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STRICT LIABILITY IN CIVIL CASES WITH SPECIAL REGARD TO ENVIRONMENTAL DAMAGES

I. Introduction

The discussion about strict liability in civil cases has been going on for many years. However, there is still much uncertainty about the meaning and the boundaries of strict liability. Divergences in the scope and application of strict liability rules make it difficult to see where exactly and to what extent European tort systems differ from each other. These conceptual differences are likely to obstruct legislative harmonisation or unification as well as the fact that liability based on fault and strict liability are not completely separate categories and that it is difficult to establish a clear border line between these two liabilities. Nowadays, the field of liability for defective products is featured by the greatest achievements in terms of unification of strict liability in European law. To a great extent, these achievements have resulted from the 1985 Directive of the EC Council 85/374/EEC. Liability for defective products in the Croatian and Hungarian legislation has assumed a new dimension by adopting this Directive and now our tort law systems includes several relevant and very similar solutions for issues relating to this kind of strict liability. Similar strict liability solutions are also expressed in the area of liability for dangerous things and dangerous activities (in most European civil law systems called liability for ultra hazardous risks). Strict liability in the area of environmental damages is specific scope of strict liability that is worthy of special regard under these liability examinations.

The European level of environmental protection began to develop in the end of the 1980th. Since then, a lot of regulation was accepted, which focused to this area. But we have to wait for the settlement of the question of civil liability in the sphere of environmental damages. The aim of this paper to show what are the mutual origins of the Hungarian and Croatian regulation of strict liability, and to show the sad event of the recent past which was occurred in Hungary, and which made the lawmakers to think over the bases of liability for environmental damages.

II. Strict Liability for Damages in Civil Law Cases

If we look in the ancient time we will find that liability for damage used to refer to the criterion of causation. The reasons for such an interpretation undoubtedly included, under the condition that the proof of fault did not imply the liability, simple application of the criterion. Social development was accompanied by the development of legal liability for

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damage and thus one, when presuming a respective liability, started to take account of the fact if the damage was done with intent, by negligence or by accident. The degree of subjective contribution of the person having done damage to the emergence of harmful consequences gained more and more attention, so the liability based on the criterion of causation gave space to the liability pursuant to the criterion of fault (culpability).

When adopting the Civil Code (1804), culpability was the only indicator of liability in French law.[1] At the end of the 19th century, the French Court of Cassation[2] introduced a new basis for regulation of extracontractual liabilities: the liability of a person who has under their power or control an item or a person is not based on presumed culpability thereof but on the presumption of the liability itself (la présomption de responsabilité). Since this resolution of the Court of Cassation, French law and legal theory have applied a particular regime of liability called strict liability (la responsabilité du fait des choses). Its character is not subsidiary with respect to liability based on culpability. On the contrary, this represents an autonomous institute, relation of which towards the institute of strict liability cannot be interpreted as an exception to the rule.[3]

In the mid 19th century, Germany faced the growth of industry, particularly the development of railroad traffic, which encouraged adoption of laws[4] regulating liability without determination of culpability. Adoption of the Civil Code required determination of a legal basis for regulation of absolute liability (Gefährdungshaftung). This was followed by a logical issue which was to be dealt with by legal theory when the laws regulating liability for damage with no presumption of fault had already been adopted. This meant searching for a legal basis for regulation of liability with the respective legislation already existing[5]. Legal doctrine has developed a number of theories[6] aimed at finding solutions in cases where liability based on culpability was not seen as the best solutions.

Contemporary requirements in terms of technical and technological advancement, globalization of industry, modern traffic, free movement of goods, services and capital generate complicated legal relations concerning damage compensation which cannot always be resolved by applying the liability criteria based on fault. Maximum protection of those suffering the damage often requires application of the criterion of causation. Therefore, strict liability for damage has been lately experiencing expansive growth within the framework of European tort law as well as within the legal systems of Croatia and Hungary. This is partly the result of acceptance of acquis communautaire, legal guidelines of the EU which have been implemented into the legal system of its current member Hungary and its

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[1] Article 1382 and Article 1383 of the Civil Code still stipulate culpability for consequences of one's own act.

[2] This refers to the decision of the Court of Cessation, according to which the employer was liable for damage done to a worker caused by boiler explosion, although the employer's guilt was not determined in this concrete case.

[3] M. Karanikić Mirić, *Krivica kao osnov deliktne odgovornosti u građanskom pravu* [Culpability as the Basis for Tort Liability in Civil Law] (Pravni fakultet Univerziteta u Beogradu , Beograd 2009], pp. 70/71.

[4] e.g. Railway Act, Act on the Liability for the State of Germany.

[5] P. Klarić, *Odštetno pravo* [Tort Law], (Zagreb, 2003), pp 31/32.

[6] On these theories see more in Ibid, page 32-45.

future member Croatia, and partly of efforts of the legislation and judicial practice of these two countries. Almost all European countries deal with strict liability within the sphere of their legislature. There are more and more legal regulations and/or new provisions that foresee liability for damage based on the principle of causation. Beside this open development, strict liability is evolving as part of judicial practice too. We are witnessing particular unification of law wherein countries maintaining the tradition of civil law have realized the advantages of development of law by means of judicial precedents and hence tend to accept this concept of its expansion. Moreover, countries governed by common law have adopted numerous legal regulations lately. The development of law by means of accepting and honouring judicial practice and giving space for such a development in countries with the civil law tradition is often called the covert development of law.

Strict liability in most jurisdiction predominantly seems to be based on singular rules rather than general or least broader clauses. This is particularly noteworthy for civil law countries: While Austrian courts, for example, apply existing strict liability laws analogously (which to some extent reduces problems caused by a tardy legislature), German and Swiss practice so far deny the possibility of extending their statutory regimes in this way at all. This is not only a difference in legislative style, but obviously also affects the scope of strict liability altogether: A general clause by its nature tends to allow no-fault liability in more instances then those addressed by singular pieces of legislation focussing on very specific kinds of risks.[7]

The issue of the possibility of unification of European tort law has become a frequent topic of legal discussions in Europe. While the basic concept of particular types of strict liability (e.g. strict liability as a response to ultra-hazardous conduct) has been integrated in numerous legal systems, the ways of identification of real liability differentiate between systems. For instance, there are huge discrepancies between the modes how to consider a certain thing or activity hazardous. These differences mostly arise as a consequence of codification of liability rules within national legal systems. The practical consequences involve great differences in defining standards of the tortfeasor's liability as well as the fact that damage compensation which the damaged person is entitled to is dependent on a legal system. Within the EU, this might influence free movement of goods and services due to high costs of liability in some economies.

Liability based on fault and strict liability is not completely separate categories. Fault liability is a system where liability depends upon the requirement that the damage is caused by the faulty behaviour of a tortfeasor. In a system of strict liability no such requirement of faulty causation of damage exists. As the question what are the requirements to establish strict liability, the answer is that the exact requirement differ from case to case, and that different sorts or types of strict liability exist. As to the question how and when exactly the fault criterion is eliminated (and thus where the realm of strict liability begins) the answer is not

[7] European Group on Tort Law, *Principles of European Tort Law* (SpringerWien/NewYork, 2005), pp. 103/104.

always clear. Sometimes, it is not clear whether one is still in the realm of liability for fault, or already in the sphere of strict liability.[8]

It is difficult to establish a clear border line between the fault and strict liability. Many legal theorist said that strict liability and fault liability are alternatives in terms of convenient classification and exposition, but closer examination suggests that in terms of substance there is really a continuum rather than two categories. Undoubtedly, there are many cases in which it is possible to see "grey areas" between these two liabilities.

III. Strict Liability as a Response to Ultra-Hazardous Conduct

To explain why strict liability may not only be social desirable, but why it may also constitute an appropriate response, academic writers and legislators have traditionally based themselves on the concept of ultra-hazardous risk. This concept underlies many of the liability rules which exist in civil law systems and which impose strict liability for narrowly defined risks, such as those triggered by cars, railways, pipelines etc. [9]

The broad conception of liability as a response to ultra-hazardous conduct is based on the idea that those who have benefit from such conduct shall bear the costs which might arise therefrom. However, such a broad conception leads to, subtly said, doubtful issues. For example, the issue of a precise definition of the term ''ultra-hazardous'', the need for reduction of this liability to things and activities, to the general notion of ''activities'' or to the source of hazard in general. Another important issue emerges as a result of these challenges: what will be the action of the legislator and judges within the scope of this segment of tort law, i.e. should the legislator persist to draw up a comprehensive list of sources of hazard as the scope of strict liability or stipulation of these sources should be a task of courts?

The German tort law represents the best example of the narrowly regulated concept of strict liability as a response to ultra-hazardous conduct. In fact, this legal system includes the possibility to define the activities or sources of hazard which may be considered ultra-hazardous by courts. This role exclusively refers to the legislator who decides thereupon by enacting special laws. Such a peculiar approach has had effect on many other European systems of civil law. Nevertheless, not all those systems have adopted such a restrained role of courts. Austria has a totally different legal system which is characterized by the fact that judges play an important role in extending the list of conduct which can be qualified as ultra-hazardous.

The French and Portuguese have gone even further: their civil codes contain explicit provisions that give judges powers to qualify any activity which seems risky by its nature or serves as an instrument for carrying out a hazardous activity as hazardous.[10]

Generally speaking, European legal systems offer various solutions with regard to this part of strict liability. Specific differences appear when new laws are enacted or when the existing laws are supplemented with new provisions based on a various approach to qualification of hazards and risks arising thereform, on the manners of extension of the hazardous conduct list and its specification and on the fashion of making decisions on a respective liability. Due to these concerns, the need for unification of European tort law in the area of strict liability

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[8] B. A. Koch and H. Koziol, *Unification of Tort Law: Strict Liability* (The Hague/London/New York, 2002), pp.45/46.

[9] F. Werro, V. V. Palmer, *The Boundaries of Strict Liability in European Tort Law* (Bern/Bruxelles/Durham, 2004), pp. 17.

[10] Ibid, pp. 401-404.

is often in the spotlight. The unification should be implemented by maintaining the respective appropriate solutions of member states and by creating fundamental guidelines aimed at closing the huge gap between some legal systems regarding solutions belonging to the field of tort law.

Still, analysis of this kind of strict liability in different legal systems may bring to the conclusion that today most legal systems include rules for strict liability referring to the following activities: railroad, motor vehicles, oil pipelines, aviation, nuclear plants, genetic engineering and some activities connected with environmental concerns.

IV. Liability for Dangerous Things and Dangerous Activities

Neither the Croatian nor the Hungarian legal system defines dangerous things and dangerous activities. It is up to the judicial practice to determine in each concrete case under which conditions a thing or an activity can be considered dangerous.

Generally speaking, in order to qualify a certain thing as dangerous, its application, properties, place and ways of usage shall constitute a higher level of danger, so this thing shall be paid special attention. An activity is characterized as dangerous if its regular course and technical nature as well as ways of its performance can be harmful to people's health or property, hence this risk requires special attention of people performing it and of people who has contact with it.[11]

According to the Croatian judicial practice, dangerous things can be cars in motion, wild animals, explosive devices, devastated buildings, weapons, industrial machinery etc. while dangerous activities may refer to railroad and tram-related activities, activities leading to harmful emission, mining, hunting and fireworks activities etc.

Numerous European legal theoreticians agree that courts tend to avoid making decisions on the culpability of the tortfeasor in a way that their qualification of certain things as dangerous enables application of the rules for strict liability providing, on one hand, maximum protection of the injured person while, on the other hand, courts sometimes, by avoiding making decisions on the culpability of the tortfeasor unnecessarily broaden the rules regulating strict liability. The positive and negative effects of such broadening require comprehensive analysis, but one thing is certain - this gap needs to be carefully approached by courts in every concrete case when deciding thereupon, taking account of all the consequences of a decision on the type of liability.

Damage done by a dangerous thing implies the liability of its owner whereas liability for damage done by a dangerous activity refers to the person performing it. Instead of the owner of a thing, the person having illegally deprived the owner thereof, the person having been entrusted it or the person who is obliged to supervise it but is not the owner's employee shall be liable for the thing. However, the owner shall be liable for a thing if the thing has been entrusted to the person who is not competent for or entitled to operating it.

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[11] These definitions have resulted from joint efforts of judicial practice and legal theory. See P. Klarić, M. Vedriš, *Građansko pravo* [Civil Law] (Official Gazette, Zagreb, 2009) pp. 615.

Nevertheless, if damage has resulted from a hidden flaw or property of a thing, this shall imply, beside the liability of the person who has been entrusted it, the owner's liability as well, of course under the condition that the owner failed to warn the former thereabout.
The tort-feasor can be released from their liability if they prove that one of the presumptions of liability is not applicable in a certain case, if damage has resulted from force majeure or solely from action of a third party which could not be anticipated and consequences of which could not be eliminated. If the third party has only partially contributed to the emergence of damage, the tort-feasor shall not be released from liability but shall, with the third party, face joint liability for the damage.

V. Liability for Damage Caused by a Motor Vehicle in Motion

Damage suffered by third parties with respect to being driven in a motor vehicle implies the liability of its owner. The holder of the registration certificate is considered to be the owner of the vehicle. A third party is an injured person who is neither the owner of the motor vehicle nor an unauthorized user of the motor vehicle nor the person involved with manoeuvring the motor vehicle. These can be pedestrians, bicycle riders, passengers etc.
Pedestrians as participants in traffic are treated as potential injured persons[12], so they are subject to unconditional application of the principle of strict liability.
The Directive 2005/14/EZ[13] primarily regulating compulsory motor car liability insurance is based on the fact that material and non-material damages suffered by pedestrians, bicycle riders and other non-motorized traffic participants, in most cases also being the most exposed party to injuries in car accidents, shall be covered by compulsory motor car liability insurance if the national civil law grants them the right to compensation of damage, which, pursuant to national legislation, neither excludes civil liability nor influences the amount of decreed compensation.
The rules for liability of the operator (driver) for physical injuries or death of passengers as well as for loss or damage of luggage used to be prescribed by international conventions, but recently they have evoked large interest of the European legislator[14]. Accordingly, in the last 15 years, a fair number of regulations on the operator's liability for damage suffered by passengers (death, body injuries, loss and/or damage of luggage) have been adopted.
In Croatia, according to Law on obligatory Relations[15], the law foresees joint liability of the vehicle owner for damage done to third parties caused by motion of two and more motor

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[12] Same B. Matijević, *Pješaci - kroz propise i sudsku praksu* [Pedestrians – through Regulations and Judicial Practice], (Osiguranje, no. 7-8, 2010), pp. 71.
[13] Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0014:0014:EN:PDF (last accessed on 19.12.2011.). This Directive has been amended by the Directives 72/166/EEZ, 84/5/EEZ, 88/357/EEZ, 90/232/EEZ and the Directive 2000/26/EZ of the European Parliament and of the Council relating to motor car liability insurance.
[14] S. Petrić, *Usklađivanje europskog odštetnog prava* [Harmonization of European Tort Law] (Collection of Works - Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, no. 7, Mostar, 2009), pp. 132.
[15] Law on obligatory Relations ("Narodne novine" no. 35/05 and 41/08).

vehicles. Every owner is obliged to fully compensate for damage done to the injured person and the injured person may require from a joint debtor to fully meet the respective liability. The question of possible exclusive culpability of one of the motor vehicle owners considering damage done to a third party can only be dealt with in a recourse claim initiated by one of the involved parties.

When it comes to damage done to one of the motor vehicle owners (car accident participants) by the other vehicle owner, the rules for culpability for damage are applied despite the fact that motor vehicles are considered dangerous things.

When motor vehicle owners do damage to each other, their roles involve both the tort-feasor and the injured person. If one of them is solely blamed for the harmful event, this person shall be liable for all the emerged damage, i.e. damage done to both vehicles, while if they have both caused the accident, either owner shall be liable for damage proportionally to the degree of their blameworthiness. In case nobody is to be blamed for the accident, the total damage is divided into equal shares. However, the court might make a different decision. The Hungarian rules are a bit different from this solution: if the cause of damage is a malfunction that occurred in the sphere of both parties' activity involvingconsiderable danger and, furthermore, if such malfunction cannot be attributed to one of the parties, eachparty shall, since individual responsibility cannot be established, bear liability for his own loss.

Cases of unauthorized exploitation of a motor vehicle that are not approved of by the owner imply releasing the owner from the liability for compensation of damage to third parties and this damage shall be compensated for by the unauthorized user. The owner of the vehicle shall also take joint liability if their action or the action of the person who was supposed to take care of the vehicle has enabled the unauthorized exploitation of the motor vehicle.

VI. Liability for Defective Products

Nowadays, the field of liability for defective products is featured by the greatest achievements in terms of unification of strict liability in European law. To a great extent, these achievements have resulted from the 1985 Directive of the EC Council 85/374/EEZ stipulating equalization of the right of member states with respect to liability for defective products. This Directive has been amended by the 1999 Directive 1999/34/EZ (hereinafter: Directive). The latter Directive has been integrated into the legal systems of all the member states of the EU and has had major effect on numerous other legal systems such as the Australian, Japanese and Swiss legal system.

The manufacturer’s liability for defective products in the Croatian and Hungarian legal system has assumed a new dimension by adopting this Directive and now our tort law includes several relevant and very similar solutions for issues relating to this kind of strict liability.

Accordingly, the Directive stipulates that the injured person is obliged to, concerning damage compensation, prove the damage, defect and the link between the defect and the damage. If two or more people are liable for the damage, their liability shall be joint and several. A product is, in compliance with the provisions of the Directive, defective if it does not meet the expectations in terms of its safety, taking into consideration all the circumstances, including: presentation of the product, exploitation of the product, i.e. its reasonably expected purpose

and the time of its commercialization. A product shall not be considered defective only because a better product is subsequently put into circulation.[16] As well, Directive determines that liability include only material damage, namely damage caused by death or by personal injuries, damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property: is of a type ordinarily intended for private use or consumption, and was used by the injured person mainly for his own private use or consumption. [17]
The producer shall not be liable if he proves:
(a) that he did not put the product into circulation; or
(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.[18]
The Directive was adopted with the declared objective of improving the protection of the product liability cases. Liability was to be based on an assessment of the product condition rather than on an evaluation of the producer's behaviour. However, if one takes a closer look at the notion of „defect“ which lies at the heart of the Directive, it seems less clear how strict the Directive really is. Another reason why this may be a matter of doubt is that most Member States have availd themselves of the option, expressly offerd by the Directive, to exclude for development risk.[19] [20] Nevertheless, the degree of harmonisation reached by the Directive is limited, and the different conceptual devices that were developed in national legal systems prior to the adoption of the Directive remain important in many areas.

VII. Civil law measures in environmental protection

Civil law can play only a secondary role in the field of environmental protection. The reason for this is that the rules of environmental protection build a very complex field of regulation where the emergence of administrative law is more significant. Despite of this fact, the authors' essay tries to outline the framework of civil law measures which can play a role in the prevention and in the mitigation of environmental damages.

In Hungary, the standard of civil liability according to environmental damages is the regulation of the Civil Code referring to hazardous operation. According to this a person who carries on an activity involving considerable hazards shall be liable for any damage caused thereby. Being able to prove that the damage occurred due to an unavoidable cause that falls beyond the realm of activities involving considerable hazards shall relieve such person

[16] Article 4, 5 and 6 of the Directive 85/374/EEC
[17] Article 9 of the Direktive 85/374/EEC
[18] Article 7 of the Directive 85/374/EEC
[19] Op. cit. n. 9, at pp. 437.
[20] Recent case law by the European Court of the Justice and by national courts suggest that the exact scope of the development risk defence is contraversal as ever.

from liability. These provisions shall also apply to persons who cause damage to other persons through activities that endanger the human environment[21]. The Act on environmental protection[22] (hereinafter Ktv.) defines the activity that endangers human environment as a measurable and significantly unfavourable alteration occurs directly or indirectly in the environment or in a component of the environment or as a directly risk of a measurable and significantly unfavourable alteration occurs directly or indirectly in a service provided by a component of the environment.

According to Section 345 of the Civil Code if someone causes damage to other persons through activities that endanger the human environment he can't be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation. If the one who caused the damage would like to be relieved, he must prove two cumulative conditions: the damage caused by a reason which was unavoidable and fall beyond the realm of activities involving considerable hazards. There are some similarities between strict and fault liability: the injured party has to prove the wrongful act, the damage and direct causal link between the wrongful act and the damage suffered. The other similitude is that the strict liability has a relieving character; if the tortfeaser can prove without any doubt that the damage caused by an exterior and unavoidable reason, he will relieve from liability. The category of unavoidability was précised by court practice. According to this, an event or a cause must be regarded as unavoidable, if there is no possibility to avoid it, regarding the given level of technical development and the carrying capacity of the economy. Consideration of the carrying capacity of the economy means that a reason can be regarded as an unavoidable one if it would be avoidable through absurd financial measures. External and avoidable reason can be the force majeure, the injured party's unavoidable behaviour, third party's unavoidable action or other external and unavoidable force's impact that cannot be regarded as force majeure[23]. In the followings we would like to introduce force majeure and third party's unavoidable action.

In case of force majeure, we can state, that the reason of the damage not falls beyond in the tortfeaser's the realm of activities, so in fact, there is no direct causal link between the wrongful act and the damage suffered. In this case we should presume that there is no liability because the direct link between the wrongful act and the damage suffered is a condition of civil liability. But we have to state that in case, force majeure only has effect through the hazardous operation. The relevant question according to force majeure whether the damage was avoidable. If our answer is yes, we cannot speak about force majeure, in this case, the base of liability according to hazardous operation is that the tortfeaser didn't' neutralize the danger. If it couldn't be eliminated, we talk about force majeure, the tortfeaser cannot be challenged. In legal theory and practice, force majeure has an objective and a subjective character according as the interfering reason is avoidable or unavoidable.

[21] Act IV. of 1959. on the Civil Code Section 345.
[22] Act LIII. of 1995. on the General Rules of Environmental Protection
[23] Eörsi Gyula: A polgári jogi kártérítési felelősség kézikönyve Budapest, 1966. p. 286-289

According to the objective opinion, force majeure are reasons which cannot be avoidable with any human effort; the subjective opinion states that all of the causes can be regarded as force majeure which was unavoidable regarding to the given persons abilities and possibilities, even if it was possible. The extreme objective opinion is dangerous, because it interprets the limits of force majeure too closely so it wouldn't be stated in practice. In this case, liability would approach absolute liability. The too subjective interpretation would result that strict liability would turn into fault liability, and this phenomenon would cease the aim of the regulation.[24]

Force majeure is a circumstance, the effect of which cannot be avoidable by human power. Objective and relative category too; relative because by the technical development its scope is narrowing, and it also contains phenomena the effect of which can be avoidable, but only with extreme financial costs. Generally the forces of nature are regarded to be force majeure which causes damage with their power or sudden appearance. We have to state that force of nature which is unavoidable but also predictable is not the part of force majeure's category (fatigue, rusting).[25]

Third party's unavoidable and external action is very close to force majeure: it is an condition which becomes unavoidable because its unpredictable character, although it can be avoidable by the objective means. The pre-condition of unavoidability in the case of third party's action is the unforeseeability of the event. This is its main difference from force majeure: most of the cases, the force majeure is unavoidable even it is foreseeable. According to this we can talk about third party's unavoidable action if it fulfils a subjective and an objective condition: the injured party didn't have to foresee the third party's interference, and this interference couldn't be avoided.[26]

In case of environmental damages, significant criticism appeared against civil law liability, namely that it is not easy to define the injured parties or the extension of the damage.

In such situation it is really difficult to circumscribe the circle of the injured parties that is why the most significant aim of the environmental protection is the "polluter pays" principle. This means if the subject of defence would be damaged, the usage of an administrative sanction is valid. If somebody takes environmentally harmful action in his own land, he causes damage in his own property. According to the civil law principle casum sentit dominus, the damage will encumber on him; but by the rules of the environmental protection act, regarding the harm of the environmental component, the authority can impose penalty on him.

There is another civil law measure which can be used in the name of environmental protection[27]: law relating to neighbours. In case of environmental damages, law relating to

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[24] Eörsi Gyula: Kártérítés jogellenes magatartásért Budapest, 1958. p.106-107.
[25] Eörsi Gyula: Kötelmi jog. Általános rész Budapest, 1997. p. 290.
[26] Eörsi Gyula: Kártérítés jogellenes magatartásért Budapest, 1958. p.109-112
[27] Glossary of Corporate Governance and Business Integrity Terms 2010/2010. Ed: Czirják László, AmCham Hungary, Budapest, 2011,p.19.

neighbours only "neighbouring" in its name; an environmentally harmful action can have effect in a few hundred kilometres too. So the Civil Code's regulation[28] relating to neighbours could prevail only if it can be interpreted widely so much so that it would cover every relationship between humans.[29] The "needlessly disturbance" at the same time means that the "neighbour" has to bear the "needful disturbance". This regulation of the Civil Code originally presumed that the neighbours will disturb each other equally so over a long term their actions will be compensated. It is going to show that obviously this presumption cannot be materialized in case of environmental pollution. We can see from the thoughts mentioned above, that in the modern age of environmental impacts and pollutions at the industrial level the law relating to neighbours can give only a slight defence to the injured parties.[30]

The new Civil Code which was accepted in 2009, but have never come into effect, gave regulations on liability for environmental damages as an individual form of civil law liability. According to this, if somebody causes environmental damage shall be liable for such damage. Being able to prove that the environmental damage occurred due to an unavoidable cause that falls beyond the realm of activities of the torfeasor or caused by the behaviour of the injured party, shall relieve such person from liability. Liability for environmental damage or for any risk to the environment shall fall joint and severally - pending proof to the contrary - upon the person who is registered as the owner or possessor (user) of the property after environmental damage or threat to the environment has occurred on which the activity resulting in damage to the environment or posing imminent threat to the environment was carried out. The period of limitation for claiming environmental damages shall be thirty years. We can see from the thoughts mentioned above, that the law maker recognized the aim, which appears in the environment's civil law defence, that is why it wanted to regulate it separately from the damages originating from hazardous operation.

This problem raises some interesting questions, e.g. wouldn't it be reasonable to prescribe absolute liability in case of environmental damages, especially as it is prescribed for example in cases of nuclear damages. But if we look back for the thoughts mentioned above about force majeure or third party's action, we can see that the prescription of absolute liability would impose such huge charges to the industrial persons (which are the biggest environment polluters) in the area of prevention. This phenomenon would accelerate the prices of the goods, and would create a lot of other problems which can be derived from this.

Probably the biggest environmental disaster of Hungary was occurred on the 4th of October, 2010. On that day, the MAL Hungarian Aluminium Production and Trade Company Limited

[28] According to Section 100: An owner is obliged, while using a thing, to refrain from any conduct that would needlessly disturb others, especially his neighbours, or that would jeopardize the exercise of their rights

[29] Sólyom László: Környezetvédelem és polgári jog, Akadémiai Kiadó, Budapest,1980 p.16.

[30] Sólyom László: Környezetvédelem és polgári jog, Akadémiai Kiadó, Budapest,1980 p.17.

by Shares' (hereinafter MAL Zrt.) sludge reservoir next to Ajka gave away, and approximately one million stere of red sludge suffused the lower level parts of Kolontár, Devecser and Somlóvásárhely. This corrosive fluid, which had alkaline effect, covered 40 square kilometres, which had unforeseeable ecological and economic consequences. Ten people were killed by the muck — most from drowning — and more than 120 had chemical burns from the highly alkaline mud, and the wildlife of creek Torna was destroyed. According to certain calculations, the catastrophe costs more approximately 35 billion forints to the government so far. To date, the real direct reason of the disaster hasn't been cleared: few of the experts accuse the sinking of the reservoir or the soaking of the wall of the embankment; according to Zoltán Illés under-secretary of state the intentional behaviour of the cooperation is added to these previous facts, when it overfilled the reservoir.[31] A new opinion of an expert states that the direct cause of the accident was the circumstance, that the solid embankment was built to a soft, clay land, therefore, the embankment was not able to comply with the natural movement of the ground.[32] According to MAL Zrt. the disaster was occurred because the sludge reservoir's corner was slipped in the clay ground. In other cases when the aluminious earth is made by this technique, this has never happened before, so this situation was unforeseeable. The tragedy was caused by the defects occurred during the phases of planning and building of the reservoir, the time when the owner of the firm was the state.[33] Very interesting circumstance in the case, that the firm's catastrophe plan which was confirmed by the authority, only states three possible cases, when the embankment could be destroyed: high levelled earthquake, terrorist attack, or war bombing. The compound and the amount of the spilled material were underestimated too: they expected only 400 thousand stere of water and 100 thousand stere of red mug to be flown; the corrosive material which caused the real damage, wasn't even mentioned.[34]

There are more options to mitigate the accident's consequences in legal way. It's obvious that the persons, who have responsibility by their own, can be held liable through criminal procedure. The public prosecutor's office got the documents of the investigation on the 23th of December, 2011. It has thirty days to decide whether it intends to charge the accused persons (this deadline can be prolonged with 30 more days if it is reasonable).

To enforce the indemnification liability both the Ktv. and the Civil code contain regulations. Damage caused to other parties by virtue of activities or negligence entailing the utilization or loading of the environment shall qualify as damage caused by an activity endangering the environment, and the provisions of the Civil Code on activities entailing increased danger (hazardous operation) shall be applied[35]. According to this, the MAL Zrt. can only be relieved

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[31] http://hvg.hu/itthon/20111222_illes_zoltan_iszapomles (2011.12.23.)
[32] http://hvg.hu/itthon/20111222_kolontar_gat_mernok (2011. 12.13.)
[33] http://hvg.hu/itthon/20110915_mal_birsag_fellebbezes (2011.12. 23.)
[34] http://hvg.hu/itthon/20101015_hatosagok_engedely_mal_katasztrofavedelmi (2011.12. 27.)
[35] Ktv. Section 103.

from its liability, if it can prove that the accident was caused by an external and unavoidable reason that falls beyond the realm of activities involving considerable hazards. The company referred for a long time to the unusual amount of rain and the unusual high wind which resulted slipping of the reservoir. The appointed experts will play a significant role to clarify these circumstances. But it is yet clear that the company don't have many chances to render such an immediate and unavoidable event, against which the firm could defend with disproportionate burdens and which was the obvious and disclosed reason of the disaster. For this it is also vital that the experts will not be able to find any mistake or abuse during damage elimination and harm-reduction.

In Croatia, issues of environmental protection are mostly regulated by Environmental protection Act 2007. Since Croatia and Hungary have basically similar environmental protection legal solutions (mostly because accepting the acquis communitarie), also because limited extent of the paper, we will not make a special reference to Croatian legislature.

Since Hungary is a member of European Union, and Croatia will be a member soon, it is important to analyze the relevant European regulations.

VIII. Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage

In the history of the integration, environmental protection played a significant role from the beginning, although it is only an individual policy of the EU since the Single European Act, which was come into force in 1987. Nowadays, 15 % of the secondary legislation[36] is made in the topic on environment, environmental protection; all of them contains rules referring on liability, but they let the member states to create the domestic laws on the system of liability.[37] The Union legislate widely in the field of environmental protection, both towards the interior and in international grounds. Very important area of this kind of legislation is the sustainable development, tackling climate change, air and water protection, protection of nature and biodiversity. Since the European Union has an international legal personality, it is a party of international environmental conventions too. Such of this is the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which with the state parties engaged themselves to reduce their emissions of certain greenhouse gases by at least 5 % in the period of 2008-2012, compared with the level of emission in 1990. The Report of the Commission notes that till 2007, the member states' greenhouse gas emissions have reduced by 12.5% compared with 1990 (reference year), while their economic growth has continued.[38] Other international conventions are for example convention on Long-Range Transboundary Air Pollution, Helsinki convention about trans-boundary watercourses and international lakes, Bonn convention about conservation of migratory species or the convention of the United Nations about combat desertification in countries seriously affected by drought and the convention of transboundary effects of industrial accidents.

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[36] On secondary legislation see:Kecskés András: Felelős társaságirányítás (Corporate Governance); HVG-Orac Lap-és Könyvkiadó Kft. Budapest, 162.o.

[37] Bándi Gyula – Erdey György – Horváth Zsuzsanna – Pomázi István: Az Európai Unió környezetvédelmi szabályozása. Budapest: KJK-Kerszöv, 2004, p.13.

[38] http://europa.eu/legislation_summaries/environment/cooperation_with_third_countries/l28060_en.htm (2011. 12. 27.)

According to our topic maybe the most important regulation is Directive 2004/35/EC. The European Parliament accepted this Directive on the 21th of April, 2004. This regulation put emphasis on liability of administrative kind instead of damage liability.[39] The principle of "polluter pays" is a very important prescription of the Directive, which has a significant effect on regulation according to environmental protection. The Directive put special emphasis on the obligation of the operator[40] in the field of prevention, and authorizes the competent authority to take the measures needed. According to this where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. Member States shall provide that, where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible. The competent authority may, at any time requires the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat; requires the operator to take the necessary preventive measures gives instructions to the operator to be followed on the necessary preventive measures to be taken; itself takes the necessary preventive measures. The authorithy also has a wide competent if the pollution has already occured. The polluter has to fulfil really strict prescriptions: it has to take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services

Another important duty of the operator is to take the necessary remedial measures. Operators shall identify, in accordance with the Annex of remedying of environmental damages, the potential remedial measures and submit them to the competent authority for its approval. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first. In making that decision, the competent authority shall have regard, inter alia, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery. Risks to human health shall also be taken into account. Important rule is that the operator shall bear the costs for the preventive and remedial actions taken.

We have to see, that to eliminate the environmental damages serious financial source is needed. The base of this source can be the financial securities. There was a severe debate during the construction of the Directive about making them compulsory. In the end, the final text contains only the obligation to the member states to take measures to encourage the

[39] Bándi Gyula: Az Európai Bíróság környezetjogi ítélkezési gyakorlata, Osiris Kiadó, Budapest, 2006. p.242.
[40] So the Directive refers to such damages occured int he enviroment which was caused by operator

development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities. The Commission had to make a report if there was any political possibility to prescribe these securities compulsory. [41]

One objection against the Directive is that its applicability is quite narrow: it refers only damages caused by operators, it refers to a specific group of environmental elements and it refers to such actions which are dangerous to the human health or the environment defined by European rules. These regulations cause other problems, because it merges the strict liability based on the principle polluter pay to fault liability, and this could lead to unwished relieves.[42] The Directive, in case of actions which are not in the Annex III, don't prescribe strict liability, so in cases culpability can be relevant.

The authors would like present some relevant cases according to the practical effect and usage of the Directive.

In the case of C-378/08 the European Court declared that the Directive does not preclude national legislation which allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the "polluter pays" principle, in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities. The Directive must be interpreted as meaning that, when deciding to impose measures for remedying environmental damage on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must, first, carry out a prior investigation into the origin of the pollution found, and it has a discretion as to the procedures, means to be employed and length of such an investigation. Second, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures are directed and the pollution.[43]

In the joined cases C-379/08. and C-380/08[44]. the Court stated further important principles according to the Directive. According to this, the directive, must be interpreted as permitting

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[41] 2004/35 EC Directive Article 14.

[42] Csapó Orsolya: A környezeti károkért való felelősség kérdése az Európai Unióban lásd http://www.jak.ppke.hu/hir/ias/20073sz/10.pdf (2011. 12. 28.)

[43] OJ C 301, 22.11.2008.

[44] OJ C 301, 22.11.2008.

the competent authority to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already implemented or begun to be put into effect.[45] In circumstances such as those in the main proceedings, the Directive does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.

IX. Conclusion

Faced with an increase in technical and industrial risks, many European legal systems have since the end of the 19th century introduced liability rules that provide for some form of strict liability. Contemporary requirements in terms of technical and technological advancement, globalization of industry, modern traffic, free movement of goods, services and capital generate complicated legal relations concerning damage compensation which cannot always be resolved by applying the liability criteria based on fault. Nowadays, almost all European countries deal with strict liability within the sphere of their legislature. There are more and more legal regulations and/or new provisions that foresee liability for damage based on the principle of causation. Beside this open development, strict liability is evolving as part of judicial practice too. In Croatian and Hungarian legal systems this is especial expressed in the area of strict liability for dangerous thing and dangerous activities in which field neither the Croatian nor the Hungarian legal system defines dangerous things and dangerous activities. It is up to the judicial practice to determine in each concrete case under which conditions a thing or an activity can be considered dangerous. Since the strict liability is generally opposed to liability based on fault only in theoretical level, legislator neither the judge are not in the simple position deciding scope or way of determination strict liability rules. That strict liability and fault liability are not totally separate categories is easy to see in the area of liability for damage caused by a motor vehicle in motion. When it comes to damage done to

[45] However, in order to adopt such a decision, that authority:

- is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;

- is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and

- must take account of the criteria set out in Section 1.3.1. of Annex II to the Directive and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

one of the motor vehicle owners (car accident participants) by the other vehicle owner, the rules of liability based on fault are applied despite the fact that motor vehicles are considered dangerous things. But, it is possible to unify at least some parts of strict liability, instead the fact that there is “grey area” in between strict liability and fault liability and the fact that there are many differences in national strict liability rules, which can be seen in solution concerning liability for defective product. Encouraged by the success of the product liability directive, the European Commission also proposed to harmonise liability for services. But liability under this proposal rest on a rebuttable presumption of fault. Another area where harmonisation is likely is environmental liability. Although the approximately 15% of the secondary legislation of the European Union has been dealt with the question of environmental protection, a uniform proposal of the regulation in the field of civil liability haven't been accepted yet. The reason for that might be the fact, that the member states usually react[46] very sensitivily to every harmonizing reccomendation, which would interfere too deeply to their domestic law. Such an area the civil law itself, about which the intent ot unify grows strong from time to time, but we are still waiting its result. According to several opinions, the harmonization of this area would be impossible, because of the differences between the member states' regulation system. A uniform conception of the question of liability to environmental damages was the Convention of the Council of Europe on Civil Liability for Damage Resulting from Activities Dangerous to the Environment which was accepted in 1993, in Lugano.[47] It was signed only by seven states, but none of them ratificated it, so it didn't came into affect. This document would define the cathegory of dangerous activity, or dangerous substance, and also it would dealt with the possibilities of aquittances of the tortfeasor. The one who caused a damage would be relieved from his liability if he could prove that the damage was caused by an act of war, or a natural phenomenon of an exceptional, inevitable and irreristable character. The situation is the same if tha damage was caused by a third pary, or it was occured because the torfeasor followed a specific order or compulsory measure of a public authorithy. The limitation period was defined in three years, and the convention prescriped the cooperation of certain organizations and authorities too. We could see, that the convention would decleare unambiguously those regulations which would refer to the civil liability of the tortfeasor. Although, it didn't came into effect, it obviously had influance to such regulations which was accepted since then. This document put special emphasis on not only the compensation and the mitigation of the damages but also on prevention. The disaster which was occurred in Hungary in 2010 is good precedent to the legislators to aggravate the regulation according to the liability to environmental damages, and it would be important that the level of the protection would be the same in every member states.

[46] Halász Vendel-Kecskés András: Társaságok a tőzsdén, HVG-Orac Lap- és Könyvkiadó Kft. Budapest, 2011. p.212.
[47] See: http://conventions.coe.int/Treaty/en/Treaties/Html/150.htm (2012.01.12.)