

Characteristic of Vicarious Liability

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Abstract

Vicarious liability may be determined as the liability of one party for the damage caused by a third party. Unlike personal liability, a person is responsible for the damage who is not guilty and is not involved in the occurrence of the harm. It is believed that it is unfair to impose the liability to a person for a harmful action of others; however, it is considered that this rule serves to the principles of fairness.²¹ The legal principle of vicarious liability is accepted in society. This is the occurrence when unification of the risk and interest takes place. A person who engages another person for fulfilling his/her goals easily determines the result. Accordingly, the probability of the occurrence of damage by the agent objectively increases.²² In this regard, it is paramount to define the preconditions according to which, responsible persons are determined for indemnification. This issue is differently regulated under Georgian and foreign legislations.

Keywords: Vicarious liability, liability, damage, employer, employee, activity creating increased danger

Introduction

The effective legislation of Georgia, which regulates the occurrence of vicarious liability, mostly differs from the legislation of foreign countries. It should be noted that in compliance of the Civil Code of Georgia the Vicarious Liability is established only during the existence of employment relationship and unlike the legislations of foreign countries, does not spread it to other civil legal relations – for example in case of existence of the assignment agreement. The Civil Code of Georgia does not regulate the rule of responsibility of employer and employee at the time of existence of enterprise risk, while the action of the employer creates increased danger. Exact regulation of the mentioned issue is paramount, because a human encounters similar relations in everyday life.

²¹ H.Wicke, Vicarious liability: not simply a matter of legal policy, *Stell LR* 1998, p. 21.

²² H.Wicke, Vicarious liability: not simply a matter of legal policy, *Stell LR* 1998, p. 23.

The aim of this research is to detect the drawbacks in Georgian legislation that regulates the vicarious liability and to plan possible ways to resolve it.

Tort law has the function of protecting safety of civil relations; furthermore, it has the function of fairly allocating the risks and civil liability. Tort law ensures protection of the rights and interests of individuals and excludes undue interference in it. Natural law prohibits interference in the interests and right of individuals without their will. Should a person's rights and interests be violated, a victim is eligible to make a claim for damage and demand restoration of the violated rights. The claim for compensation of damage is the legal means to protect the disbalance arising from the damage. A tortfeasor is liable to redress the damage and in this way the negative results is eradicated for the victim. This rule clearly indicates that the primary role of the tort law is to compensate the damage. At the same time, the tort law has the function of prevention.²³

Based on the estimation of the conceptions of national law, tort law is divided into two main directions. The first direction is fault-based liability and the second direction is liability without fault. The first one imposes the liability to a person based on his/her faulty action, which is a deviation from the standard of conduct. The second one relates the cases when a person is liable to compensate the damage without his/her fault and regardless whether his/her action is in compliance with the standard of conduct or not.²⁴

One part of scientists justifies the principle of liability without fault due to the protection of the interests of a victim. Although it is unfair to hold the most prudent person responsible, however the principle of justice prevails.²⁵

Nowadays, the law of continental Europe as well as common law foresees the imposition of liability without fault. However, it should be mentioned that in the law of continental Europe the liability without fault is exception from the general rule, as for the common law, liability without fault is the general rule, especially in the contractual relations.²⁶

²³ G. Batlidze, The responsibility caused by faulty action in tort law, The review of Georgian business law, 4th edition, 2015, p. 17-18.

²⁴ G. Batlidze, The responsibility caused by faulty action in tort law, The review of Georgian business law, 4th edition, 2015, p. 17.

²⁵ K. Kochashvili, Fault as the condition of civil responsibility, Law journal #1, 2009, p. 112.

²⁶ K. Kochashvili, Fault as the condition of civil responsibility, Law journal #1, 2009, p. 108.

The absence of a fault does not preclude subjective condition of the imposition of liability. The subjective condition for the imposition of the liability is the risk of tortfeasor. The risk is a subjective condition when the person more or less consciously makes the probability of damage in the future; however, the person is not obligated to determine the inevitability of the damage in advance, because the damage may not occur. As to the fault, in case of its existence, the tortfeasor always knows the likelihood of the occurrence of unlawful consequence, while in case of existence of the risk, it is assumed unlawful outcome.²⁷

The vicarious liability is the absolute liability when a person is responsible for the damage caused by the third person who acts in compliance with the interests and in favour of the principal. The vicarious liability is one of the form of strict liability when the principal is jointly liable together with the agent to compensate the damage, inflicted the damage by the agent in course of performance of the duty.²⁸ According to this arrangement, not only the agent, but also the principal is obliged to protect the law and order, their action is to be placed in the framework of the law. Such regulation is efficient, because the principal will always try to control the agent to the extent possible and will take all necessary measure to avoid the harm.²⁹ Meanwhile, in the most cases, the responsible person is the solvent principal together with the tortfeasor agent what facilitates for the victim to satisfy his/her demand to receive inflicted damage.³⁰

The fact that the principal is responsible to compensate damage without any action or fault, confirms that the vicarious liability is one of the form of the liability without fault. However, this does not exclude the possibility that there may exist a fault of the principal.³¹

There is a different opinion whether the vicarious liability is the liability without fault or not. One part of scientists believe that the vicarious liability is the liability without fault, since at the first stage the responsibility is imposed on the non-culpable principal. According to the opposite opinion of the second part of scientists, as the principal has the possibility to demand redress from the agent (tortfeasor), the liability without fault does not exist.³²

We encounter the most cases of vicarious liability in employment relationship; namely, the employer is responsible to compensate the

²⁷ Dmitrieva O.V. Liability without fault in civil law, Russia 1997, p. 21.

²⁸ Reineir H. Kraakman, Vicarious and corporate civil liability, 1999, p. 669.

²⁹ Reineir H. Kraakman, Vicarious and corporate civil liability, 1999, p. 670.

³⁰ J.W.Neyers. A Theory of Vicarious Liability, Alberta Law Review, 2005, p 6.

³¹ J.W.Neyers. A Theory of Vicarious Liability, Alberta Law Review, 2005, p 2.

³² Dmitrieva O.V. Liability without fault in civil law, Russia 1997, p. 29-30.

damage that is inflicted by the employee during the performing of labour duties. It should be noted that such rule is not limited with the employment relations. In the countries of the common law, the similar regulation is also applied in cases of the existence of the assignment contract.³³ In most cases, the principal is obligated to compensate the damage caused by the agent when the latter is the executor of the principal's will and he/she acts in compliance with his/her interests.

Vicarious liability is the rule for responsibility. In this case, the principal is responsible not due to its action, but on the basis of legal relations which the principal has with the agent. This rule is different from the traditional form of liability according to which, the person is liable for his/her action.³⁴

Vicarious liability is regulated in compliance with the Article 997 of the Civil Code of Georgia according to which, a person shall be bound to compensate the harm caused to the third person by his/her employee's unlawful act when the latter was on duty. The liability shall not accrue if the employee acted without fault. The third person is any person, regardless he/she is the employer's worker or not. The person that is liable to compensate the harm for the unlawful act of his/her employee, may be a legal entity or a physical person. The act of an employee has to be estimated as the act of an employer. Meanwhile, the employer is not liable to compensate damage, should employee acted without fault.³⁵

According to the commentary on the Civil Code of Georgia, from the content of this article derives that the victim is not eligible to demand the compensation of harm to the employee. The victim has the right to sue the employer. In case of accepting the claim, the employer has the right to demand from the employee to compensate the damage as a regress. For the harm caused by the employee, even if the existence of the employer's fault, but not in course of performing his/her duty, the responsible person is only the employee and not the employer.³⁶ Regardless of this interpretation, in accordance with the existing case-law, not only the employer is bound for the compensation of the harm, but also the employee. Namely, the employer is bound to compensate the harm on the basis of the Article 997 of the Civil Code of Georgia and the employee is bound to compensate the harm on the basis of the Article 992 of the Civil Code of Georgia. The last, is the general article for imposition of the liability.

³³ H.Wicke, Vicarious liability: not simply a matter of legal policy, *Stell LR* 1998, p. 21-22.

³⁴ Paula Gilika, *Vicarious liability in Tort: A comparative perspective*, p. 2.

³⁵ The commentary of civil code of Georgia, 4th volume, 2001, p. 400-401.

³⁶ The commentary of civil code of Georgia, 4th volume, 2001, p. 402-403.

The Article 997 regulates the special rules of compensating the harm occurred while performing the employee's duty and establishes the liability for the person to compensate the damage. For the imposition of the liability the following conditions must jointly exist: a) harm; b) an unlawful act of the tortfeasor or inaction; c) causal connection between an unlawful act and harm; d) fault of tortfeasor; e) existence of employment relationship between the tortfeasor employee and employer. Meantime, the faulty action, existence of which is a mandatory condition for imposition of the liability, must be caused by the employee.³⁷

It should be noted that the Civil Code of Georgia determines the vicarious liability only in case of existence of employment relationship and it does not apply on the other civil relations – for example – on the assignment agreement. Within the framework of the assignment agreement, the Civil Code of Georgia does not foresee the principle of vicarious liability. Particularly, according to the Article 718 of the Civil Code of Georgia, if the harm is caused by the agent, the responsible person towards the victim is the agent and not the principal. The principal is bound to compensate the damage only in case the damage occurred as a result of significant danger associated with performance of the mandated task in accordance with the principal's instructions. Therefore, if the instruction is connected with the performance of a dangerous act, only the principal is bound to compensate the damage.

The Civil Code of Georgia does not regulate the rule of liability of an employer and an employee at the time of existence of enterprise risk while the action of the employer creates increased danger. From the characteristic of performing increased dangerous activity, the harm may occur without the employee's fault. As the harm occurs while performing increased dangerous activity, it is justifiable to bind the employer liability to compensate the damage. In this case, the responsibility of the employee has to be excluded. In contrast, the Article 997 of the Civil Code of Georgia, in case of non-existence of the fault employer's responsibility is excluded and in fact it establishes the responsibility only for the employee. Such regulation clearly contradicts the rules that enacts the liability without fault. To sum up, at the time of existence of enterprise risk while the action of the employer creates increased danger, for determining of liability of employee, decisive must be the cause of damage – the harm occurs due to unlawful action of the employee, or the harm occurs with the increased danger.

In the countries of common law, only the harm caused by the employee is not sufficient for imposition of liability to the employer. The tortfeasor must be the employee or the agent. Meanwhile, the harm must

³⁷ The decision of supreme court of Georgia of 16 December, 2013. Case #660-627-2013.

occur during performing the duty. The liability of the employer does not exclude the liability of the employee; consequently, both of them is liable to compensate the damage³⁸. To impose the liability, legal relations between the employer and the employee should necessarily exist. It is not mandatory such legal relation to be only employment agreement. The responsibility may be bound even if the assignment agreement exists.³⁹

The classical example of vicarious liability is the enterprise relationship. In this case, the basis for imposing responsibility is only one circumstance when with the harm occurs due to the fault of the employee while performing his/her duty. Such responsibility is considered as the liability without fault, since the employer is liable regardless his/her fault. Such responsibility is based on enterprise risk activities. While existence of enterprise relations, in most cases the employer is bound to compensate the damage not because that it engages the tortfeasor employee, but because, the employer's business creates dangerous risk in which the employee is involved. There is also another consideration stating that the liability of the employer which is provoked by the harm caused by employee is established for the breach of own obligation by the employer.⁴⁰

At the time of existence of enterprise relationship, the employer is bound to the responsibility for the activity which creates increased danger. The employee is involved in performing the duty which creates increased danger. In this case, the liability of the employer for the activities of increased danger is not accidental; furthermore, the employer controls the activities of the employee.⁴¹ At the time of existence of increased dangerous activity, the liability of the employer replaces the liability of the employee, since the employer him/herself creates increased danger and, of course, takes responsibility for negative results.⁴²

Unlike the enterprise relationship, while the activity does not cause increased danger, the responsibility of the employee together with the employer is preserved. There is no doubt that the employee's responsibility should exist when damage is caused by his/her intentional and unlawful act.

³⁸ J.W.Neyers. A Theory of Vicarious Liability, Alberta Law Review, 2005, p 3-4.

³⁹ The enterprise risk theory: redefining vicarious liability for intentional torts, Anne E. Spafford 2000, p.16.

⁴⁰ The enterprise risk theory: redefining vicarious liability for intentional torts, Anne E. Spafford 2000, p.11.

⁴¹ The enterprise risk theory: redefining vicarious liability for intentional torts, Anne E. Spafford 2000, p.17.

⁴² The enterprise risk theory: redefining vicarious liability for intentional torts, Anne E. Spafford 2000, p.20.

It is necessary the employee to maintain his/her responsibility in order all prudential measures to be taken and the harm to be avoided.⁴³

In the Civil Code of Germany, vicarious liability is regulated with the Article 831 according to which, the person that engages another person to fulfill his/her assignment is liable to compensate the damage caused by the latter while performing his/her duty. The principal is not liable if it takes all necessary care while choosing the agent. Furthermore, the principal is not liable if it must purchase instrument or device either to lead performing of assignment and it takes all necessary care while purchasing or leading the assignment. The responsibility is excluded even when such damage would occur in case of the respective care.⁴⁴

According to the commentary on the Civil Code of Germany, the responsibility provoked by the agent is not the responsibility for the principal instead of the third person. This interpretation determines the breach of own obligation by the principal which is caused by careless choosing of the agent or improper control of his/her activity. The characteristic of responsibility is that the fault and causal connection is assumed at the time of choosing the agent for performing the duty. In accordance with the Civil Code of Germany, the agent is the person who is liable to fulfill the principal's instructions. The principal always determines the characteristic of activity, its content and capacity. The responsibility is imposed regardless of the faulty action of the agent. The harm has to be caused in course of performing the duty. In accordance with the case-law, the causal connection must exist between the assignment and the harm.⁴⁵

Conclusion

To sum up, in the Georgian legislation there exist some drawbacks which need to be correctly regulated. The Civil Code of Georgia determines the vicarious liability only in case of existence of employment relationship and it does not apply on the other civil relations – for example – on the assignment agreement. Within the framework of the assignment agreement, the Civil Code of Georgia does not foresee the principle of vicarious liability.

The Civil Code of Georgia does not regulate the rule of liability of the employer and the employee at the time of existence of enterprise risk while the action of the employer creates increased danger. From the characteristic of performing increased dangerous activity, the harm may occur without the employee's fault. As the harm occurs while performing

⁴³ The enterprise risk theory: redefining vicarious liability for intentional torts, Anne E. Spafford 2000, p.22-23.

⁴⁴ Civil code of Germany, GTZ Tbilisi 2010, p. 176.

⁴⁵ Jan Kropholler, the commentary of civil code of Germany, 2014, p. 653-654.

increased dangerous activity, it is justifiable to bind the employer liability to compensate the damage. In this case the responsibility of the employee has to be excluded. In contrast, in accordance with the Article 997 of the Civil Code of Georgia, in case of non-existence of the fault, the employer's responsibility is excluded and in fact it establishes the responsibility only for the employee. Such regulation clearly contradicts the rules that regulate the liability without fault.

The review of foreign law revealed that vicarious liability may occur not only at the time of the existence of the assignment agreement, but also at the time of the existence of the employment agreement. The agent is the person who is liable to fulfill the principal's instructions. The principal always determines the characteristic of activity, its content and capacity. At the time of existence of increased dangerous activity, the liability of the employer replaces the liability of the employee, since the employer him/herself creates increased danger and, of course, takes responsibility for negative results.

At the time of existence of enterprise risk, while the action of the employer creates increased danger, for determining the liability of the employee, decisive must be the cause of damage – the harm occurs due to the unlawful action of the employee, or the harm occurs with the increased danger.

Considering the above mentioned it is necessary to alter the rules enacted in Georgian legislation and vicarious liability must be established not only at the time of the existence of the assignment agreement, but also at the time of the existence of the employment agreement. While the action of the employer creates increased danger and the harm occurs due to dangerous activity, the responsibility has to be determined only for the employer and the responsibility of employee must be excluded.

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