https://doi.org/10.22364/iscflul.8.2.29

Lauris Rasnacs, *Dr. iur.*
University of Latvia, Latvia

POSSIBLE IMPROVEMENT OF PROVISIONS OF LATVIAN CIVIL LAW CONCERNING LIABILITY FOR DAMAGES, CAUSED BY ABNORMALLY DANGEROUS ACTIVITY

Keywords: tort law, strict liability, negligence, insurance

Summary

As members of society, we all substantially benefit from various activities, which impose increasing danger. Our PCs and mobile smartphones include several metals obtained through mining operations, numerous household items have been made by using chemical reactions. If we are ill, we may need medication, which is made by using chemical reactions and biological experiments. Autonomous vehicles and flying devices are gaining increasing popularity and extended application in both commercial and non-commercial use.

Some more radical members of society may say that we do not need these things and may withdraw from their use. However, it would be more realistic to contend that the society would never give up existing comfort, even if it is gained at least partly by activities creating increased danger. Therefore, the question is, how to regulate the liability for damages, caused by the activities incurring increased or abnormal danger to ensure that these regulations provide sufficient protection for injured parties and, at the same time, do not discourage potential operators from carrying out these activities, which create significant positive effect, despite of their danger.

Various jurisdictions are dealing with this question in different manner. The most important Latvian regulations are included mainly in the Art. 2347 para. 2 of Latvian Civil Law, adopted in 1992 and mainly mirroring the legal provisions of the earlier 20th century, with slight adjustments, introduced in 2012.

The author of the present paper holds an opinion that this Latvian regulation should be revised on the basis of more recent examples from other jurisdictions, such as Netherlands, and partially taking into account the findings and proposals, made in such splendid example of international academic cooperation as Principles of European Tort Law (hereinafter – PETL). The author of the current article makes such comparative analysis, as well as examines case law, discusses findings of some other authors and, consequently, proposes several amendments, which should be considered in order to improve the Latvian regulations, dealing with liability for damages caused by abnormally dangerous activity.

1. Characteristics of abnormally dangerous activity

First of all, the author proposes a brief view at terminology. Apart from term "abnormally dangerous activity", the terms "actions with dangerous things, mechanisms, processes and substances", "source of abnormal danger", and "major source of danger" are used. As the author has explained in one of his previous papers, the interaction of the man with certain things, mechanisms, processes and substances, but not these things, mechanisms, processes and substances are the ones, who may cause the abnormal danger.1 Therefore in the further text of this paper the author will mainly use the term "abnormally dangerous activity", which will have the same meaning as other terms referred to above.

The characteristics of abnormal danger form the substance of definition of abnormally dangerous activity. In actual disputes, these characteristics also help to determine, whether the activity under question is abnormally dangerous. The answer to this question, in its turn, is essential in order to decide whether the special provisions of liability for damages caused by abnormally dangerous activity shall be applied in particular case. Therefore, one shall not underestimate the importance of the said characteristics. However, as it often appears with crucial legal instruments, the exact list of these characteristics is far from being clear.

The purpose of PETL "...is to serve as a basis for enhancement and harmonisation of the law of torts in Europe",2 provide several substantial characteristics of abnormally dangerous activity and important commentaries in this respect. Art. 5:101 para. 2 PETL stipulates, that "an activity is abnormally dangerous, if a) it creates a foreseeable and highly significant risk of damage even all due care is exercised in its management and b) it is not a matter of common usage". Para. 3 adds that "[a] risk of damage may be significant having regard to its seriousness or the likelihood of the damage". Hence, the abnormally dangerous activity is characterized by (1) foreseeability; (2) highly significant risk of damage; (3) inability to prevent this risk, even all due care is exercised in its management; (4) not being the activity of common usage. The rather long list of characteristics suggests that abnormally dangerous activities could occur relatively rarely. One of the authors of PETL Professor Bernhard A. Koch confirms the narrow approach, when the activity under question is abnormally dangerous and strict liability is applicable. Such narrow approach is particularly determined by the requirement that calls for an action not to be a matter of common usage in order to find the respective activity abnormally dangerous.[3]

Notably, the commentaries of PETL does not provide further explanation regarding 1) foreseeability of damage and 2) inability to prevent highly significant

---

[1] Rasnačs L. Regimes of Liability for Damages Caused by Abnormally Dangerous Activities. In: Juridiskā zinātne / Law, No. 12, 2019, p. 189.

[2] Spier J. (author of the chapter). European Group on Tort Law. Principles of European Tort Law. Wien, New York: Springer, 2005, p. 16.

[3] Koch B. A. The "European Group on Tort Law" and Its "Principles of European Tort Law" The American Journal of Comparative Law, Vol. 53, Issue 1, Winter 2005, p. 195

risk, even all due care is exercised in its management. Perhaps, the authors of PETL does consider these two characteristics as self-evident. Perhaps they are, but their importance nevertheless shall not be underestimated. The foreseeability of damage is characterised by the likelihood, that certain activity may turn into something, which will cause damages, as it was described in famous UK Rylands v. Fletcher case regarding the artificial water reservoir, built by defendants, namely: "the rule applies to bringing onto the defendant's land things likely to do mischief if they escape, which have been described as 'dangerous things'".[4] In other words, foreseeability of damage in this sense means typical risks, usually associated with the certain activity, which may cause substantial damage for other persons.

Inability to prevent highly significant risk, even all due care is exercised in its management, is important in order to substantiate, why strict liability should be applied for damages, caused by abnormally dangerous activity, instead of liability for faults. If the person can entirely eliminate the said risks by obtaining certain steps, it illustrates the existence of standard of conduct, which, pursuant to the Art. 4:101 PETL is characteristic for the liability for fault and the application of strict liability simply does not have any sense.

Let's take a look to the characteristics, given to abnormally dangerous activities in some European jurisdictions.

Art. 1056 para. 2 of Estonian Law of Obligation suggests that: "A thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist." Para. 1 of the same article adds about "danger characteristic to a thing constituting a major source of danger or from an extremely dangerous activity".[5] Hence, the Estonian law makes emphasis on the fact, that the risks, associated with major source of danger or abnormally dangerous activity, may not be prevented even by exercising the due diligence in handling them or performing them. Estonian law also adds criteria of "specialist" as the one, with whom the comparison shall be made. In addition, Estonian law speaks also about "characteristic danger", which is already the same "typical risk", mentioned above.

Quite interesting is the approach of Dutch law. Art.s. 6:173–6:177 of Dutch Civil Code does not provide one general definition of abnormally dangerous activity.[6] Instead, Dutch Civil Code stipulates several, more certain examples – dangerous equipment, dangerous constructed immovable things, dangerous substances, dumping grounds and mining operations. All of them have property of great or special danger. Quite an interesting provision can be found in Art. 6:177 of the Dutch Civil Code. Namely, this provision provides a list of typical risks for

---

[4] Waite A. J. Deconstructing the Rule in Rylands v. Fletcher. In: Journal of Environmental Law, Vol. 18, Issue 3, 2006, 432

[5] Estonian Law of Obligations Act. Available: https://www.riigiteataja.ee/en/eli/506112013011/consolide [viewed 01.05.2021.].

[6] Dutch Civil Code. Available: http://www.dutchcivillaw.com/civilcodebook066.htm [viewed 01.05.2021.].

mining operations, hence substantially contributing in clarity, in which situations respective legal provisions are attributable.

Provisions of Latvian Civil Law, namely, Art. 2347[7] para. 2, are not made on the basis on Civil Laws of the Baltic Provinces (of former Russian Empire), as the most part of the Civil Law,[8] but instead are based on the example of Art. 469 of the Civil Code of Latvian Socialist Republic.[9] The wording of Art. 2347 para. 2 Latvian Civil Law is, as follows:

> *A person whose activity is associated with increased risk for other persons (transport, undertakings, construction, dangerous substances, etc.) shall compensate for losses caused by the source of increased risk, unless he or she proves that the damages have occurred due to force majeure, or through the victim's own intentional act or gross negligence. If a source of increased risk has gone out of the possession of an owner, holder or user, through no fault of theirs, but as a result of unlawful actions of another person, such other person shall be liable for the losses caused. If the possessor (owner, bailee, user) has also acted without justification, both the person who used the source of increased risk and its possessor may be held liable for the losses caused, having regard to what extent each person is at fault.*

Art. 2347 para. 2 Latvian Civil Law does not explicitly refer to the [abnormally dangerous] "activity". Instead, the Latvian law uses wording "source of abnormal danger" (in Latvian: *paaugstinātas bīstamības avots* –). Latvian author *Dr. iur.* Jānis Kubilis explains that the source of abnormal danger is thing or activity, which is not usual and which in certain circumstances creates the increased risk of substantial damage to the other persons. Whether the damage is substantial shall be evaluated according to the harshness and likelihood of the damage in certain situation.[10] From this clarification one may conclude, that this clarification does not pay particular attention to the details of foreseeability or typical risk and inability to prevent this risk, even if all due care is exercised in its management. Importance of the criteria of inability to prevent the risk, even if all due care is exercised in its management, is already analysed above. Importance of typical risk will be analysed in the section 3 of the present paper. Although the clarification, provided by *Dr. iur.* Jānis Kubilis, emphasizes the criteria of source of abnormal danger as being something "not usual", the criteria of "not a subject of common usage" are not explicitly included in the Art. 2347 para. 2 of Latvian Civil Law and

---

[7] Latvian Civil Law. Available: https://likumi.lv/ta/id/90220-civillikums-ceturta-dala-saistibu-tiesibas [viewed 01.05.2021.].

[8] Švarcs F. Latvijas 1937. gada 28. janvāra Civillikums un tā rašanās vēsture [The Civil Law of the Republic of Latvia from 28 January 1937 and history of its making]. Rīga: Tiesu Namu Aģentūra, 2011, p. 47.

[9] Kubilis J. Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [The Current Issues and Modernisation of Liability Caused by Abnormally Dangerous Activity]. In: Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2014, p. 200.

[10] Kubilis J. 2014, p. 205.

is also the matter of debate in broader sense. The author will analyse this criterion its meaning and application in the section 2 of this paper.

Another interesting detail is that with amendments from 29 November, 2012 some examples of source of abnormal danger – "transport, undertakings, construction, dangerous substances" were added to the wording of Art. 2347 para. 2 of the Latvian Civil Law. These examples, however, are not exhaustive and, moreover, they are far away from adding the clarity to the meaning of the source of abnormal danger. Instead, they may raise a question, whether every transport, every undertaking shall be treated as a source of abnormal danger. The author will examine this matter in the section 3 of the present paper.

Consequently, although the provisions of Art. 2347 para. 2 of Latvian Civil Law, like statutory provisions of several other European jurisdictions, stipulate some relatively clear examples of actions, which shall be considered as dangerous and at the same time provide also possibility to treat also other actions, not explicitly mentioned in the list as dangerous, these provisions could not be considered as sufficient, as they are not providing certain preconditions, upon which these actions shall be treated dangerous and they do not provide sufficiently clear indication of possibly liable person and, moreover, they completely neglect such important aspect as typical risk, associated with the actions with dangerous things, mechanisms, processes and substances. Moreover, the list of examples of actions, which may be considered as dangerous pursuant to the Art. 2347 para. 2 of Latvian Civil Law, shall be made clearer, specifying, for instance such broad terms as "construction" or "enterprise", which, in fact, includes several different groups of actions.

2. Matter of common or uncommon usage

As noted above, one of the particularities of abnormally dangerous activity is that the respective activity is not a matter common usage. In simple words, it means that this activity is not carried out by everyone.

An otherwise ordinary activity may be deemed abnormally dangerous when it is carried out in ultrahazardous manner. Field burning was found abnormally dangerous, because it created hazards beyond the ordinary risks of common use of fire. Pest control by means of fumigation was found abnormally dangerous, because it is "specialised activity".[11] Hence, it may be concluded that in those casess when respective activity must be carried by some sort of specialists, it might be found that this is abnormally dangerous activity (of course, if it also has the other necessary properties).

Although the requirement that the respective activity must be carried out by specialist may indicate that this activity is not a matter of common usage, in

[11] Spinaci V. Lessons from BP: Deepwater oil drilling is an abnormally dangerous activity. Nova Law Review, Vol. 35, Issue 3, 2011, p. 817.

some cases, as an exemption, the requirement of specialist may be absent. This aspect may be illustrated by concept of "unusual and dangerous occupation" (in German: die ungewöhnlichen und gefährlichen Beschäftigung), established in German law. This concept is not limited solely to business activities performed by professionals, although the professionals carry out the respective occupations in most cases. The judgment, issued by the regional court of appeal of city Hamm (Oberlandesgericht Hamm) provide an illustration thereof. In this case, the insured person sought the payment of insurance indemnity under personal insurance policy, which had an exemption of insurance coverage if the damage were to be caused by unusual and dangerous occupation. The damage in question was caused in the course of "sexual game" with another person, when the plaintiff put a belt around the other person's neck, thus causing the shortness of breath, and dragged her on her around the apartment as an imagined "slave". At one point, the other person collapsed in unconsciousness, was taken to the hospital, where several bodily injuries were discovered. Although there was no dispute that this other person entered this "sexual game" willingly, it was qualified as a criminal activity and the plaintiff was sentenced with monetary fine, which he later sought to claim from the insurance company under the personal insurance policy. In the civil case, the court found that the said "sexual game" should be considered as "unusual and dangerous occupation". Obviously, tightening a belt around the neck – especially if it is used, as here, to achieve shortness of breath and is associated with "dragging" the injured party, as she crawled along on all fours through the apartment – is objectively dangerous. Regarding the unusualness, the court provided that general activity was unusual, if its nature, even assessed according to generous scale, clearly fell outside the scope of the usual types of activity. Whether or when this is the case, it can only be answered on a case-by-case basis. In the opinion of the court, the differentiation necessary in this context must be based on what, according to today's understanding of the general public, and not only in individual cases, can still be regarded as normal activity in the context of a private household, whereby the average citizen, but not the customs of certain groups, applies as a yardstick. In the opinion of the court, the limits of the dangers of daily life for which the defendant is responsible are, in any case, transgressed, if the activity in question would no longer reasonably be carried out by an average informed policyholder due to the risks associated with it. That's how it was found here.[12]

Sometimes the question about not being the matter of common usage is applied like a dogma. For instance, it is stated that the manufacture, storage, transportation and use of high explosives are not matters of common usage,[13] although it might be

[12] Oberlandesgericht Hamm Hinweisbeschluss v. 27.4.2011 – I-20 U 10/11, BeckRS 2011, 18634, European Case Law Identifier (ECLI): ECLI:DE:OLGHAM:2011:0427.I20U10.11.00

[13] Smith A. O. Manufacture and distribution of handguns as an abnormally dangerous activity. University of Chicago Law Review, Vol. 54, Issue 1, 1987, p. 386.

argued at least in the context of the USA, where the possession of various guns and ammunition is, in fact, quite common.

In the USA, the requirement of not being the matter of common usage is often applied together with additional criteria of location appropriateness. For instance, in case when the damage was caused by service station's underground storage tanks for gasoline located close to the residential water wells, it did create a strict liability, as such place for the said tanks was inappropriate.[14] Other cases attest to whether the choice of place could be considered as a "non-natural use" of particular place.[15] In case with placing of huge amount of phosphate slime behind earthen walls in connection with the mining of phosphate rock, the court applied strict liability for the damage caused when the earthen walls broke, because of the scale of the activity and the magnitude of its attendant risk.[16]

However, the application of requirement for respective activity not being a matter of common usage in Latvian case law is applied rather confusingly. In the judgment in Case No. SKC-549/2013 of 6 February 2013, the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia analysed the application of law in the situation regarding the compensation of material and non-material damages caused by the severe consequences of a traffic accident.[17] Worthy of note, it was found that the respective traffic accident was caused by the driver of cargo van "Renault Master", driving of which, according to the publicly available information, required the driver's licence of category B,[18] i.e. same as any vehicle of personal use. Hence, it may be concluded that driving of such car may be considered as a matter of common usage. However, in given circumstances, the Civil Cases Department completely overlooked this aspect, which would logically lead to the conclusion, that Art. 2347 para. 2 of Latvian Civil Law was not applicable, as the case did not concern the damages caused by source of abnormal danger. Instead, the Civil Cases Department in the point 10.1 came to an excessively broad conclusion that the owner of the vehicle, whose employee was the driver who caused the accident, was liable for all the damages caused by the accident.

After a year, in Case No. SKC-156/2014 of 27 November 2014, the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia came to a rather opposite conclusion.[19] Namely, in point 6 of the judgment, the Civil Cases

---

[14] Boston, G. W., Strict liability for abnormally dangerous activity: The negligence barrier. San Diego Law Review, Vol. 36, Issue 3, 1999, p. 659.

[15] Boston, G. W. 1999, p. 660.

[16] Ibid., p. 662.

[17] Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 6 February 2013 in Case No. SKC-549/2013. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 03.05.2021.].

[18] See, for instance: https://busu-noma.lv/pakalpojums/renault-master-maxi/ [viewed 03.05.2021.].

[19] Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 27 November 2014 in Case No. SKC-156/2014. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 03.05.2021.].

Department provides that Art. 2347 para. 2 of Latvian Civil Law does not preclude liability of the person who has caused the traffic accident. Hence, the court prefers to apply "standard" liability model of fault instead of wide application of strict liability for damages caused by object of abnormal danger.

American scholar Steven Shavell has made far-reaching proposal regarding the requirement of not being the matter of common usage. Namely, he criticizes this requirement and suggests that the strict liability regime applicable for damages caused by abnormally dangerous activities shall be expanded also to the liability caused by dangerous common activities. He emphasizes that no other country employs the uncommon activity requirement, noting that in France strict liability has been the dominant form of liability in tort since about 1930, without apparent untoward consequences.[20] Worth to mention that this criticism of Steven Shavell is addressed mainly to the USA's first Restatement of Torts.

Hence, the proposal of Steven Shavell comes into direct contradiction with approach of PETL, which suggests limited and narrow application of the strict liability applied for the damages caused by abnormally dangerous activity, and such narrow application is achieved mainly via requirement for not being a matter of common usage.[21] The authors of PETL clarify that an activity is plainly of common usage, if it is usually carried on by a large fraction of the people in the community. From that perspective, driving a motor car is certainly a matter of common usage and for that reason falls outside the scope of the abnormally dangerous activity (although, as noted above, Latvian courts sometimes have come to the different conclusions).[22]

The author of the present paper does not agree with proposal of Steven Shavell to drop the requirement of not being the matter of common usage, which would inevitably lead to the broader application of strict liability.

Firstly, the author suggests to keep in mind that liability regimes themselves do not always prove to be an effective tool for preventing damages. Usually, the state has its own mechanisms for controlling potentially dangerous activities, such as use of weapons, chemicals, powerful vehicles, etc. Hence, it is important that the state ensures the mechanisms for reducing the relevant risks, such as adopting the requirements for persons carrying out these activities or maybe even providing that certain activities may be carried out only by certain specialists. However, the use of such mechanisms will ensure also the possibility to determinate, whether the activity under question shall be treated as a matter of common usage or not.

Secondly, the wide application of strict liability will lead to what in German is called "Haftungslawinen" or "avalanches of liability", i.e., the situation that substantial number of natural and legal persons may be exposed to civil liability. However, will it make our society safer? The author disagrees. A greater level of

[20] Shavell St. The Mistaken Restriction of Strict Liability to Uncommon Activities. Journal of Legal Analysis, Vol. 10, 2018, p. 42.

[21] Koch B. A. 2005, p. 195.

[22] Ibid., pp. 106, 107.

safety could be rather reached via various preventive measures, which, as noted above, serve also as tool in order to determine whether the particular activity shall be treated as a matter of common usage, hence using this criterion as one of tools for determining whether the respective activity shall be treated as abnormally dangerous and the strict liability shall be applied or not.

Consequently, one of the mandatory requisites of abnormally dangerous activity is that this activity is not a matter of common usage. This aspect usually, but not always, means that the law requires this activity to be performed by a specialist or a professional.

The question whether the activity is not a matter of common usage, should be answered on case-by-case basis, not as a dogma.

Likewise, the Latvian law should include the requirement of not being a matter of common usage as a mandatory requisite of the abnormally dangerous activity.

3. Meaning and importance of typical risks and degree of danger

As already mentioned, the present wording of Art. 2347 para. 2 of the Latvian Civil Law provide several non-exhaustive examples of source of abnormal danger – "transport, undertakings, construction, dangerous substances". However, these examples are rather confusing. As Professor Kalvis Torgāns has emphasized, not every accident which happens in respect to the transport or during the construction, should be attributed to the consequences caused by source of abnormal danger.[23] The yardstick, which may help to draw the line as to what should be attributed to the consequences caused by a source of abnormal danger, are the so-called typical risks of respective abnormally dangerous activity.

The answer to question whether we are dealing with a typical risk, is important from at least two perspectives.

On the one hand, these criteria help to distinguish whether the primary cause of the respective damages is the particularities of abnormally dangerous activity, which could not be completely controlled, or merely intent or negligence. For example, if a box with high explosives detonates due to reaction to moderate shake during its transportation, it might be a typical risk pertaining to these explosives. Then again, if the employee, who has the duty to ensure safe carrying of these explosives, negligently puts them close to the heat and the explosives detonate due to the heat, the explosion is attributable primarily to the negligence of the respective employee, in the absence of which there would not be an explosion. Hence, in the latter case there is also no reason to apply strict liability, as the case could be solved with application of liability for intent or negligence. Moreover, as it is provided in the commentaries of the PETL, using similar example with a box of explosives, it is important to establish whether the damage has been caused by

[23] Torgāns K. Saistību tiesības [Law of Obligations]. Otrais papildinātais izdevums. Rīga: Tiesu Namu Aģentūra, 2018, p. 479.

materialisation of abnormal danger, which substantiates the application of strict liability regime, or not.[24]

On the other hand, the criteria of typical risk help to distinguish whether the damage was caused during the situation which the potentially liable person (usually the one who performs and/or directly controls the performance of abnormally dangerous activity) should take into account as potential risk, or during the situation which is beyond the limits of foreseeability. However, the foreseeability of risk of damage is one of the attributes of abnormally dangerous activity, pursuant to the Art. 5:101 para. 2 subpara. (a) of PETL.

Foreseeability is one of the attributes to fortuitous or accidental event.[25] Latvian author Dr. iur. Jānis Kubilis explains that the possessor of object of excessivedanger also bears the risk of accidental damages in the meaning that he is, inter alia, liable for such damages.[26] Most likely, Jānis Kubilis derives such conclusion from the wording of Art. 2347 para. 2 of Latvian Civil Law, which at least explicitly does not mention that accidental event may serve as an excuse, releasing the potentially liable person from the liability for damages caused by the object of excessivedanger. However, at least in broader terms than the wording of the said legal provision of Civil Law, the said approach of Jānis Kubilis cannot be supported.

As it is validly emphasized by Professor Jānis Kārkliņš, at least part of manifestations of fortuitous event, including the third party fault, is a reason releasing from liability for damages caused by abnormally dangerous activity.[27] As such, the third-party fault is stipulated also in Art. 7:102 para. 1, subpara. b of PETL. Such approach is justified with the purpose to avoid an overly broad application of strict liability.

The criteria of typical risks, attributable to the particular abnormally dangerous activity, serves a similar purpose, i.e., to reasonably limit the application of strict liability, which, if applied too broadly, may prevent the persons from carrying out abnormally dangerous activities, which, in spite of their dangerous nature, also deliver a certain valuable result for society in terms of production.

Taking into account such considerations, the author suggests to include the criteria of typical risks in the Latvian law regulating the liability for damages caused by abnormally dangerous activity and, to extent possible, provide the list of such risks, associated with particular activity, similarly as it is done in the Art. 6:177 of the Dutch Civil Code regarding the list of typical risks for mining operations.

---

[24] Koch B. A. 2005, pp. 106, 107.

[25] Kārkliņš J. (author of the chapter), Torgāns K., Bitāns A. Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Issues of Contracts and Torts in the European Union and Latvia]. Rīga, Tiesu Namu Aģentūra, 2017, p. 306.

[26] Kubilis J. 2014, p. 204.

[27] Kārkliņš J. Third Party's Fault as an Exclusion from Strict Liability. In: Legal Science: Functions, Significance and Future in Legal Systems II. The 7th International Scientific Conference of the Faculty of Law of the University of Latvia,16–18 October 2019, Riga. LU Akadēmiskais apgāds, 2019, p. 379.

4. In search of proper liable person

No doubt, that one of the crucial issues in tort law is determining which person shall be held liable for particular damages. The case when damages are caused by actions with dangerous things, mechanisms, processes and substances, is no exception.

The general rule of tort law is that the liability shall be imposed on the person, who's fault shall be found in respect to the cause of damages. This is a common general requirement of fault as a mandatory requisite of fault in both legal systems – those of continental Europe and common law, where English legislation also states that "[s]ome would go so far as to say that fault is always necessary".[28] The requirement of fault goes back to the Roman law[29] and later – natural law, providing that a person can be held liable only if he has done what he ought not to have done, or if he has not done what he ought to have done.[30] Hence, the requirement of fault provides an objective test for assessment of one's actions or inaction, and also a measurement of fairness for the assessment whether it would be fair to impose a civil liability on a particular person.

However, the requirement of fault is not relevant, at least explicitly, in case if the damages are caused by abnormally dangerous activities. At the same time, different opinions exist as to whether in such cases the requirement of fault should be completely abandoned.

The authors of PETL seem to have entirely abandoned the requirement of fault in cases when the damages are caused by abnormally dangerous activities. They provide that carrying on an abnormally dangerous activity does therefore not require that the person ultimately liable has been directly and actively involved in the activity in the sense of "hands-on" action. Moreover, they, inter alia, emphasise the aspect of availability of compensation (including deep pocket arguments, which tend to attribute compensating for the loss to the party who can best afford it),[31] which has nothing in common with requirement of fault.

Art. 2347 para. 2 of Latvian Civil Law imposes the liability for damages caused by the source of abnormal danger, on the possessor of this source. Latvian author Dr. iur. Jānis Kubilis emphasizes that the question whether possessor's actions shall be considered faulty, per se is not a precondition for liability for said damages. He also goes so far as to suggest to exclude from Art. 2347 para. 2 of Latvian Civil Law the present provision – that the possessor of source of abnormal danger shall be released from liability, if he, she or it has lost the possession over

---

[28] Rogers W. V. H. England, PETL Fault, No. 1, quoted from Widmer P. (author of the chapter). European Group on Tort Law. Principles of European Tort Law. Wien, New York: Springer, 2005, p. 64.

[29] Zimmerman R. The Law of Obligations. Roman Foundations of the Civilian Tradition. 2nd ed., Oxford: Oxford University Press, 1996, p. 1027.

[30] Ibid., p. 1034.

[31] Koch B. A. 2005, p. 109.

the said source.[32] It means that not only fault, but to the large extent also the actual ability to control the source of abnormal danger plays very little role in application of civil liability.

The author of the present paper does not agree that the liability for the damages caused by the abnormally dangerous activity could be viewed as something so distant from the fault and even the actual control over the respective object. In this context, it is worth to emphasise the findings of the eminent Dutch Professor Cees van Dam, "that there is no exact borderline to be drawn between negligence and strict liability", "the dichotomy between negligence and strict liability is outdated" and "legislators and courts look for the right balance by mixing negligence and strict elements.[33]

The requirement of right balance by mixing negligence and strict elements is not a mere matter of trend. Actually, it is a matter of finding the right balance between the interests of injured party and the wrongdoer. The injured party must have reasonable prospects to have his, her, its damages compensated. The wrongdoer must face the liability for situations, where he, she or it has had at least a partial possibility to assess the risk and prevent the damages. In other words, the liability cannot be applied as a strike of doom to someone, who just has appeared in a wrong place and a wrong time. Such application may prevent the persons from carrying out the respective activities, although such activities may, in general, be beneficial. In other words, the question is about balancing of the rights of persons to life, bodily integrity, health, etc., against the society's pivotal freedom to act.[34] In order to find the right balance between the interests of injured party and the wrongdoer, the author would like to make the following proposals.

Although at the first glance the strict liability may seem more favourable to the injured party regarding the prospects to have his/her damages compensated, in fact, it brings such result only in part of the relevant cases. Otherwise stated, in one case it may bring such result, whereas in another – not. The only real instrument, which will definitely improve the possibilities of injured party to receive the compensation for damages, is a compulsory civil liability insurance, availability of which plays a very important role as a balancing act between person's rights and society's freedom to act.[35] Therefore, Latvian legislator should likewise consider possibilities to reasonably expand the duty of mandatory civil liability insurance on the persons, which may be found liable for damages, caused by abnormally dangerous activities. In order to reasonably expand the said duty, the list of possibly liable persons should be made clearer.

First of all, the application of liability should stress, which person exercises an actual control over the respective dangerous activities. Interesting findings

---

[32] Kubilis J. Latvijas deliktu tiesību modernizācijas galvenie virzieni [The Main Ways of Modernizing the General Rules of Latvian Tort Law]. Riga: Latvijas Universitāte, 2017, p. 228.

[33] van Dam C. European Tort Law. Oxford: Oxford University Press, 2013, p. 306.

[34] van Dam C. 2013, p. 219.

[35] Ibid., p. 221.

are brought by the judgment in Case No. SKC-51/2020 of 20 January 2020 by the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia.[36] In this case, the court analysed the distribution of liability between the owner of building (tower) crane and its lessee, who was at the same time also the lessee of the real estate, where the crane was used for construction works and caused damage. The court emphasized that, although the owner of the crane may be considered as its possessor, the lessee of the crane exercised the actual control over the operations with the crane and was entitled to give binding instructions to the operator of the crane. Hence, it may be concluded that the possessor of abnormally dangerous activities is the one, who exercises an actual control over these activities and therefore is in the best position to evaluate possible risks and prevent the damages.

Secondly, it must be kept in mind that one requisite of object of excessive danger is the requirement that the respective activity is not a matter of common usage. As it was said in the section 2 of the present paper, it usually, but not always means that the respective activity must be carried out by specialist or professional. These specialists and professionals shall be considered as possessors of the respective abnormally dangerous activities. If necessary, the legislator must consider the necessity to expand the duty of compulsory civil liability insurance, imposed on these professionals.

Conclusion

1. Although the provisions of Art. 2347 para. 2 of Latvian Civil Law, similarly to the statutory provisions of several other European jurisdictions, stipulate some relatively clear examples of actions, which are considered as dangerous, and at the same time provide also the possibility to treat also other actions, not explicitly mentioned in the list, as dangerous, these provisions could not be considered as sufficient, since they fail to provide certain preconditions, upon which these actions shall be treated as dangerous and they do not give a sufficiently clear indication of the possibly liable person. Moreover, they completely neglect such an important aspect as typical risk associated with the actions with dangerous things, mechanisms, processes and substances.
2. The list of examples of actions, which may be considered as dangerous pursuant to the Art. 2347 para. 2 of Latvian Civil Law, shall be made clearer, specifying, for instance, such broad terms as "construction" or "enterprise", which, in fact, includes several different groups of actions.
3. One of the mandatory requisites of abnormally dangerous activity is that this activity is not a matter of common usage. This aspect usually, but not always,

[36] Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 20 January 2020 in Case No. SKC-51/2020. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 26.06.2021.].

means that the law requires this activity to be performed by a specialist or a professional. The question whether the activity is or is not a matter of common usage, should be answered on case-by-case basis, not as a dogma. The Latvian law must, likewise, include the requirement of not being a matter of common usage as a mandatory requisite of the abnormally dangerous activity.

4. The author suggests to include the criteria of typical risks in the Latvian law regulating the liability for damages caused by abnormally dangerous activity and, to extent possible, provide the list of such risks, associated with particular activity, similarly as it is done in the Art. 6:177 of the Dutch Civil Code regarding the list of typical risks for mining operations.
5. The law must explicitly stipulate that the provisions of strict liability, set in the Art. 2347 para. 2 of Latvian Civil Law, should be applied in cases when the damage is caused by the typical risk associated with particular activity, and also, to the extent possible, the list of such typical risks.
6. The law should also specify more clearly the liable person for damages caused by actions with dangerous things, mechanisms, processes and substances. In general, it may be the person who operates (performs) a particular activity, but in cases where possible, the specification should be made even clearer, to extent possible focusing on specialists and professionals who have better prospects for assessing the risks and preventing the damages.
7. The law should reasonably expand the duty of compulsory civil liability insurance on the persons which may be found liable for damages caused by the respective abnormally dangerous activities.

BIBLIOGRAPHY

Literature

1. Boston, G. W. Strict liability for abnormally dangerous activity: The negligence barrier. San Diego Law Review, Vol. 36, Issue 3, 1999.
2. European Group on Tort Law. Principles of European Tort Law. Wien, New York: Springer, 2005.
3. Kārkliņš J. Third Party's Fault as an Exclusion from Strict Liability. In: Legal Science: Functions, Significance and Future in Legal Systems II. The 7th International Scientific Conference of the Faculty of Law of the University of Latvia, 16–18 October 2019, Riga. Rīga, LU Akadēmiskais apgāds, 2019.
4. Koch B. A. The "European Group on Tort Law" and Its "Principles of European Tort Law". The American Journal of Comparative Law, Vol. 53, Issue 1, Winter 2005.
5. Kubilis J. Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [The Current Issues and Modernisation of Liability Caused by Abnormally Dangerous Activity]. In: Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2014.
6. Kubilis J. Latvijas deliktu tiesību modernizācijas galvenie virzieni [The Main Ways of Modernizing the General Rules of Latvian Tort Law]. Riga: Latvijas Universitāte, 2017.

7. Rasnačs L. Regimes of Liability for Damages Caused by Abnormally Dangerous Activities. In: Juridiskā zinātne / Law, No. 12, 2019.
8. Shavell St. The Mistaken Restriction of Strict Liability to Uncommon Activities. Journal of Legal Analysis, Vol. 10, 2018.
9. Smith A. O. Manufacture and distribution of handguns as an abnormally dangerous activity. University of Chicago Law Review, Vol. 54, Issue 1, 1987.
10. Spinaci V. Lessons from BP: Deepwater oil drilling is an abnormally dangerous activity. In: 35(3) Nova Law Review, Vol. 35, Issue 3, 2011.
11. Švarcs F. Latvijas 1937. gada 28. janvāra Civillikums un tā rašanās vēsture [The Civil Law of the Republic of Latvia from 28 January 1937 and history of its making]. Rīga: Tiesu Namu Aģentūra, 2011.
12. Torgāns K., Kārkliņš J., Bitāns A. Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Issues of Contracts and Torts in the European Union and Latvia]. Rīga, Tiesu Namu Aģentūra, 2017.
13. Torgāns K. Saistību tiesības [Law of Obligations]. Otrais papildinātais izdevums. Rīga: Tiesu Namu Aģentūra, 2018.
14. van Dam C. European Tort Law. Oxford: Oxford University Press, 2013.
15. Zimmerman R. The Law of Obligations. Roman Foundations of the Civilian Tradition. 2nd ed. Oxford: Oxford University Press, 1996.
16. Waite A. J. Deconstructing the Rule in Rylands v. Fletcher. Journal of Environmental Law, Vol. 18, Issue 3, 2006.

Legal acts

17. Estonian Law of Obligations Act. Available: https://www.riigiteataja.ee/en/eli/506112013011/consolide [viewed 01.05.2021.].
18. Dutch Civil Code. English translation available at: http://www.dutchcivillaw.com/civilcodebook066.htm [viewed 01.05.2021.].
19. Latvian Civil Law. Available: https://likumi.lv/ta/id/90220-civillikums-ceturta-dala-saistibu-tiesibas [viewed 01.05.2021.].

Court practice

20. Oberlandesgericht Hamm Hinweisbeschluss v. 27.4.2011 – I-20 U 10/11, BeckRS 2011, 18634, European Case Law Identifier (ECLI): ECLI:DE:OLGHAM:2011:0427.I20U10.11.00
21. Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 6 February 2013 in Case No. SKC-549/2013. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 03.05.2021.].
22. Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 27 November 2014 in Case No. SKC-156/2014. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 03.05.2021.].
23. Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 20 January 2020 in Case No. SKC-51/2020. Available: http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs [viewed 26.06.2021.].

Other materials

24. Characteristics for driving with Renault Master. Available: https://busu-noma.lv/pakalpojums/renault-master-maxi/ [viewed 03.05.2021.].