

# Historical Aspects of Employer's Liability for Damage Caused by an Employee to a Third Party at Work or in Work-Related Situations under Serbian Law

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## **ABSTRACT**

In this article, the author analyses the evolution of an employer's liability for damages caused by an employee to a third party at work and in work-related situations under Serbian law. As a starting legal source, she considers the Serbian Civil Code of 1844, which is a shortened version of the Austrian Civil Code of 1811, and analyses its rules on this subject. However, during the translation of the Austrian Civil Code, an omission occurred, which made it difficult for the author to determine whether it establishes fault as a condition of liability in a general way and to draw a conclusion on whether the liability of the employer is fault-based or a form of strict liability. After the Serbian Civil Code had ceased to be in effect, with the adoption of the Law on the Invalidity of Legal Regulations enacted before 6 April 1941, the employer's liability for damage caused by an employee and suffered by third parties was regulated by the Basic Law on Labour Relations on 24 October 1966. Similarly, the Draft of a Code on Obligations and Contracts of 1969, published by Professor Mihailo Konstantinović ("Sketch"), also regulates this issue but differentiates between two categories of employers: state and private employers. In relation to the liability of public employers, it referred back to labour law regulations. Finally, the 1978 Obligations Act regulated this subject matter in relation to all employers. It prescribes that the employer shall be liable for damage caused by an employee to a third party at work and in work-related situations, with the condition that the employee acts at fault. The 1978 Obligation Act does not determine the legal nature of this liability. However, contemporary legal scholarship is of the opinion that it should be construed as strict liability, since the employer cannot exempt himself/herself from liability by proving that there is no fault on his/her side. Only employees' faults are legally relevant.

## **KEYWORDS**

Serbian Civil Code of 1844, fault-based liability and strict liability, Basic Law on Labour Relations, "Sketch" (Draft) for a Code of Obligations and Contracts, 1978 Obligations Act.

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## Aspecte istorice ale răspunderii angajatorului pentru prejudiciile cauzate de un angajat unui terț la locul de muncă sau în situații legate de muncă, potrivit dreptului sârb

### REZUMAT

În acest articol, autoarea analizează evoluția răspunderii angajatorului pentru prejudiciile cauzate de un angajat unui terț, la locul de muncă și în situații legate de muncă, în dreptul sârb. Ca punct de plecare, ea examinează Codul civil sârb din 1844, care reprezintă o versiune abreviată a Codului civil austriac din 1811, și analizează dispozițiile acestuia referitoare la această materie. Totuși, în cursul traducerii Codului civil austriac a intervenit o omisiune, care a îngreunat stabilirea de către autoare a faptului dacă acesta instituie voința ca o condiție generală a răspunderii și formularea unei concluzii privind caracterul răspunderii angajatorului, respectiv dacă aceasta este una întemeiată pe voință sau o formă de răspundere obiectivă. După ieșirea din vigoare a Codului civil sârb, ca urmare a adoptării Legii privind nulitatea actelor normative adoptate înainte de 6 aprilie 1941, răspunderea angajatorului pentru prejudiciile cauzate de un angajat și suferite de terți a fost reglementată prin Legea fundamentală privind relațiile de muncă din 24 octombrie 1966. În mod similar, Proiectul Codului obligațiilor și contractelor din 1969, publicat de profesorul Mihailo Konstantinović („Schița”), reglementează, de asemenea, această problemă, dar face distincția între două categorii de angajatori: angajatori de stat și angajatori privați. În ceea ce privește răspunderea angajatorilor publici, acesta trimite la reglementările din dreptul muncii. În final, Legea obligațiilor din 1978 a reglementat această materie în privința tuturor angajatorilor. Ea prevede că angajatorul răspunde pentru prejudiciile cauzate de un angajat unui terț, la locul de muncă și în situații legate de muncă, cu condiția ca angajatul să fi acționat cu vinovăție. Legea obligațiilor din 1978 nu stabilește natura juridică a acestor răspunderi. Cu toate acestea, doctrina juridică contemporană consideră că ea trebuie calificată drept răspundere obiectivă, întrucât angajatorul nu se poate exonera de răspundere prin dovedirea lipsei voinței sale. Singura voință relevantă din punct de vedere juridic este cea a angajatului.

### CUVINTE CHEIE

Codul civil sârb din 1844, răspundere bazată pe voință și răspundere obiectivă, Legea fundamentală privind relațiile de muncă, „Schița” (Proiectul) Codului obligațiilor și contractelor, Legea obligațiilor din 1978.

## I. THE SERBIAN CIVIL CODE OF 1844 – THE EMERGENCE OF THE LEGAL INSTITUTE

From a historical perspective, to determine the emergence of an employer’s liability for damages<sup>2</sup> caused by an employee to a third party at work and in work-related situations under Serbian law, one should refer to Art. 810, Sec. 2 of the Serbian Civil Code of 1844,

2 The Serbian Civil Code does not contain a definition of damage. According to D. Janković, damage is any detriment caused to someone’s property, rights, or person, which consists of two elements, namely, positive or simple damage and negative damage (lost profit), D. Janković (1936): *Izvodi iz specijalnog dela obligacionog prava*, Grupa Futur Beograd, Beograd, p. 62.

which prescribed an exception to fault-based liability.<sup>3</sup> Sec. 1 of this article explicitly states that no one is to be held liable for damage caused by others. However, Sec. 2 lays out an important exception. It refers to someone who keeps persons in his/her service (in today's time, service would mean an employment relationship), with the condition that these persons are "vagrants, rogues, and known criminals"<sup>4</sup> without any identity documents. If such persons cause any damage, the person they serve will be liable. Therefore, it prescribes a form of liability for the actions of other people. As the Serbian Civil Code was drafted based on the Austrian Civil Code in 1811, Art. 810, Sec. 2 corresponds to Art. 1314 of the Austrian Civil Code,<sup>5</sup> with some deviations. However, Art. 810, Sec. 2 only gives us the impression that the laird (master) will be liable for other people's actions because the laird (master) himself/herself is imputable for accepting persons known for their misconduct, since they would have had to be aware of that.

It is important to note that the Civil Code of 1844 regulated the contract of service but did not distinguish between labour and work contracts. Another important point is that the Serbian Civil Code did not contain a general provision on the employer's liability for workers and employees.<sup>6</sup> The aforementioned studies referred only to specific situations that resemble employment relationships.

## 1. Analysis of Art. 810 of the Serbian Civil Code of 1844

Art. 810 of the Serbian Civil Code designates persons in the service of a citizen who has given them the opportunity to enter into relations with the public. If they cause damage to a third party, the named person would have to compensate because these persons acted under his/her instructions to carry out different tasks on his/her behalf. The third party relied on his/her trust in the master who instructed the servants, because those servants knew the master and, based on that personal relationship, they undertook the tasks in relation to which the damage was caused.<sup>7</sup>

At that time, there were servant documents from which the master could see the kind of behaviour the servant had previously demonstrated. Certain servant categories are mandatory to possess such documents. However, even if they had records of proper conduct in the servants' documents, but the master knew them as

3 The fault-based liability has prevailed everywhere in legal life since its origin in Roman law, and through the civil codes of the 19<sup>th</sup> century, because everyone was liable for "evil intent or negligence". However, at that time, modern codes (19<sup>th</sup> century) provided that even if there was no "evil intention or negligence", exceptionally the tortfeasor will be held liable even though he/she did not act with fault. Dragoljub Arandelović (1924): *O odgovornosti za naknadu štete (Objašnjenje glave XXX Građanskog zakonika)*, Izdavačka knjižarnica Napredak, Beograd, p. 26.

4 Arandelović (1924): p. 33.

5 Art. 1314 of the Austrian Civil Code stipulates that whoever accepts a person into his/her service, and that person does not have any documents about him/her, is dangerous because of his/her physical and mental characteristics, and keeps him/her with him/her despite knowing about this, will be liable for the damage caused by that person. Arandelović (1924): p. 33.

6 Mihailo Konstantinović (1952): *Obligaciono pravo (prema beleškama sa predavanja profesora M. Konstantinovića)*, Savez studenata Pravnog fakulteta u Beogradu, Beograd, p. 120.

7 Arandelović (1924): p. 33.

those demonstrating misconduct previously, the master would be liable for them. Conversely, in a situation where the servant had a document from which his/her honesty could be determined, but the servant was not personally known to the master, the master would not be liable for his/her servant. This distinction is important because of the burden of proof: the master was considered *bona fide* in relation to the honesty of his/her servants, so the injured party had to prove that the improper behaviour of the master's servants was known. Although Provision 810 of the Code prescribes that the master is liable for all the damage that the servant causes to someone in real life, this was not quite like that. It would also not be logical because, for example, if the servant went somewhere for his/her personal needs and caused damage to someone, it would not even be fair for the master to be liable for the damage because it had nothing to do with him/her. Only in the case when the master is privately related to third parties does he/she need to fulfil some obligation towards them, and then, instead of personally fulfilling his/her obligation, he/she uses his/her servant, and the servant does not fulfil the obligation properly, resulting in damage to the third party, then the master would be held liable for the damage.<sup>8</sup>

## 2. Analysis of Art. 811 of the Serbian Civil Code of 1844

Art. 811 prescribes that the master shall be held liable if he/she hires a person without qualifications for a specific job—that is, an incompetent and unskilled person who causes harm to another person—while he/she knew of these inabilities. In this case, his/her fault is choosing the wrong person for a given task (*culpa in eligendo*). This study also creates the impression that deviations have arisen from fault-based liabilities.

Damage can be caused either to persons with whom the employer has a contractual relationship or to third parties with whom there is no contractual relationship. In the first case, the principal will be liable for the damage that is considered to have been caused by his/her action and not by someone else's action. The plaintiff must prove that the damage was caused by poor performance. The principal, however, to be released from liability, would have to prove that the damage was a result of *casus* (a fortuitous event), but only if it was agreed that he/she would be liable for the results of the *casus*.<sup>9</sup>

Thus, there is an example from case-law, from the period when the Civil Code of 1844 was still in application, in which the plaintiff took his mare to a horseshoe shop whose owner was not present at the time, and the shoeing was performed by a person at the shop who had been prohibited from working due to incompetence. Before the shoeing, the person noticed that the hoof was injured and warned the plaintiff about it, but the mare's owner ignored that fact and approved the shoeing. Subsequently, the mare died of tetanus, and the plaintiff sued the owner of the shop and the person who performed the shoeing, demanding compensation for the damages. The District Court rejected this claim, which was subsequently confirmed by a higher District

<sup>8</sup> These are the situations specified in Chapter 22 of the Serbian Civil Code, which regulates mandate, as well as Art. 616.

<sup>9</sup> Arandelović (1924): p. 37.

Court. The reasoning behind the decision was that the person was not in a working relationship with the owner of the horseshoe shop and did not have permission from the owner to perform the task. Owing to his lack of qualifications, he was prohibited from performing the given tasks, and the plaintiff was warned about the mare's physical defects beforehand. The public prosecutor filed an extraordinary legal remedy for this judgment. The Supreme Court of the People's Republic of Serbia annulled both the decisions and granted claims. It stated that the damage was caused during an illegal activity, and the owner was liable because he accepted an unqualified person at the store who did not have a work permit.<sup>10</sup>

### 3. Analysis of Art. 812 of the Serbian Civil Code of 1844

This article<sup>11</sup> is an exception to the set of rules according to which an innkeeper is liable for other people's actions only when he/she is at fault in choosing people who will work for him/her. Therefore, it is not required as a condition for the principal to know about the earlier life of his/her younger counterparts; however, he/she will nonetheless be liable if damage occurs.

This brings us back to the beginning of Chapter 30, Art. 800, which stipulates that whoever causes damage to another person, be it on someone else's property or rights and persons, must compensate for it. Subsequently, Art. 801 prescribes that from the obligation to compensate for the damage, one can only be exonerated if one proves that the damage is not attributable to one's fault but happened by accident. Therefore, the Code did not define faults in any of the articles. It appears that this omission occurred during the translation of the Austrian Civil Code. This led to the conclusion that the principle of causation was adopted because Art. 801, as a condition for exemption from liability for damage, states that the tortfeasor should prove that the damage happened accidentally and that they were not at fault. Furthermore, proving that damage accrued accidentally is even more difficult than proving the absence of a fault. This further leads to the conclusion that the Serbian Civil Code of 1844 adopted the principle of proven fault.<sup>12</sup>

However, it is important to return to the interpretation of Art. 812 of the Serbian Civil Code, because, according to Professor M. Konstatinović, there is a presumption of the employer's fault in that article, which is absolute.<sup>13</sup>

In his analysis, Dragoljub Arandelović exhaustively tackled the innkeeper's liability for the damage that guests/passengers would suffer from the things brought in. Although it may seem confusing (since Art. 812 does not contain the word "thing" anywhere but generally prescribes the liability of innkeepers), at the same time, it

10 Liability of Employers and Workers – Assuming Risk, *Anali Pravnog fakulteta u Beogradu*, 4/1955, pp. 456–457.

11 Art. 812 of the Serbian Civil Code of 1844 reads as follows: “[i]nnkeepers, taverners, boatmen and drivers (carriers) are also liable for the damage that their people would cause to passengers”.

12 Dragan Kostić (1975): *Pojam opasne stvari*, Institut za uporedno pravo, Savremena administracija, Beograd, p. 70.

13 Konstatinović (1952): p. 121.

refers to Art. 580 of the Code, which is included in Chapter 19 of the Code under the title *Deposit or Trust* and which corresponds to Art. 970 of the Austrian Civil Code but is slightly modified. Art. 970 governs the liability of innkeepers, boatmen, etc., such that they are liable for their servants who are in their service or other persons in their house who cause damage to passengers in respect of the things received. He further referred to Art. 677, which governs the lease agreement. Although it is not applicable to the liability of the innkeeper, it departs from the assumption that the passengers and the innkeeper conclude a contract for the reception of the passengers to live in the inn, and the passenger pays a certain price in money for it.<sup>14</sup> Art. 678 governs rent or housing contracts; hence, it is necessary to analyse Chapter 25 of the Code pertaining to lease contracts. However, regardless of these regulations, the innkeeper will be liable for damage, irrespective of whether he/she concludes a housing contract with the passenger. The same applies to the deposit contract regulated in Chapter 19 because the liability of the custodian arises from the deposit contract, parallel to the liability of innkeepers, because they are also obliged to keep things entrusted and are handed over things in trust and to compensate for damage due to omissions during storage, if any.<sup>15</sup> This leads to the conclusion that innkeepers are liable in the same way as for breaches of contract. However, there is one important and mitigating circumstance: he/she will not be liable for *casus*. The conditions for the innkeeper's liability are as follows: 1) he/she took away or damaged the thing from the passenger with malicious intent; 2) he/she was careless when storing things, left the door open and unsecured, so thieves could easily get in and steal things; and 3) due to general negligence.<sup>16</sup>

If none of the aforementioned conditions could be attributed to the fault of the innkeeper, he/she would not be liable for the damage accrued to the things brought in. The same applies to natural events and catastrophes causing the destruction of things, but also to theft, which could not be prevented even by the increased attention of the innkeeper, or if things are perishable by their very nature. At the time, the older school of thought in the theory of private law prevailed, according to which there was no liability in private law if there was no fault due to the occurrence of the event.<sup>17</sup>

However, it may often happen that passengers do not have the opportunity to enter into a binding relationship with the innkeeper and arrange lodging directly because he/she does so with his/her servants (porters, maids, waiters), so the liability of the innkeeper also includes the liability for damages caused by the fault of his/her servants. Servants also include persons who temporarily perform work for the innkeeper, such as laundresses, day labourers, craftsmen who perform work on behalf of the innkeeper, as well as persons who live with the innkeeper if they work for him/her.

14 Dragoljub Arandelović (1906): *Odgovornost gostioničara prema putnicima zbog pretrpljene štete u gostionicama na unesenim stvarima*, Štampano u državnoj štampariji Republike Srbije, Beograd, pp. 5–7.

15 Arandelović (1906): p. 8.

16 Arandelović (1906): pp. 9–11.

17 Arandelović (1906): pp. 12–13.

Therefore, analogous to the conditions enumerated above for the innkeeper's liability due to his/her fault, it also applies to the servant, and this is covered by Art. 812.<sup>18</sup>

The innkeeper would not be able to exempt himself/herself from liability for the mentioned persons, even if he/she could prove that they have a history of proper conduct, since he/she has to pay more attention when choosing his/her servants, because the passengers are entrusted to them.<sup>19</sup>

To be entitled to compensation, a passenger must prove that the items had been handed over undamaged. The time of the emergence of the liability is important, since it can also be the moment when the innkeeper or servant receives things outside the inn, because it is not necessary that things are actually brought inside the inn. The evidence can be receipts, witnesses who were present when the item was handed over, or mutual oaths. The amount of damage was determined by expert opinions. If the passenger proved that the damage was caused by bad intent or gross negligence, he/she could claim, in addition to the actual damage, the profit he/she lost due to the destruction of the object or even compensation at the extraordinary value of the object.<sup>20</sup>

#### 4. Social changes and special laws

Regarding labour relations, in addition to the Serbian Civil Code of 11 March 1844, the following acts were applied in Serbia: the Guild Decrees of 14 August 1847 and its amendments on 29 January 1849 and 30 April 1853; the Mining Code of 15 April 1866 which was amended on 21 July 1877, 6 February 1896, and 27 January 1900; the Rules on Relations between Servants and Their Masters on 12 September 1904; and the Act on Shopkeepers on 28 June 1910.<sup>21</sup>

As society developed, so did labour laws. In the second half of the 19<sup>th</sup> century, trade unions were formed in most European countries, which also had an impact on Serbia. First associations for mutual assistance were formed, followed by the establishment of the first trade union named *Opančarsko-radničko društvo* in Belgrade.<sup>22</sup> Forty-nine years had to pass until its establishment (although it was short-lived), because in London in 1847, the Founding Congress of the "Union of Communists" (the first workers' party) was held, in which Yugoslavs took part together with workers and free intellectuals from various European countries that followed a communist ideology.<sup>23</sup> Prior to that, there were no conditions for the introduction of labour law

18 Arandelović (1906): p. 14.

19 Arandelović (1906): p. 15.

20 Arandelović (1906): p. 16.

21 Nikola Tintić (1969): *Radno i socijalno pravo, Knjiga prva: Radni odnosi (I)*, Narodne novine, Zagreb, p. 132.

22 Boško Perić (1949): *Radno pravo, Beleške predavanja docenta Dr Boška K. Perića, na Pravnom fakultetu u Sarajevu u školskoj 1948/49 godini, Sveska 1, Uvod i istorija radnog prava (Radnički pokreti i istorija radnog prava u inostranstvu)*, Odbor za izdavanje udžbenika, skripata i učila za studente fakulteta i visokih škola NR BiH, Sarajevo, p. 117.

23 Perić (1949): pp. 54–55.

institutes, like those in Western Europe, bearing in mind the long-term Turkish influence that left a deep mark on both the Serbian economy and society as a whole.<sup>24</sup>

## II. THE EVOLUTION OF THE INSTITUTE AFTER THE SECOND WORLD WAR UNTIL THE ENACTMENT OF THE 1978 ACT ON OBLIGATIONS

### 1. The new social environment and the adoption of the Law on the Invalidity of Legal Regulations enacted before 6 April 1941 and during the enemy occupation

After gaining liberty from the Turkish rule, Serbia faced the First World War at the beginning of the 20<sup>th</sup> century, after which it was united with other South Slavic nations in the Kingdom of Serbs, Croats, and Slovenes in 1918, which in 1929 changed its name to the Kingdom of Yugoslavia. Shortly after the Second World War, a period of an unstable legal environment emerged, during which the Act on the Invalidity of Legal Regulations—enacted before 6 April 1941—applied for the period of enemy occupation (briefly known as the Act on Invalidation). It set aside the Civil Code of 1844, among others.

This also affected the law of obligations, which was not regulated by statutes until 1978.<sup>25</sup> However, in 1969, Mihajlo Konstantinović, a professor at the Faculty of Law in Belgrade, wrote and published a large project for the codification of law in the field of obligations. He modestly named it a *Sketch for the Code of Obligations and Contracts*, but it was in fact a full-fledged normative proposal for an act on obligations. The 1978 Obligations Act mostly relied on the 1969 “Sketch”. The “Sketch” was an unofficial draft for which Professor Konstantinović was personally responsible and which left a deep mark on judicial practice.

### 2. Basic Act on Labour Relations of 1966

As new social conditions emerged, the rules on the principal’s liability for his/her servants who caused damage to third parties from the Civil Code of 1844 were no longer sustainable. The spirit of socialism spread, and new rules had to be adopted for the needs of life in a socialist society.

This happened with the adoption of the Basic Act on Labour Relations of 24 October 1966. The Act stipulates in Art. 97, Sec. 1 that the labour organisation where the worker was working at the time the damage was caused is liable for the damage caused to third parties (individual or legal entity) by the worker at work and in work-related

24 Perić (1949): p. 1.

25 Mihailo Konstantinović (1969): *Obligacije i ugovori, Skica za Zakonik o obligacijama i ugovorima* as reprinted in the series *Klasici jugoslovenskog prava* (1996), Novinsko-izdavačka ustanova Službeni list SRJ, foreword by Slobodan Perović, p. 7.

situations. Sec. 2 specifies that for damage caused to a third party by an employee of a state body or organisation performing activities of public interest, in connection with the performance of a service or other activity of a state body, or an organisation performing activities of public interest, the socio-political community, or an organisation in which a service or other activity is performed, shall be held liable. In addition, in Sec. 3, the Act specified that the injured party had the right to demand compensation directly from employees if the injury was caused by a criminal act.<sup>26</sup>

For a proper understanding of the terms used in the 1966 Basic Act on Labour Relations, one should consider the specificities of post-Second World War Yugoslavia, in which a special, milder form of socialism, so-called self-managing socialism, was developed, with its specific legal concepts and terminology. Instead of employer, for instance, the term labour organisation was used; instead of the state, social-political community; and later, instead of employment relationship, joined work was used.

It seems that the principle of strict liability prevailed in the rules of the 1966 Act, because the labour organisation was liable to third natural and legal persons for damage, regardless of whether the employee was at fault. However, whether the labour organisation is entitled to recourse depended on the employee's faults. If the employee acted with simple negligence, he/she was not obliged to compensate the organisation for the damage caused to the third party and was paid by the labour organisation, but if the damage was caused intentionally or by gross negligence, the employee was obliged to compensate the amount that the organisation paid to a third party. The labour organisation had a deadline of six months to request recourse, which was calculated from the moment it paid compensation to the injured third party. The reason for this legal solution was that the same deadline was prescribed for filing a lawsuit. There was, however, one exception: when the worker caused damage by a criminal act (for example, while transporting goods for a third party, the driver stole part of the goods). In such cases, the injured party could demand payment for the damage directly from the worker. The place of occurrence of the damage did not affect the liability of the labour organisation for damage. This place could be both within the labour organisation itself or outside of it (for example, during the transportation of goods, damage occurred on the road or in the business premises of a third party).<sup>27</sup> The 1966 Act prescribed special grounds for the exemption from or limitation of employees' liability in the recourse procedure. According to Art. 99, Sec. 2 of the 1966 Act, the labour organisation itself, by its internal acts, prescribes the conditions, bodies, and procedures to decide on the release of the worker for payment of damages. In addition, it specified that employees could have been released from liability if they had acted with gross negligence. The rules also specified that the labour organisation should especially consider, when deciding on the employee's liability in the recourse procedure, the economic position of the worker, his/her conduct, and previous work. When the amount to be compensated by the labour organisation was so high that the

26 Osnovni zakon o radnim odnosima (prečišćen tekst) sa objašnjenjima i drugim propisima iz te oblasti, *Službeni list Socijalističke Federativne Republike Jugoslavije*, 1966, p. 54–55.

27 Teofilo Popović, Aleksandar Nikolić (1969): *Propisi o radnim odnosima, Komentar osnovnog Zakona o radnim odnosima*, Prosveta, Beograd, p. 169.

worker could not pay it without major consequences to himself/herself and his/her family, the labour organisation could decide to exempt him/her from the payment obligation.<sup>28</sup>

Special rules applied to individuals employed by private employers. In such cases, the private employer was also liable for damage caused by the employee to a third person, but only under specific conditions. First, the damage had to be caused by an employee who was permanently employed by the employer, as employers could not be held liable without a permanent employment relationship; for example, in the case of a work contract, an employer was not obliged to compensate for damage caused by the employee. Second, the employee had to have caused the damage while performing tasks entrusted to him/her, since damage occurring outside the employee's duties did not give rise to employer liability. If an employee caused damage while acting in accordance with the employer's specific orders, the employer was solely liable on the basis of their own fault; however, if the employee caused damage due to their own fault, both the employee and the employer were jointly liable, and the injured party could choose from whom to seek compensation. After paying damages, the employer had the right to seek recourse from the employee who was at fault, although if the employer was also at fault, the amount of reimbursement was proportionately reduced. The employer could be released from liability if it was proven that the damage was caused by force majeure or that the injured party or a third party was responsible; however, if there was an increased risk of damage, which was a condition for strict liability, the employer remained liable in accordance with the rules of strict liability.<sup>29</sup>

### **3. State liability for civil servants – The 1948 Act on Civil Servants**

When a civil servant caused damage while performing his/her duties, the injured party could be another person or the state itself. Only the former shall be analysed in this study because the rules applicable to these cases differed.

The Act on Civil Servants of 7 May 1948<sup>30</sup> prescribed the rules that a civil servant would be personally liable for the damage he/she causes to others (citizens or the state) while performing his/her duties in the service, and that the state is the guarantor for this. The condition for liability was the fault of the official, which the injured party would have to prove. The Act also contained a rule that the superior liable for appointing the official, according to the consent of the Ministry of Finance, would pass a decision on the release of the civil servant from liability if he/she caused damage that resulted from the action undertaken for the sake of the general public interest.<sup>31</sup>

If the judgment was passed against the civil servant and compensation could not be recovered from him/her, it could be demanded from the state because it was in the

28 Popović, Nikolić (1969): p. 169.

29 Popović, Nikolić (1969): p. 173.

30 Zakon o državnim službenicima od 07.05.1948. god. (Act on Civil Servants of 7 May 1948) Art. 40.

31 Konstantinović (1952): p. 124.

role of a guarantor, and the judgment had an effect against it as well, but only on the condition that it also participated in the proceedings. Otherwise, if the state was not included in the lawsuit, the injured party could file a new lawsuit against the state to collect damages within one year from the date of the damage or within nine months from the date of learning about the damage, after which their right was extinguished. The court at the venue at which the damage occurred was competent to hear the case. The state had the right to recourse against civil servants for the amount paid to the injured party.<sup>32</sup>

The same rules were applied to members of the national militia according to the Act on the National Militia of 12 December 1946.<sup>33</sup>

The Constitutional Act of 13 January 1953<sup>34</sup> changed this liability by making the state liable to pay the amount of damage caused by its officials to citizens through illegal actions. The new Act on Public Servants from 1957 defined and implemented this principle in more detail.<sup>35</sup> The basis of this was the old moral rule according to which anyone who caused harm to another must be held liable. This rule provided fertile grounds for various explanations based on liability. According to one understanding, damage caused by the fault of officials or competent collegial bodies was considered to be caused by the fault of the state itself because its activity takes place through them. This liability could be based either on the presumption of a fault by the employer due to poor supervision or due to poor selection of the staff. Some support the idea that the guarantee of the work of the staff was the basis of the state's liability.<sup>36</sup> The state could not supervise itself, but it did so through officials who were hierarchically subordinated to one another. Professor Đorđe Tasić made a distinction between the liability of the state for actions that were illegal from the liability that violated the equality of citizens when it came to public burdens, because the state was liable according to the principle of risk and pays for damage according to the principle of equality of citizens for public burdens.<sup>37</sup>

#### 4. Special cases

There were a range of special cases of employee liability. For instance, if an inspector caused damage to companies or individuals who worked with foodstuffs during supervision, the state was directly liable. These were situations in which the inspector seized foodstuffs suspected of being dangerous to life and health. He/she could also order them to be destroyed or prohibit their use until they were examined by an expert. If the tests showed that the foodstuffs were not dangerous, the inspector had to withdraw the ban

32 Konstantinović (1952): p. 124.

33 Konstantinović (1952): p. 126.

34 The Constitutional Act of 13 January 1953, Art. 99.

35 Dragaš Denković: Osnov odgovornosti za štetu koju građanima prouzrokuju javni službenici, *Analiz Pravnog fakulteta u Beogradu*, 1–2/1962, p. 58.

36 Denković (1962): p. 61.

37 Đorđe Tasić: Odgovornost države za protivpravna akta njenih organa, *Društveni život*, 1921, pp. 280–281; Đorđe Tasić (1924): *Odgovornost države po principu jednakosti tereta*, p. 198 as cited in Denković (1962): p. 61.

on their use and return them to the companies or persons from whom they had been confiscated. However, if the food was destroyed, they had the right to demand compensation directly from the state or from the body whose inspector had ordered the confiscation, all based on the Regulation on Health Control of Food of 21 June 1948. The injured party could also demand damages from the inspector who acted in fault. In this case, the state also had the right to recourse from the inspector. This rule was heavily criticised because the liability of the inspector deprived him/her of his/her freedom in the performance of his/her duties, because his/her duty was to protect public health, and he/she should not suffer consequences if he/she did not cause the damage intentionally or because of gross negligence.<sup>38</sup>

The General Act on People's Committees<sup>39</sup> was enacted on 1 April 1952. This foresaw that municipalities, counties, or cities would be liable for the damage caused by a committee member or employee of the People's Committee to citizens in the performance of their duties due to their illegal acts. The injured party was entitled to request compensation from the People's Committee; if it refused to comply within 30 days, it had the right to file a lawsuit in court.<sup>40</sup>

## 5. Strict liability for the damage caused by dangerous things

Parallel to employee liability, the rules of strict liability evolved. This was necessitated by the fact that there were cases in which liability was based on an increased risk of damage. If the employer controls the source of the increased risk and damage that occurred, he/she could not be released from liability by proving that he/she was not at fault and that he/she paid due attention. For example, damage can occur from an accident involving a car owned by an employer and driven by a chauffeur employed by the employer. The employer would not be able to absolve himself/herself of liability by proving that the chauffeur acted contrary to his/her instructions, because the employer's liability was not based on fault but on the increased danger created by a vehicle qualifying as dangerous.<sup>41</sup>

Until the enactment of the 1978 Obligations Act, there was a lack of general rules on dangerous things. Moreover, special acts that regulated strict liabilities for certain dangerous objects were rare. In the pre-war Yugoslav state, that is, between the two world wars, several acts were enacted in which the strict liability of the owner was regulated, applicable to a specifically defined situation. The most important act in this regard was the Railway Act, enacted on 23 June 1930, which envisaged rules on compensation for damages caused by railway construction. Furthermore, the Act on Aviation of 18 February 1913 and the Act on Companies for Regular and Occasional Transportation of Passengers and Goods by Motor Vehicles on 2 December 1930 should also be mentioned. However, strict liability for dangerous things was not

38 Konstantinović (1952): pp. 126–127.

39 Opšti zakon o narodnim odborima od 01.04.1952. god. (General Act on People's Committees of 1 April 1952) Art. 29.

40 Konstantinović (1952): p. 127.

41 Kostić (1975): p. 70.

regulated in a general way, so post-war jurisprudence had to create a new solution for this area.<sup>42</sup>

The first attempt to provide a general rule on strict liability may be identified in Art. 136 of the "Sketch", specifying which things are considered dangerous, stating that: they are movable or immovable things, whose position, use, or characteristics, or their very existence, represent an increased risk of damage to their surroundings.<sup>43</sup> However, today, there is no definition of dangerous things or activities in the Obligations Act, so it is up to courts to assess which things are dangerous and which are not.<sup>44</sup>

### III. THE 1978 OBLIGATIONS ACT

The "Sketch" had explicit rules on the liability of the employer for the damage caused by an employee to a third party in relation to work or work-related situations. However, these regulations addressed this subject matter less *in meritum* than the 1978 Obligations Act did. It seems that Professor Konstantinović was well aware of the rules contained in the 1966 Basic Act on Labour Relations. For this reason, in Art. 135, the "Sketch" simply refers back to the labour law regulations. It states that for compensation for damage caused to the labour organisation or third parties by an employee at work and in work-related situations, the rules of labour law regulation should apply.<sup>45</sup> This rule aimed to cover almost all situations, since the majority of workers were employed in "labour organisations". However, there was also some space for private employers, although very narrow. This seems clear from the second section of the same Art. 135 of the "Sketch" stipulating that for the damage caused at work and in work-related situations by persons employed by individual employers, their employer is liable in addition to them. Finally, the third section stipulates the employer's right to recourse. It envisages that the employer, who compensated for the damage attributable to the person employed, has the right to demand compensation of the paid amount from him/her, unless, in a given case, fairness requires that he/she bears the damage in full or in part.<sup>46</sup>

Finally, we reach the present era, in which the 1978 Obligations Act is in force. However, the rules of the Obligation Act have changed over time. At the time of its enactment, it bore the hallmarks of the society in which it was created; Art. 170, Sec. 1 spoke not of the employer but of the organisation of associated labour, which would be liable for the damage caused by the worker (employee) unless it proves that the worker acted as he/she should. After amendments to the 1993 Obligations Act, Art. 170, Sec. 1 stipulates that the company in which the employee worked at the time of causing the damage is liable for the damage caused by the employee in the course

42 Kostić (1975): pp. 71–72.

43 Konstantinović (1969): p. 29.

44 Marija Karanikić Mirić (2016): *Objektivna odgovornost za štetu*, Službeni glasnik, Beograd, p. 82.

45 Vrleta Krulj: Opšta pravila o građanskoj odgovornosti i posebna pravila o odgovornosti radnika i radnih organizacija (Osvrt na rešenja usvojena u „Skici za Zakonik o obligacijama i ugovorima”), *Zbornik radova Pravnog fakulteta u Nišu*, 1970, p. 65.

46 Konstantinović (1969): p. 51.

of work or work-related situations unless it proves that the employee acted as he/she should in the given circumstances. In the subsequent section, the Obligations Act stipulates that the injured party has the right to demand compensation directly from the employee if he/she causes the damage intentionally. Finally, Sec. 3 excludes the application of this rule from Sec. 1 if the damage is caused by a dangerous thing or dangerous activities when the liability is strict.

The existence of a presumed fault, based on the employee, is required to establish employer liability. In this case, the employer's fault is not important for the employer to be strictly liable. The right of the employer to recourse against the employee was regulated in a subsequent article. First, Art. 171, Sec. 1 expands the application of liability rules to all employers (Art. 170, Sec. 1 only names companies). However, in Sec. 2, any person who indemnifies the injured party for damage has a recourse claim against the employee if he/she caused the damage intentionally or by gross negligence. If the damage was caused by ordinary negligence of the employee, the employer had no right to recourse for the damages paid.<sup>47</sup>

It is important to note that although the employee's fault is prescribed as a condition, it is not considered a fault-based liability according to the recent Serbian doctrine of civil law. A leading contemporary Serbian scholar, Professor Karanikić Mirić, provides a strong argument for this. She claims that the employer is liable for damages, regardless of whether he/she himself/herself is at fault. The employer's liability is fault-based and is not a type of subsidiary liability. Only if they prove that there is no professional fault by the employee can the employer be released from liability.<sup>48</sup>

Art. 172 stipulates the liability of a legal person for any damage caused to their organs or bodies. Sec. 1 states that a legal entity is liable for damages caused by its bodies to a third party in terms of the performance of or in connection with the performance of its functions. Sec. 2 further states that, if nothing else is prescribed for the given case, the legal person has the right to compensation from the person for whom the damage is attributable to his/her intentional or gross negligent conduct. Finally, Sec. 3 specifies that the right to recourse expires within six months of the date of payment of compensation for damages. To establish the liability of a legal person according to judicial practice, it is necessary for the acts of the organ to be illegal and irregular.<sup>49</sup>

In addition, there are special rules regarding whether the damage is caused by a civil servant when the rules of the Act on State (Civil) Servants apply.<sup>50</sup> Art. 124 of this Act stipulates that when a civil servant causes damage at work or in a work-related situation to a third party through the illegal or irregular performance of his/her labour obligations, the state shall be held liable. If the damage was intentionally caused, the injured party could claim compensation directly from the civil servant,

47 Marija Karanikić Mirić (2020): *Granice odgovornosti poslodavca za zaposlenog*, in Vuk Radović (ed.): *Kaznena reakcija u Srbiji*, Pravni fakultet Univerziteta u Beogradu, Beograd, pp. 168–169.

48 Karanikić Mirić (2016): p. 11.

49 Karanikić Mirić (2016): pp. 65–66.

50 Zakon o državnim službenicima 2022 (Act on Civil Servants 2022), Art 124.

and if the state had already paid compensation for the damage, it would have had the right to recourse from the civil servant within six months.

Finally, there is a special situation that brings us back to Art. 170, Sec. 3 of the Obligations Act, which refers to a dangerous thing used by a person employed by the owner of the dangerous thing. In such a case, the employer shall be held liable as if he/she himself/herself had used the dangerous thing according to strict liability, and such a circumstance only resembles liability for another person, that is, the employer's liability for the acts of his/her employee.<sup>51</sup>

## IV. CONCLUSIONS

Looking back at the historical evolution of the institution of employers' liability for the damage caused by their employees to third parties during work or in work-related situations, one thing is certain: throughout this time, the employer's fault-based liability and strict liability became intertwined. In the Serbian Civil Code of 1844, there were situations where the employer was liable because he/she acted with fault since he/she knew of the earlier improper conduct of his/her servants and took them into his/her service anyway. He/she was also liable, again, based on his/her own fault, when he/she made the wrong choice of his/her servants because he/she knew they were not qualified for the given task (*culpa in eligendo*). However, when the employer played the role of an innkeeper, he/she could have been liable in both fault-based and strict liability regimes.

As society was developing but at the same time collapsing under the gusts of wars in the 20<sup>th</sup> century, the provisions of the Serbian Civil Code proved to be unsustainable, so a new solution had to be adopted. A major milestone was the 1966 Basic Act on Labour Relations, which explicitly regulated this subject matter. In his "Sketch", Professor Konstantinović initiated in 1969 a wave of changes that was also reflected in the rules of the 1978 Obligations Act, which is still effective even today. However, it does not explicitly specify whether employer liability is fault-based or strict. The contemporary civil law scholarship, led by Professor Marija Karanikić Mirić, supports the interpretation that the employer's liability under the 1978 Obligations Act is strict, because he/she cannot be relieved from the liability by proving that he/she himself/herself was not at fault. However, when the damage is caused by a dangerous thing that the employee used while performing work tasks, the employer, as the owner of such a thing, would be liable as if he/she himself/herself caused the damage, which is a different legal solution compared to all previous ones. This is, for that matter, the result of all social changes and the consequences of the development of society, which would never have occurred if there were no risks in every business. However, for someone to take on a risk, they must accept responsibility for both their own actions and those of their associates, since this responsibility is tied to the pursuit of economic profit, which ultimately drives social activity.

51 Karanikić Mirić (2016): p. 110.