force and, on the other, to obtain an adequate return from the work of its employees and an efficient operation in the company.

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<sup>4</sup> In addition, it should be recognized that the employer owns the means of production, so that takes the benefits derived from their use. So is the one who has to deal with the damage that those means of production caused to employees or third parties when they are used.

<sup>5</sup> Thus, it is possible to mention, other parties responsible, as the workers themselves, managers, prevention services, their own or others, among others.

For its part, the imposition of cooperation duties on the employee, as an indispensable means to achieve their effective protection against accidents resulting from work, is closely related to the labour law and in particular, the ban waiver by employees of the rights recognized by law.

In that sense, the imposition of such duties to employees constitutes a concrete and specific expression of the duty to work diligently and in cooperation with the employer. It does not mean that it has placed the employer on a par with the employer in relation to achieving their effective protection against accidents at work.

Thus, the employer is legally obliged to fulfil their debt security, even if employees working for said employer fail to comply with the obligations which have been legally set out to them. It is up to the employer, who was given the principal responsibility, to comply with the right of employees to effective protection against the risks of accidents<sup>6</sup>.

Therefore, the employer cannot claim that the employee has not fulfilled its obligation to cooperate, to be exempted from liability for its own failure, except, of course, in the case of an event which is beyond their control such as a force majeure.

However, the extent to which the debt arises, is an almost perfect requirement of achieving the protection of the health and safety of employees, which ultimately makes one of the main problems defining the scope and limits and not only with regard to whether the employer has to guarantee the health and safety of employees, but about the behaviours that the debt of guaranteeing employees' safety imposes. However, there are principles that preventive action and risk assessment means that dictate how to act or to abstain, and that are appropriate to avoid consequences at work. Unfortunately, these rules do not fit the classic structure of legal norms, or the uses, since they are often not formalized in writing or contained in a legal text, nor are known to the community. But this does not prevent that in some way they can be considered as a source of rules for a specific category of legal relationships: those established through the professional act of the subjects.

Finally, the courts have been for years based on the premise that the health and safety at work responds to the plan to protect the worker / employee against the risks of their profession trying to offer the maximum guarantee of safety or reduce the risks purely incidental and unavoidable, not only for social interest, but for the respect that the integrity and the life of man deserve as the primary and most noble element of society.

In addition, they consider that the health and safety focussing mainly on the prevention of accidents at work are configured as necessary and inexcusable law enforcement cannot be mitigated or pulled over under any pretext. So the doctrine states that the debt of guaranteeing safety is legally imposed on the employer / employee in the area of prevention of accidents. Thus, the responsibility placed on a company to guarantee employee safety is not limited to affording them the normal means of protection but the company is instead obliged to properly monitor compliance of its instructions, which should ultimately aim to protect workers from any sort of risk posed in the carrying out of their required duties.

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<sup>6</sup> The consent of the victim, that is, the employee allegedly consented to carry out their work under the conditions presented to him, is not justification to prevent consideration of an act as unlawful for personal damage.

### 3.3. - A distinction to overcome: obligation of the means or the result?

The distinction between obligations of means and results (Pascual Estevill, 1995) (Alterini & O. J. y López Cabana, 1995) (Cabanillas Sánchez, 1993) (Yzquierdo Tolsada, 1995) (Jordano Fraga, 1991) (Lobato Gomez, 1992) was outlined in Roman law, which had contracts in which the obligation was precisely determined, and others only demanded the debtor's acting in good faith. The former French law also took into account that distinction, especially through the thought of DOMAT.

However, the theory reached legal significance because of doctrinal discussions about the proof of fault in contract and tort fields. DEMOGUE was the first exponent of this (Demogue, 1925).

However, if we address the issue of considering the safety requirement as a means or as a result it is presented as a topical issue until there is an agreement from the doctrine on its use. If we focus on specific behaviour it seems quite plausible locate obligations of one kind or another, especially regarding contractual matters.<sup>7</sup> Although, in any contract, the debtor agrees to make it is to seek suitable means for obtaining a certain result that will satisfy the creditor.

With this, it is possible to admit that any obligation is to achieve, by the debtor, a specific result, which will prove useful to the creditor. However, the content of the result which is due can be configured in different ways. On the other hand, the creditor's interest in meeting the obligation is a common thing, predicable of any mandatory link. Although, however the obligation is defined - as the means or the result - there will always be further creditor interests not covered by the content of the obligation, that is, on the part of the debtor. Obviously, in any provision or obligation, by definition, there is a behaviour represented by an activity owed by the debtor. Finally, obligations to do, such as obligations of means or of result, generally due by the debtor can be configured in two ways (Jordano Fraga, 1991):

a) as a simple display of diligent activity, technical or common, so that the debtor who performs, true, but does not achieve the end-result of such activity straightening, end result that is not due, as there is integrated into the content of the obligation;

b) as a diligent behaviour that is associated or complete with a certain typical result, so that it is due, then joins the obligation of the debtor and the creditor's right, without their actual achievement, hence the debtor cannot claim to have complied, although it has shown some diligence to achieve the desired activity.

#### 3.3.1 - Terminological and conceptual issues

According to Lobato Gómez, obligation of means (Lobato Gomez, 1992) is one in which the benefit is due to the carrying out of an activity by the debtor, aimed at immediately satisfying the creditor; the development of a diligent conduct aimed at achieving the result sought by the creditor. For that, the debtor must provide the means, through diligent work, which enable the creditor to obtain the result. Therefore, the expected result may not be achieved as long as the debtor does not act displaying a certain

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<sup>7</sup> According to (Le Tourneau, 1982) involving many contracts simultaneously obligations of the two types. Although, in my opinion, it is a terminological statement, which does not contribute to understanding the differences between the two types of obligations. Indeed, there are doctrinal contradictory constructions, as initially choose to qualify this duty well as an obligation of result, as well as obligation of means.



behaviour, while not develop a certain behaviour, which must necessarily be composed of human and technical resources, to produce the result that the creditor expected.

Furthermore, according to Yzquierdo TOLSADA (Yzquierdo Tolsada, 1989), the content of obligations of means are structured or organized into two different types:

a) Instrumental and integrative obligations, involving specific delivery extensions of duty, the duty of care that is derived when conducting compliance, and whose breach entails, in fact, violating the obligation, although the latter should be tested by the creditor.

b) Obligation of protection arising from the nature of the contract, regardless of the agreed performance and whose failure generates own responsibility.

Consequently, any contractual obligation, such as that between employees and employers, is to a certain behaviour of the debtor safety, some diligence, in order to prevent or reduce accidents, ensuring the health safety of the employees. In that sense, MORENO QUESADA links the connection between obligation and duty to exercise due diligence: the obligation of means, or duty of care is that by which the debtor agrees only to do everything possible to ensure the provision to the creditor that is expected: no commitment to procure, regardless a result but to act the means at its disposal to procure; It is obliged only to act diligently.

They are obligations that the employer is also subject to<sup>8</sup>.

In addition, it is events in which the outcome has a high random rate so that the parties can become the object of the obligation depends too little of one diligence of the debtor to which the parties may consider the object of the obligation, therefore, continues this author, the result must then stay out of the contract, rather than the debtor agrees to use the means it has and its power to achieve it (Moreno Quesada, 1976). In these cases, the employer must prove that its action is based on the deployment of a normal degree of diligence, falling on the creditor test to prove the negligence of the debtor. Instead, obligations of result, are those in which the debtor is obliged to provide directly and immediate satisfaction to the creditor, by obtaining an agreed outcome, which integrates the provision, because the important thing is to achieve thereof, so that, if it is not achieved, it is presumed that due diligence was not used, only it destroys the presumption that debtor found proving an obstacle to their diligence could not or should not win. In other words, the result is independent of the degree of care that employs the debtor in fulfilling the obligation (Lobato Gomez, 1992). Although obligations result does not exclude, but rather is imposed, to get diligent activity. Well, the parties to achieve them think about the result and not the means that will enable reach, so make the result the direct object of the obligation, and as for the diligence with which they have to act, it will be all necessary (Moreno Quesada, 1976). This is a question of efficiency of the utility, so that failure to achieve the result, presumes that the necessary is not used.

With that, if the obligation is to result the parties set a particular purpose to conclude the contract; I did not catch the supposed breach of the obligation. Obviously, in these cases, the creditor will simply show that the result has not been obtained, and the debtor, however, bears the burden of demonstrating that the impossibility or frustration of the result is due to a cause that is not attributable to constitute a fortuitous or assume, the occurrence of a force majeure. Finally, as noted by Jordano Fraga, one can conclude that if the obligations of means and result are two ways to define the content of the obligation

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<sup>8</sup> For information on the transcendence between diligence and vigilance see (Igartua Miró, 2000)

to do, are also, at the same time, two different ways to set the fulfilment of obligations (Jordano Fraga, 1991). Therefore, according to the aforementioned author, there is a perfect parallel between the two forms of obligations to do, in the area of enforcement: in both the debtor to satisfy a creditor, because it has to be done, and, of course, what because what appears is defined as the provision of the debtor, in the obligatory relationship (Jordano Fraga, 1991).

### 3.3.2 - *The delimitation of the safety requirement as an obligation of means*

When analyzing accidents in order to establish liability, you cannot always make a clear distinction as to the assessment of two different events that make up the misfortune, but once found the harmful result a subjective causation is sought : failure to observe the behaviour involves not fulfil the duties implicit security duty of the employer. On the other hand, we note that the content of the duty of security includes the employer simply the following obligations:

- a) take all necessary measures to ensure the protection<sup>9</sup> of the health and safety of employees;
- b) have the human resources and materials needed to perform the necessary preventive tasks;
- c) comply with the rules on the prevention of occupational hazards;
- d) build an organization on health and safety at work;
- e) develop a permanent action for the realization of the planning of preventive activities.

Obviously, all this bearing in mind that such duties are not transferable, so that the failure or defective performance by the employee, who is hired by the employer for carrying out these tasks, not exempt, in principle, the latter of its liability for the debt of safety incumbent on him<sup>10</sup>.

In that sense, a slight and superficial analysis of that article suggests clearly that this debt is an obligation of the employer or media may result. For that, to clarify the situation, it is necessary to analyze the behaviour of the employer / debtor to know if you have correctly executed the provision or delivery of the debtor is strict, so that the simple failure to comply involves necessarily a responsibility. In effect, the legislation on occupational accidents and safety and health at work has assumed a concept of effective applied to the protection of employees, equivalent to prevention, by the employer, that all risks present, they are legally considered labour<sup>11</sup>.

As a result, the employee may require the employer to perform preventive activity in compliance with all other legal requirements are incorporated, by legal mandate, the content of its obligation to security, which are the necessary budget preventive result. By

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<sup>9</sup> As expressed by (Galdeano, 2006).

<sup>10</sup> What is obvious is the absolute safety for the employee that the failure of delivery due to the personal involvement of the employer, the employee in charge of security or services that may own prevention in its case be hired. In this regard, see (Moliner Tomborero, 1996). Obviously, the delegation of powers or the outsourcing of compliance with the obligation not permit employers to avoid their transferable debt position in this legal relationship, as stated by (Miquel González, 1993).

<sup>11</sup> However, the employee cannot claim the prevention of those risks linked to the proper conduct of the work performed, in each case in question and as such is permitted by law and, according to the prior art, at the time, they cannot be eliminated or reduced without distorting, the business in question. Thus, an employee claim as such, would be an abuse while exercising their right to effective protection against risks arising from work.

other words, the employee is entitled to an employer behaves in fulfilling its obligation of protection under the terms of diligence<sup>12</sup>.

Thus, the obligation of means requires the employee's health and safety is effectively maintained, being interested, above all, by the employer, the aforementioned display diligent conduct, because the employer meets its obligation, even without avoiding or reducing accidents, it makes a diligent activity, which is, firstly, because by it and, on the other, required by the employee. Therefore, the employer's obligation to protect, effectively, employees at their service, up from accidents is undoubtedly an obligation of means, and that consideration of the degree of protection and safety of employees. It is not evaluated based on the result, but according to the diligence employed by the employer<sup>13</sup>. Therefore, the employer must act as a good parent, consummating, thus debt safety at work, which is committed to its employees.

It treats, therefore, of an obligation requiring a certain diligent activity of the employer, so that faulty performance exists in all cases where the measures taken by the employer does not comply with the legal or conventionally required diligence. As a result, the employer, not reaching the conduct displayed, the degree of diligence required, must qualify as negligent or guilty about the facts.

So what we seek is simply a rule that the employer may actively develop their business safely in a rigorously healthy environment, but also that the activity is not aimed, as far as possible, to harm employees. The cause of damage to employees is an irrefutable indication that there has been a breach of the guarantee on the part of the employer<sup>14</sup>.

On the other hand, the effective protection of the rights at stake integrates compliance, thereby, the damage they may suffer is a breach of the duty of protection and safety against accidents. Yet the lack of diligence and vigilance (Chaumette, 1992)<sup>15</sup>, causing risk, are also breaches.

Obviously, the infringement of the rights of the employee and ineffective protection, generating accidents, occurs from the time when the employer violates an obligation of safety and health, which is applicable, will correspond. Also required from the employer, in some cases, is the minimization of risks, or even monitoring and evaluation does not affect the rating of the bond as a result, because the duty of protection is met when the employer adopts preventive measures relevant, though, despite this, a work accident occurs. Obviously, in cases where only one can achieve a reduction in risk, and the damage to health, shall be disregarded for the employer, as the unavoidable misfortune, if he has displayed the diligence and has used the means to mitigate the risk. In that sense, input is given to the possibility of enforcement if the harmful effects are mitigated, if not possible the full guarantee of the safety and health of employees. The realization of this coexistence, in exceptional cases, from accidents at work and occupational provision,

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<sup>12</sup> In that sense it is part of a labour doctrine, as (Sala Franco, 1996) (Montoya Melgar & Piza Granados, 1996).

<sup>13</sup> As Mengoni notes (Mengoni, 1954), the obligations of means necessary, behaviour under a role model, Stagecoach content and technique.

<sup>14</sup> However, as González Labrada states in (González, 1996), if the employer fails to comply with his diligence and not a personal injury or accident at work occurs does not mean you have met, the risk factor subsists damage, but given its condition, it does not cause the appearance of subsequent damage, which does not mean that the result material pursues the obligation has not occurred since the danger is latent.

<sup>15</sup> The author argues that the diligence and alertness is perhaps a guarantee obligation.

which occurs in varying degrees depending on the various factors, whence the need for specific measures aimed at least decreasing occupational risk or misfortune.

Finally, it appears that the Courts to qualify occupational accidents as a responsibility of an objective nature to the employer, considered that this is an obligation of result and not of means or activity (Cabanillas Sánchez, 1993) (Luque Parra, 2002) (Navarro Fernández & Pertíñez Vilchez, 2002)<sup>16</sup>, although, in that case, we cannot guarantee, despite all security measures, that accidents will not happen. The reliability of the techniques or tools used by the employer tend to lead to effective protection, but the advance in technology makes it impossible to ensure high accuracy in avoiding accidents at work creating new risks which require new techniques that limit or avoided.

And it is difficult considering the duty of safety and health of employees as an obligation of result<sup>17</sup>, since it involves the admission that not only diligent conduct, but also the achievement of the result because required for the proper performance of the employer's duties. In addition, presents complicated foreknowledge of possible accidents, so it is sufficient that the employer meets all legally enforceable obligations as a means to effectively safeguard the interests of the employee, without his achievement will not derive a failure for the employer.

### 3.3.3 - Impact of the recognition of the safety requirement as an obligation of means

This goal requires addressing an old problem: the consideration of the duty of health and safety at work as a result means or has practical significance in terms of the determination of non-compliance and the role that the employee or the employer play in test load<sup>18</sup>.

In that sense, the tendency to envision a dual system of contractual responsibility supports the distinction between obligations of means and obligations of result, it has been produced by two ways:

a) Indirect: altering the burden of proof will be focusing on the principles of responsibility.

b) Direct: survey conciliatory opposition between standards of care and responsibility and would be two types of obligations - objective and subjective.

From this perspective, LOBATO GOMEZ stressed that has tried to point out the existence of two different disciplines with regard to compliance / non-compliance with them and their test two ways of imputation of liability for the breach and its possible exemption and even to articulate two different regimes of liability, objective in the case of obligations of result, culpable in the case of obligations of means.

Obviously, no one doubts that the purpose of the general duty of prevention include a highly diligent and presumed by the employer, the protagonist of the debt security activity<sup>19</sup>. In other words, the characterization of a duty as means affects and involves

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<sup>16</sup> However, for the latter, employer liability is an absolute obligation, because at the same time that the employer is required to show power of direction and control of work activity he or she is also required to take proper care of the life of his or her employee.

<sup>17</sup> A view that is not shared, for example, by labour law specialists (Labrada And Gonzalez, 1996)

<sup>18</sup> The evolution of this doctrine has been well analysed by (Cavanillas Mugica, 1987)

<sup>19</sup> For (Alfonso, 1998) we are faced with a very large obligation of means, because the debt is not limited to compliance with the specific measures expressly laid down in the rules of risk prevention, but the employer must take all other steps necessary, for which the risk assessment shall indicate the measures to be taken.

obligations to the debtor is not obliged to achieve a specific result, but the deployment or development of a diligent activity.

On the other hand, recognize this obligation as an obligation of means generates consequences. But what is the usefulness of such recognition?

DEMOGUE argued that there are cases in which the debtor undertakes a contractual obligation to achieve a particular result, and that in the event of not being achieved, must demonstrate to be free of responsibility casus (classical obligation of result). And there are other cases in which, on the contrary, the failure to realize the purpose, by itself, does not generate responsibility unless the creditor demonstrates the fault of the debtor (Demogue, 1925). The undeniable merit recognized the doctrine developed by the French jurist lies in having highlighted the importance of the neat delineation of the content of the obligations in connection with the rules of the burden of proof (Cabanillas Sánchez, 1993).

But both obligations of means and obligations of result, the probation is always the same: the creditor who wants to assert a contractual responsibility to aduce the debtor's default, without prejudice to the different content of the benefit due by the debtor, is reflected in the different test content creditor. In other words, according to LUNA Yerga, the general principle of burden of proof, as to the claim for compensation, it is applied evenly to both obligations of means as to the outcome. Thus, the author clarifies that corresponds to the actor (creditor or debtor) act constituting prove his claim, which in the case of claims for compensation is the obligation breached, the contents will be different depending on whether the obligation is qualified as result (failure to obtain results due) or media (lack of diligence in the activity by the debtor).

However, the failure to set the media obligations, we must get to the demonstration of the debtor's fault, but it is the result of the different nature of the object because it does not allow splitting the breach of guilt, for in these obligations the breach is the fault of the debtor (Luna Yerga, 2003).

In this sense, in the obligations of means there is no derogation regarding the presumption of guilt (Llambías, 1973). With regard to the above, the law presumes guilt is established by default and there is no way of establishing such default if not by proof of fault. It is, then, that the way to prove the breach of an obligation of means is the accreditation of the omission of those proceedings who demands the nature of the obligation.

Thus, the fault / negligence of the debtor in the conduct of an obligation of means, is located on the grounds of material breach, observing the trial of responsibility and failure to comply with it. Indeed, it is first such failure, against which the judgment of contractual responsibility is highlighted, in relation to which, in the event of an unsatisfied creditor, the debtor has to provide, if possible, their specific liability.

By contrast, regarding the obligations of result which allow for this separation, the creditor need not reach the test because of the debtor may be limited to incumbent proof that is the breach of obligation, as proven breach of an obligation of means, they will always be imputable. In other words, to an obligation of result, the employee / creditor must prove only the production of the accident, with the respective damage, to establish the liability of the employer. That is, in the event that damage occurs and since obtaining the result is integrated into the content of the provision, the injured employee will be sufficient to demonstrate the reality and effectiveness of harm, being the employer / debtor the burden of proof diligent performance. So, being an obligation of result, the

fault is not the burden of the employee. By contrast, in an obligation of means, as is the derivative of the accident, it is for the employee to demonstrate the lack of diligence on the part of the employer. Hence the guilt or failure to meet the obligation of means must be accredited and for it to not occur, the employee would see his claim dismissed.

In that sense, for MENGONI when the claim exercised is that of compensation for damages, the creditor must prove the material breach, the facts constituting his claim, and once tried this, the debtor would only have proof of an impeditive fact or extinctive facts (Mengoni, 1954). However, JORDANO FRAGA has warned about this interpretation error, because according to him, every creditor seeking contractual liability from the debtor bears the evidence of the infringement by the latter of its obligation, whatever it may be, and whatever is the form of violation reported (Jordano Fraga, 1991). However, continues the author, in terms of compliance, accurate and complete performance by the debtor / employer of the benefit due, with content that imposes the obligation, excludes any question of contractual liability for performance of the obligation, it and it cannot be basis for any claim of credit. In that sense, the obligations of result, a debtor who does exactly what is required to be fulfilled, and consequently avoids the contractual liability; the same way as obligations of means, the debtor who carries out the requested activity, also complies, and precisely for that reason, also avoids the contractual responsibility (Jordano Fraga, 1991).

If we examine the reasoning a little further, we see that the burden of proof of the employee, of guilt or failure does not mean, fortunately, that he must necessarily prove such ends, although non-accreditation hurts. However, the test is based on a series of facts that are not available to the Courts, but the third party or the parties themselves who are responsible to provide it to the process. However, also for the judge, based on the facts contributed to the demand, establish a logical explanation of the result or the confession itself or probation recklessness of the debtor / defendant, because the facts constituting the test, which were contributed to the process, stop belonging to the subject that contributes to form part of the process, regardless of the person that can benefit or hurt your rating. In other words, the part that made the process provides does not exclusively benefit, but it becomes part of the process and can also take advantage of the counterparty. Obviously, the employer is relieved of all burden of responsibility, from the moment that either it is proved that his performance used due diligence or an escape failure that prevented it from providing exactly or pay at all their duty is observed (Jordano Fraga, 1987). Otherwise, we would be producing a reversal of the general rules of the burden of proof<sup>20</sup>.

In this sense, the diligent activity becomes the object of these obligations, which although comparatively rare in the recruitment law itself, are of a particular interest. The interest in obligations of means is random (Bonastre, et al., 1996)<sup>21</sup>, potential and eventual, and the reason for which it is enough to act on the content of the obligation, with

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<sup>20</sup> For this, see (Luna Yerga, 2003), *no es correcto sostener,...., que la regla introducida en el art. 217.6 LEC propicia la inversión de la carga de la prueba*. Además como señala, (Llamas, 2000). It happens, ..., that on numerous occasions the result will be, from a material point of view, identical to reversing the burden of proof, especially when the test in question is found exclusively available to the defendant in the process. However, from a formal point of view, the application of these principles is identified with what has come to be known as dynamic distribution of the burden of proof, which is precisely allocating the burden of proof that that part procedural at each stage of the probationary period is in a better position to produce it in the process.

<sup>21</sup> For him, accidents at work should not be considered as a random fact linked strictly to the notion of fatality.

the compliance with the prudent and diligent conduct of the employer by their mere activity or effort.

Finally, if it comes to a claim on a contractual basis, as in the accidents, the damage to the employer's conduct has economic repercussions for the possible damages that the employee may request. Therefore, it is also up to the employee to prove the causal link between the damage resulting from the accident and breach of safety regulations by the employer (Asua González, 2006).

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