1105

ACTA UNIVERSITATIS SZEGEDIENSIS
DE ATTILA JÓZSEF NOMINATAE

ACTA JURIDICA ET POLITICA

Tomus XV.

Fasciculus 10.

1969 JAN 29

LÁSZLÓ NAGY

The employer's liability for damage caused within the scope of employment on the Hungarian Labour law

SZEGED
1968

ACTA UNIVERSITATIS SZEGEDIENSIS
DE ATTILA JÓZSEF NOMINATAE

ACTA JURIDICA ET POLITICA

Tomus XV.

Fasciculus 10.

LÁSZLÓ NAGY

The employer's liability for damage caused within the scope of employment on the Hungarian Labour law

SZEGED
1968

Redigunt

GYÖRGY ANTALFFY, ÖDÖN BOTH, ANTAL FONYÓ, ISTVÁN KOVÁCS, JÁNOS MARTONYI, KÁROLY NAGY, ELEMÉR PÓLAY

Edit

Facultas Scientiarum Politicarum et Juridicarum Universitatis Szegediensis de Attila József nominatae

Nota

Acta Jur. et Pol. Szeged

Szerkeszti

ANTALFFY GYÖRGY, BOTH ÖDÖN, FONYÓ ANTAL, KOVÁCS ISTVÁN, MARTONYI JÁNOS, NAGY KÁROLY, PÓLAY ELEMÉR

Kiadja

A Szegedi József Attila Tudományegyetem Állam- és Jogtudományi Kara
(Szeged, Lenin krt. 54.)

Kiadványunk rövidítése
Acta Jur. et Pol. Szeged

Part I

GENERAL PRINCIPLES OF LIABILITY FOR DAMAGE CAUSED WITHIN THE SCOPE OF EMPLOYMENT

I.

INTRODUCTION

1. The concept of liability for damage

Liability always accrues by the breach of some legal obligation. Hence it is a legal institution of secondary character. Its purpose is to prevent future wrongful conduct, and it imposes sanctions of educative character on the violator to achieve this end.

One particular form of responsibility is liability for damage. This liability materializes in cases of wrongful conduct causing material damage. Unlike other forms of responsibility, liability for damage has a dual character. One aspect is to remove, to repair the consequences of the wrongful act. The other is the sanction, the punishment, which materializes as a compulsory reduction of the means of the liable person.

Considering this dual nature, liability for damage substantially differs from other forms of responsibility (e. g. criminal or disciplinary responsibility). Liability for damage — usually materializes only upon the initiative of the damaged person;

— it is not absolutely conditional on culpability of the damager;

— the severity of the sanction is usually adjusted to the damage caused;

— the sanction is of pecuniary nature and can always be expressed in terms of money;

— compensation imposed as a sanction is due to the damaged person.

The various forms of responsibility are not exclusive of one another. Hence several forms of responsibility can materialize in case of one and the same wrongful act. For instance, a driver having caused a crash is held responsible under criminal law (provided his conduct was highly dangerous to society); since he also has violated his obligation as an employee to do his work attentively, according to regulations, his employer will hold him responsible under disciplinary rules in addition; over and above this, having caused material damage by his conduct, the driver will be held liable for damage. The common purpose of these forms of responsibility is the education of the violator, and, thereby, prevention of similar product. Liability for damage has an additional special purpose: compensation, i. e. the complete or partial repair of the disadvantage the damaged person has suffered.

Criminal or disciplinary responsibility is always regulated and imposed in the interest of society as a whole. By contrast, the reparative aspect of liability for damage is regulated in the interest of the damaged person first of all, whereas the other, sanctionative, educative-preventive ascept considers regulation out of social interest. The proportional relation of these two aspects determines the character of the system of liability for damage. Considering this dual nature, regulation and imposition of liability for damage are more complex than those of other forms of responsibility.

2. *Liability for damage caused within the scope of employment*

I. The basis of liability for damage caused within the scope of employment is the circumstance that some right or obligation, constituting the purport of employment, has been violated. In such cases liability for breach of contract is involved.

According to some views, liability for damage caused within the scope of employment is not based solely on the breach of duties undertaken in a contract.

It has been suggested that liability for damage caused within the scope of employment might have a dual basis. On the one hand, such liability may exist for the breach of some duty arising from employment (e. g. the employer unlawfully witholds the employee's work-book); on the other hand, liability may arise from the breach of general civic duties (e. g. a case of breach of general civic duties relating to the protection of human life is involved if the employee sustains injury from an accident and suffers loss of earning as a result). Consequently two bases should exist simultaneously, i. e. obligations arising from employment, and certain general civic duties, which are not comprised in the obligations that constitute the contents of employment.[1] Another standpoint is that in the cases mentioned above the obligation contents of employment and general civic duties are violated at the same time.[2]

Yet to base the employer's liability for damage partly on the violation of obligations of employment, and partly on the violation of obligations outside the scope of employment, is actually an undue restiction of the purport of employment. Those holding this view fail to realize that the general principles of law, or their formulation as provisions of law in the Constitution, lay down views, requirements, which are valid for the entire legal system.[3] These views and requirements are being realized within the various branches of law. For instance, the principle of protecting human life is of universal validity and must therefore be enforced in all and any relations of human society. So it is realized also in the statutes of labour. The principle of protecting human life is realized, first of all, in the rules relating to labour safety. Following from their compulsory nature, these rules become constituent parts of any type of employment even in the absence of special stipulations to this effect. Consequently to interpret liability for damage within the scope of labour statutes as the responsibility for violating general civic duties is out of the responsibility for violating obligations constituting employment, obligations that are the expression of general legal principles, or of the basic principles

[1] Biely K.: Pohladavky na nahradu skody z pracovného pomeru a zák. c .101/53. Zb. o prechodnej uprave premlcania. (Právny Obzor 1956. 4.)
Флейшиц Е. А.: Обязательства из причинения вреда и из неосновательсного обогашения
Ohanovicz A.: Odpowiedzialnosc cywilna pracownika w swietle najnowszego orzecznictwa Sadu Najwyzszego. (Panstwo i Prawo, 1956. 5—6.)
Tomeš I.: Zpráva o habilitaci Dr. K. Witze:, Majetková odpovodnost zamestnancu za skodu zpusobenou zamestnavateli." (Právnik. 1958. 5.)

[2] Ignatowicz J.—Stelmachowski A.: Podstawy prawne majatkowej odpowiedzialnosci pracowników. (Panstwo i prawo, 1956. 10.)
Grzybowsky S.: Rozgraniszenie podstaw prawnych majatkowej odpowiedzialnosci pracowników. (Panstwo i Prawo, 1957. 7—8.)

[3] Nagy L.: A munkajog általános elvei. (General principles of the labour law.) (Jogtudományi Közlöny, 1960. 1.)

of the legal system to put it in another way, in the field of emplyment. But let us add from the outset that the general principles only become constituent parts of employment to such an extent as is prescribed by the provisions of labour statutes in the given case. This follows from the coercive nature of statuory labour regulations. Thus the view that some obligation within the scope of employment and some general civic obligation are violated at the same time is not tenable either. (What we may admit at most is that the violation of some rule realizing some general civic duty in respect to employment, or breach of an obligation arising therefrom, means, indirectly, also the breach of some general civic duty. But this is not a case of co-ordination, i. e. not the simultaneous violation of two, simultaneously coexisting obligations of identical content. It is rather a relation of the specific and the general. Violation of the specific comprises — though indirectly — the violation of the general.)

II. In the cases discussed above the basis of liability for damage caused within the scope of employment has been supposed to exist outside the scope of employment. But there are views, too, which place the relation of responsibility, arising from causing damage within the scope of employment, outside the domain of labour statutes, or, more exactly, wish to bring responsibility under civil law in such cases into operation as well. Several variants of these views are known, and some of them are making substantial progress towards accepting the special labour-statutory liability for damage.

Some time ago, views came up occasionally holding that it is altogether incorrect to speak of special labour responsibility. Liability for damage should belong to the category of civil law, and if liability under labour statutes is mentioned at all it ought to be considered as specific in a relative sense only since it is actually a subspecies of responsibility under civil law. This view is now coming up less often, but its remainders still can be found in certain standpoints. The same view is manifest is opinions that the provisions of the Civil Code should be applied also to questions of liability under labour statutes.[4] Essentially the same view is reflected in the opinion that compensation of the employee for industrial injury — including compensation paid by the social insurance system — should be governed not by labour statutes, but by provisions of civil law, since the relations involved — are not actually relations of employment.[5] I think that Section 348 of the Hungarian Civil Code under which employee and employer are jointly and serverally responsible for damage caused to a third party by a wilful criminal act ought to be regarded as the reflection of these former views.

As contrasted to the views discussed in the foregoing, there is a school of thought which places the responsibility for the violation of obligations arising from employment — be it either on the employee's side or no the employer's side — within the scope of labour legislation. This position is expressed in the literature of Hungarian labour questions.[6] This standpoint

[4] Tomeš I.: 1. c.

[5] Яйчков К.: The system of the obligations arise from damage in the sowiet-law. (Moscow, 1957.) (Russian.)

[6] Nagy L.: A dolgozók anyagi felelőssége (Worker's material liability.) (Budapest, 1956.)

Nagy L.: Das Arbeitsrechtsverhältnis, als Voraussetzung der Arbeitsrechtlichen

has recently become dominant also in the Czechoslovak, Hungarian and GDR literature.[7] It is reflected in the Czehoslovak Code of Labour,[8] as well as in the German Democratic Republic's Code of Labour,[9] and in the Hungarian Code of Labour.[10]

In my opinion, the latter view is the correct one. Confusion existing in respect to this problem is ascribable to several circumstances. One of these is the fact that all categories of responsibility are related, since each of them is a responsibility in itself and will therefore reveal similar features. But this fact does not result in their identity. So we may speak of legal responsibility as the comprehensive category that includes financial liability under civil law, labour legislation, or co-operative law. It is obvious that these, being categories of responsibility on the one hand, and relating to financial liability on the other, will show a number of common features. But these features are not those of civil law, or criminal law, but are characteristic of certain types of responsibility. This is the point of correlation with the other factor, viz. that certain fundamental rules and features of liability for damage have been laid down and formulated for the first time in the sphere of civil law so the obvious attitude was to see the presence of responsibility under civil law in every case of such liability. The proper place of the employee's liability was less controversial because of the fact that it showed features — mainly because of a considerable restriction of this libility — which were difficult to reconcile with the notion of responsibility under civil law. At the same time, the proper place of cases within the sphere of the employee's liability — e. g. damage caused wilfully or by criminal act — in which the rules of liability bear a high resemblance to responsibility under civil law, is still highly controversial. Finally, I should like to mention the former primary character of civil law. This situation prevailed also in Hungary's legal system prior to the liberation. As one type of contract for goods the contracts of employment figured in the category of contracts under civil law. In the socialist legal system the relations of employment are the relations of participation in the work of the community. Also the primary character of civil law has vanished. Yet at the time labour law became a special field, there was no a simultaneous framing and regulation of the aforesaid rela-

---

materiellen Verantwortlichkeit. (Acta Universitatis Szegediensis. Acta juridica et politica, 1958. Tom 5. Fasc. 11.)

Nagy L.: A Munka Törvénykönyve rendszerének meghatározása. (Definition of the system of the Labour Code.) (A MTA társadalom-történettudományi osztályának Osztályközleményei X. 1960.)

Nagy L.: Anyagi felelősség a munkaviszony keretében okozott károkért. (Material liability for damages caused in a labour relation.)) (Budapest, 1964.) Abr.: Liability.

Nagy L.: Anyagi felelősség. (Material liability.) (Budapest, 1966.)

Weltner: A magyar munkajog. (The hungarian labour law.) (Budapest, 1962.) *Abr.*: Labour law.

Weltner—Nagy: Magyar munkajog (Hungarian labour law.) (Budapest, 1966.)

[7] With K.: Ceskoslovenské prácovné právo. (Praha, 1960.)

Schlegel R.: Arbeitsunfall und Schadenersatzplicht. (Berlin. 1959.)

Kaiser F.: Einige Bemerkungen zu den Ansprüchen des Werktätigen gegen seinen Betrieb bei einer Körperschädigung durch Betriebsunfall oder Berufskrankenheit. (Arbeitsrecht, 1958. 3.)

[8] VIII. part.

[9] 57—62. §.

[10] 98. §.

tionships, obviously because of the short period of time available. So the field of civil law must occasionally still be resorted to in some form or other. This, however, often gives the semblance as if civil law continued to be the basis of labour legislation.

The employer's liability for violating some obligation arising from employment belongs to the sphere of labour law. Being a material liability it shows the same features as responsibility under civil law. Yet at the same time its independence and dissimilar rules arise from the difference that appears between labour relationships and relations of civil law. As the most substantial feature of this difference it may be pointed out that the establishment of this legal relationship of labour does not aim at creating or regulating some commercial deal, but at putting into effect the participation in the work of society. The creation of this legal relationship is influenced on the employee's side also by moral motives. Legal relationship in itself usually means the creation of a permanent bond, the joining in a collective, and is being realized within the scope of this collektive, (What has been mentioned here is not the complete set of dissimilar features. I have mentioned chiefly those which are of importance in respect to material liability.) Hence the views that the material liability of the employer belongs to the sphere of civil law, or enjoys but a relative independence from the latter, are not acceptable.

3. Delimination of liability for damage caused within the scope of employment

a) Delimitation from other consequences of breach of duty

Liability for damage caused within the scope of employment is a sanction of educative nature imposed because of breach of duty arising from employment. Consequently problems of delimitation may present themselves primarily in connexion with other consequences involved in the breach of duty.

Contracts of employment provide direct possibilities for demanding correct performance of the obligations arising from employment, and, in case of non-performance or faultly performance, for terminating the employment. This follows from the purpose of the contract of employment which is to recruit labour force for accomplishing the tasks on the employer's side, and to partake in the work of society and obtain a share of the national income to make his living on the side of the employee. These aims can be realized only if the contract of employment materializes. From all this it follows that in the field of labour law the primary aim in case of breach of contract is always to ensure the performance of obligations and to maintain the contract of employment thereby. Let us add right away that the aim is always to ensure performance as stipulated, i. e. non-pecuniary services must be performed in kind, and performance in money can take place only in case of impossibility of performance as specified.

In case of faulty performance of obligations, the employer or the employee may have claim to recovery, in addition to the claim to performance and the right to terminate employment, if either of them sustains material loss owing to non-performance or faulty performance of obligaitons. Even the claim to performance proper may convert into a claim to recovery in case

of impossibility of performance. But the conversion of performance in kind into performance in money does not yet constitute material liability; conversion into a claim to recovery can take place in cases where performance in kind becomes impossible, while performance in money is not possible, or may be prohibited.

It often happens in practice that the claims to performance are classified in the category of material liability. This phenomenon emerges especially in connection with performance in money. For instance, if an unlawful measure for terminating employment is annulled, the employee's claim to retained wages does not belong to the category of liability but constitutes the claim to performance. Namely, annulment of the unlawful measure restores employment, and the case must be judged as though the unlawful measure had not been taken at all. Consequently, the employee is entitled to his wages on the basis of employment, so he is entitled to demand the performance of paying wages. This is no liability for damage. If, however, the employee was in need of hospital treatment meanwhile, but because of termination of his employment was not entitled to social insurance services — including medical care free of charge — and therefore had to pay the hospitalization costs, his claim to recorvey will accrue in respect to these expenses. So this will be a case of liability for damage. The discrimination between claims to performance and revovery in connection with the unlawful termination of employment is not only of theoretical, but also of practical importance. Thus in case of unlawful termination of employment adjudicated wages are distrainable, while sums adjudicated as damages are not.[11]

b) Delimitation from violation of obligations arising from other legal relations that exist between the subjects of employment

Not only one, but several legal relationships may exist at the same time between the subjects of employment. It may happen, for example, that the employer commissions his employee to do some translation work at home after working hours. In this case a relationship of commission is created, in addition to employment. It may happen, too, that the same employee's house is leased out by the employer for the purpose of a company holiday house. In this case a third legal relationship, that of tenancy, is created between employer and employee. It may happen within the scope of any of these legal relationships that one party causes damage to the other by some activity. (E. g. the company employees spoil some pieces of equipment in the rented house.) In such cases the damaging conduct takes place between the parties not within the scope of employment, but within some other legal relationship. And since the violated basic relationship is not the one of employment, the relationship of liability arising therefrom follows the nature of the former, and does not belong to the sphere of liability for damage caused within the scope of employment.

In this context the problem of the nature of damage sustained by employees staying at workers' homes or company holiday houses has been raised in practice repeatedly. Provisions of law contain no specific rules concerning this problem. The cases occurring in judicial practice were connec-

[11] Supreme Court, decision №796/15.

ted with damage sustained in workers' homes, and in respect to the legal ground of such claims the position taken in these matters is usually limited to the ruling that the employer is answerable only in case of dereliction on his part. Yet the obligations for what particular violation the employer can be held liable in such cases are not specified in these rulings. Several solutions may be taken into consideration.

One position may be that possibility of recreation in workers' homes or company holiday houses is provided by the relationship of employment. The employer establishes these facilities for the welfare of his employes. The sources of such facilities usually are welfare funds or, possibly, profit shares. Thus the possibility of establishing them arises on the basis of labour regulations. Moreover, in cases where the employer is under the obligation to provide accomodation — e. g. in the building trade or mining — the establishment of workers' homes is carried out as the fulfilment of one obligation within the scope of employment, and pursuant to compulsory rules of labour statutes. On the basis of this consideration, the liability for damage caused by the employer in the holiday house or the workers' home belongs to the sphere of liability for damage caused within the scope of employment. Ruling P. 20 155/1956 of the Supreme Court seems to adopt this position. The Court has ruled that the employer is not ordinarily obliged to keep guard over quarters provided for employees, but in the given case the quarters were remote from inhabited areas and from the employees' working-place, so guarding would have been necessary because of the hazard of burglary; since the employer failed to provide a guard, he is liable for damage.

It may be argued, too, that staying at a workers' home or the company holiday house, is outside the scope of employment relationship, so damage sustained at these places be judged according to the rules of liability under civil law.

Finally, there might be a standpoint saying that damage sustained during the use of workers' homes or company holiday houses cannot be judged according to the rules governing liability for damage caused within the scope of employment, nor can the present rules of civil law be applied to such cases.

As concers the views discussed in the foregoing, the first is right in that provision of accommodation in workers' homes or recreation in company holiday houses is based on the employer's obligations arising from employment. But in my opinion a clear distinction ought to be made between the availability of a service due to the employee on the basis of employment, and its actual use by the employee. Within the scope of employment, employers are obliged to provide accommodation to employees active in certain branches of industry. This accommodation can be provided either by establishing workers' homes for the employees to live in, or by reservation of accomodation in a hotel, or possibly at a private person. The disjunction of provision and making use of the services appears clearly in such a case. But there are several other comparable cases. For example, the benefit of travelling home very four weeks is due to employees trasferred to some lacality where they live away from their families. The employer is obliged to make available this travel benefit. If he fails to do so, he violates his obligation arising from employment. But if the employee sustains some damage during

travel, or the booking clerk issues a wrong ticket, the employer cannot be held liable for damage. The employer meets his obligation by making available the workers' home to the employee or by issuing to him the transfer order to the company holiday house. If he fails to do so — e. g. does not reserve accommodation toa recruited worker — he violates his obligation, and in case of sustaining damage (e. g. the employee has ti live in a hotel) the employee has a rightful claim to recovery. But to make use of accomodation, i. e. to make use of the service provided by the employer, its utilization, does no longer belong within the sphere of employment. Hence if the employee sustains damage during such utilization, this event is outside the sphere of the relationship of employment. Consequently damage caused at worker's homes or ccmpany holiday houses cannot be classified as damage caused within the scope of employment. Yet if this position is adopted, there still remains the problem of what rules should be applied in such cases. On the other hand, the view mentioned third is correct in that the rules governing the innkeepers' liability are not suitable in every respect to this case. The circumscantes differ from those in hotels in case of both workers' homes and company holiday houses. It is therefore that this question calls for regulation. In my opinion such rules should be laid down not in labour statutes but rather in the domain of civil law, since the legal relationship between the company running the workers' home and the employee making use of this accommodation does not belong to the sphere of labour law. It is a practicular sort of tenancy. This appears clearly from cases where the workers' home is run by some organ maintained for this purpose. The contrary view, i. e. to classify these relationships as belonging to labour legislation, would lead too far, as tenancy created in case of providing official quarters for a certain activity should have to be regulated by labour statutes as a result.

c) Delimitation from liability for damage caused to or by a third party

Liability under labour law is the consequence of the breach of some duty arising from employment. It may happen, however, that the effect of the damaging conduct is materializing outside the relationship of employment, or a person outside this employment may display an activity whose damaging effect materializes within the scope of employment.

Suppose a burglar steals the employee's chlothes from the locker. In this case no relationship of employment exists between the third party — the burglar — and the employee or employer, and cannot arise either as a matter of course. Thus liability in this case does not belong to the sphere of material liability under labour law. But, as a result of burglary, claim for damages can accrue between the subjects of the legal relationship of employment, which claim then belongs to the sphere of labour law (The basis of this claim will be the fact that the employer has violated his obligation of safe-keeping in respect to the employee's personal belongings, since burglary could have been prevented). In a case like this, the employee can claim damages from the bulglar pursuant to the rules of civil law, and also from the employer pursuant to the rules of labour law. (These two claims do not necessarily coincide. It may be that the employer can be held liable only for a specified category of personal belongings. But the burglar is liable for all

and any damage caused by him.) The employer in turn can bring an action under civil law against the burglar, claiming the sum he has paid for the damage.

The situation is similar if, for instance, the employee suffers an electric shock through the fault of another worker working at the same machine. The employee then will have a rightful claim for damages against the employer. Since the worker causing the accident has acted within the scope of his employment, responsibility to the third party — the injured employee in this case — will lie with the employer on behalf of the worker causing damage, as provided by Section 348 of the Civil Code. Similarly, the employer will be responsible to the social insurance agency and refund the latter with the sum paid to the injured employee. At the same time the employer can enforce claim for damages against the worker causing the injury. pursuant to the rules of liability under labour statutes.

An example of the opposite case is when the employee suffers a fatal accident within the scope of his employment, and his survivor dependents are left without support and advance their claim against the employer. This case illustrates a seeming exception to the principle that the relationship of liability arising as a result of damage between the subject of employment and a third party does not belong to the sphere of liability for damage caused within the scope of employment. Namely the claim of the survivors of the employee killed in an industrial accident is governed by the rules of liability under labour law.

4. Types of damage caused within the scope of employment

Liability for damage caused within the scope of employment accrues from the non-performance or faulty performance of the contract of employment. We have clarified in the foregoing that non-performance or faulty performance does not in itself result in liability for damage, and that it only does so if the employee or the employer sustains damage from this conduct.

Based on the circumstances in which damage is caused by the employer to the employee, we may speak of four types of damage:

a) the employee is deprived of the possibility to exercise some right due to him on the basis of the contract of employment, and sustains damage in this case by

I. the loss of an income

II. having to bear certain expenses, i. e. suffer reduction of his existing means;

b) the employee's right to work sustains injury, he is hindered in doing his work. In this case he may sustain damage by

I. loss of an income, including loss of income due to him from some other place (e. g. in case of unlawful witholding of his work-book),

II. having to bear certain expenses, i. e. suffer reduction of his existing means;

c) some of the employee's personal belongings are damaged or lost. In this case damage may be sustained in that the employee's available means are reduced by

I. shortage, damage, loss of things, possibly

II. expenses.

d) the employee's health or corporeal intergrity is injured (this coincides partially with the cases of paragraph b.) In this case damage may be sustained by

I. loss of an income, wages first of all,

II. having to bear expenses, i. e. reduction of available means;

(This latted includes the case when the dependents sustain damage because of the employee's death. This may materialize in that the dependents'

I. income (support) is lost

II. available means are reduced since expenses have to be borne.

In cases of damage caused to the employer by the employee, the following types may occur:

a) the employer is deprived of the possibility to exercise some right due to him on the basis of the contract of employment, and the employer sustains damage by

I. loss of an income,

II. reduction of available means because of expenses;

b) some property of the employer is damaged, destroyed, or the employer is prevented from exercising some right due to him in rescept to others, in which case damage may be sustained by

I. reduction of available means, through

— deterioration of value of things,

— expenses

II. loss of income;

c) in case of damage caused by the employee to a third party the employer is obliged to assume responsibility, in which case damage may be sustained by

reduction of available means, through

I. paying for damage, repair,

II. expenses;

d) the employee cannot give account of material, money given him on trust, or cannot return them, in which case damage may be sustained by

I. loss of income

II. reduction of available means by

— the value of things lost

— expenses.

The basis of the types of damage enumerated above is the same: non-performance or faulty performance of the contract of employment. Yet to differentiate between types is of importance all the same. On the one hand, the Possibility and method of influencing and educating the damager may vary on the other. And these circumstances have a substantial effect on the framing of the system of liability for damage. After laying down the general principles of liability we must therefore decide with what differences they can be employed in cases of various types of damage.

In order to be able to lay down the principles of liability for damage, we must define the concept of belonging within the scope of employment, the criteria of breach of contract, the conditions under which influencing is possible, and the questions involved in imposing sanctions. Finally, beyond all

these, we must study the causal relations that provide a firm basis for determining the relationship of the various components of liability for damage. All these combined constitute the complete system of liability for damage under labour law in the broader sense.

The system of liability for damage — and especially the ratio and content of the various components within it — is not exempt from changes. It varies in accordance with social and economic progress. The importance of various interests protected by the institution of liability for damage may change, the other means of influencing and education may increase in weight, the self-consciousness of people may rise to a higher degree, and so on. All these affect the institution of liability for damage. So the effect of these factors must always be kept in mind when this institution is discussed.

II.

EMPLOYMENT

A) *Introduction*

Liability for damage caused within the scope of employment accrues from the violation of obligations arising from employment, and — regarded from the other side — from the infringement of rights arising from employment. From this it follows that whenever liability id brought into operation the first thing to do is to clarify whether a relationship of employment had existed between damager and damaged, i. e. whether the damaging conduct actually represented the violation of obligations or rights arising from employment. Several controversial issues present themselves in this respect. One of these groups relates to the problem how this liability is taking shape at the time of establishing and terminating employment, and in case of defective contracts of employment. The other group of questions emerges whenever it is to be decided what damaging conduct represents the violation of obligations or rights arising from employment if different types of causing damage are involved. The third group comprises the questions whether the perpetrator or sufferer of the damaging act was or was not a subject of employment and in what capacity he had acted.

B) *The existence of employment*

1. *Breach of promise to establish employment*

Before discussing the questions connected with the existence of employment I should like to call the attention to the circumstance that the claim raised by the employee for breach of promise to establish employment does not belong to the sphere of liability for damage caused within the scope of employment. Here the facts of the case are that the employer had made a promise to emyloy somebody, but employment has not been created for reasons beyond the interested person's control. Considering this promise, the interested person was justified in relying on the creation of employment, has accepted no other employment as a result, and has austained damage

from the non-materialization of the relationship, of the promised employment. No labour relationship whatsoever has therefore emerged between the parties. Hence violation of obligations undertaken with a contract of employment is out of the question. The employer's conduct of not having employed the interested person in spite of his promise to do so constitutes an extra-contractual, wrongful, damaging attitude, consequently the liability arising therefrom must — in my opinion — be jedged pursuant to the rules of civil law. This position has been taken also in judicial practice.[1]

2. *Causing damage within the scope of employment based on a contract of employment null and void*

The voidness of a contract of employment may be raised in connection with liability for damage in two aspects. On the one hand, it may be problematic in what manner the damage sustained by one party as a result of the voidness of the contract of employment should be repaired. On the other hand, it may be open to debate what rules are governing the repair of damage caused during the existence of employment, i. e. damage not arising from voidness, if such employment has resulted from a contract null and void. At present, neither of these cases is regulated under labour legislation.

As concerns the first case, i. e. damage resulting from the voidness of the contract of employment, liability for such damage lies within the sphere of labour law. But the rules governing liability for damage caused within the scope of employment, must be applied to such cases with certain differences. The reason for doing so is that damage has not been caused within the scope of employment, but in connexion with establishing employment.

As concerns the second case, i. e. liability for damage caused during the existence of employment based on a contract null and void, the generally accepted view in literature and practice is that such damage must always be judged pursuant to the rules governing liability for damage caused within the scope of employment. The reason is that the actual legal status of the subjects at the relationship of employment does not differ in anything during the existence of the void employment from that of a valid contract. Hence labour law attaches the same legal effects to void contracts of employment — during their existence — as to valid contracts (e. g. the employee is entitled to wages, days of rest, to leave if employment has lasted long enough, etc.). It would be a contradiction of principles if in this case of liability rules other than those of labour law were applied.

3. *Damage caused during the period between creating employment and actual starting of work*

It may happen that damage is caused during a period of time that passes from the coming into existence of employment and the starting of actual work. E. g. the employee calls on the employer to be informed exactly where roys some of the employer's material or equipment.

[1] Supreme Court P. 6949/1949.

it is he hes to report for work and suffers an accident when leaving the workshop. The question is whether in such cases the rules of labour law or the rules of civil law should be applied for judging liability for damage.

During the period that passes from entering the contract of employment and the starting of work, the employee or the employer can sustain damage in two ways. One case is when the employer violates his obligation undertaken in the contract of employment by not actually creating employment, or creating it after the due date; or the employee fails to meet his obligation and does not enter service, or enters it after the due date only. The other case is when the employer injures the life, health or corporeal integrity of the employee, or the employee's personal belongings brought to the employer's premises are damaged or destroyed; or the employee damages or dest-

In the first case, sausing damage constitutes violation of the contract of employment beyond all question. Hence liability for damage is governed by the rules of labour law.

The situation is different in the second case. Here the circumstances, which necessitate a regulation that differs from liability under civil law in respect to liability for damage caused within the scope of employment, do not yet exist.

Let us first study this problem from the angle of the employer's liability. In case of injury to the employee's life, corporeal integrity, or damage or destruction of some of his personal belongings, the employer's liability for damage rests on the requirement that the employer is under the obligation to create within the scope of employment such circumstances in which the employees can do their work undisturbed, need not be afraid of their health or corporeal integrity being injured, their belongings brought to the premises lost or damaged. Within the scope of this obligation the employer is expected not only to set up the necessary equipment, take the necessary measures, but also to instruct the employees as to the order or working, conduct within the premises, and to supervise the observance of these rules. Adequate instruction of the employee cannot take place before he enters service, as he is not yet assigned to some unit of the enterprise, and, as a result, no proper supervision can be exercised over him. As concerns circumstances, such an employee does not differ from a person who is not employed there but stays at the employer's premises for some particular purpose (visit, shopping, etc.). (Dangerousness of the unit is present also in respect to this person, he does not know the regulations, etc. This situation is not affected by the fact that this person might posses qualification by which he is familiar with the machinery, equipment of the given workshop. For example, a lathe operator inspects and tests the lathe at which he is going to work and suffers an accident before entering service.) Any visitor of the premises may possess technological qualification which makes him familiar with the machinery and operations of the workshop he is visiting. This circumstance will be taken into account by the court in an action for damages brought by such person, and this person's possible instrumentality in sustaining damage might be established by the court exactly on account of his qualification. By contrast, in case of employees the emphasis lies not only on qualification, but on familiarity with the given place of work, machinery, on instruction received in these matters and, first of all, on the fact that constant supervision

can and must be exercised over employees actually doing work on the premises. All this does not apply to employees who appear at the premises before entering actual service. It would not be justifiable in any respect to impose a different responsibility on the employer towards such persons. This would not be justified by the requirements of reparation, nor by those of education. By the same token, there cannot be any obligation on the employer's part to keep safe or protect from damage the personal belongings of such persons over and above the ordinary liability for damage to any other person entering the premises.

Similar conclusions are reached if the problem is viewed from the angle of the employee's liability. Circumstances that justify the regulation of the employee's liability within the sphere of labour legislation emphasize two points. One is the particular nature of employment, and the circumstance that the employee is doing work within a collective, by which the possibility is given to get acquainted with the employee thoroughly, and to apply differentiated means of education if he causes damage. The other is the fact that within the scope of employment the possibility of causing damage is increased. Until and unless the employee enters actual service, neither of these circumstances exist. Hence during the period in question, the employee's legal status does not differ from that of any other person who is not employed there.

It follows from the foregoing that in case of damage caused during the period that passes from making the contract of employment to the time actual work is started, the rules governing liability for damage caused within the scope of employment cannot be applied.

C) *Damage becoming manifest after the termination of employment*

From the circumstance that the employer's or employee's liability only applies to damage caused within the scope of employment it follows that the provisions of labour statutes cannot be applied to damage caused after the termination of employment.

Two questions present themselves in this respect. First, whether the provisions of labour law can be applied to cases where damage has been caused during employment, but is detected only after the termination of employment. Second, whether the provisions of labour law can be applied to cases where the act entailing damage has been performed during employment, but actual damage arises and is detected only after the termination of employment (e. g. the employee sustains an industrial accident from which he recovers in a few weeks, after which he terminates his employment by giving notice. Some months after, symptoms of paralysis appear in his leg. Medical examination establishes that paralysis is the sequel of the preceding accident but could not be predicted at the time of the accident.)

In my opinion, it is the time at which the causative act of the damage was performed that must be relevant in respect to the application of rules of liability. The essential factor is that damage resulted from the fact that the employer's or employee's right arising from employment has been viola-

ted. The causative process had set in during employment. The causal nexus between conduct and damage subsists, only the occurrence or detection of damage takes place within this causal succession at a time by which employment had been terminated.

D) *Damage caused within the scope of employment*

In the foregoing we discussed cases in which the existence of obligation and resulting liability for damage were disputable because the existence of employment was questionable, i. e. it had to be decided whether on the basis of a contract of employment the employer or employee was under the obligation to perform.

It may happen, however, that the coming into existence and the subsistence of employment is beyong question, but the question arises whether at a given time or situation the employee or employer was entitled to some right, or was under the obligation of performance. Whether some right or obligation constitutes the purport of the relationship of employment is not the question in these cases; the question is whether or not the employer or the employee was entitled in the given case to exercise some right, or demand some performance, while the latter two were constituent elements of employment beyond question.

As concerns the time of performance, the rights and obligations constituting employment can be divided into several groups. There exist obligations whose performance, fulfilment, are the constant, incessant duties of the party concerned for the entire duration of employment. For instance, one of these duties is the employer's obligation to keep the employee's work-book in his custody until the termination of employment. On the other hand, there are obligations whose performance — considering their nature — is binding on the obligov only during a specified period of time. The majority of rights and obligations constituting employment belong here. Thus the obligation to keep the employee working, constituting the escense of employment, is binding on the employer only for a specified section of the week or the day, and only within a specified length of time. Finally, there are certain rights and obligations which can be exercised and must be met at a specified time or event taking place. Such obligations are to pay jubilee rewards, or to return to the employee his work-book upon termination of employment.

Cases in which the party concerned can exercise some right or must meet some obligation on a constant basis, or some performance is due at a specified time or following some specified event, present no problems in connection with liability for damage. Where most problems arise from is the performance or breach of obligations, or exercise and infringement of rights, connected with doing work and keeping employed or other closely related rights and obligations (e. g. the right to healthy and safe working conditions). In such cases it is often questionable whether in the given instance the subject of employment was entitled to insist on performance, whether such performance was due or not. For instance, whether the employer was or was not under the obligation to provide healthy and safe working conditions in the case and at the time the employee sustained injury. Since these ques-

tions present themselves differently at various types of damage, they will be discussed there. It should be noted as a general principle that in drawing the limits we must start from the function of liability for damage. Liability for damage can be brought into operation in cases where compensation, i. e. the imposition of sanctions, is actually fit to influence the employer or employee to avoid improper conduct in the future, and safeguard to the fullest extent the other party's exercise of rights. Wherever this possibility is not given, bringing into operation liability for damage is not justified. (If the situation calls for some intervention, measure nevertheless, this ought to be effected not through the liability for damage, but in some other way).

E) *The subjects of employment*

We may speak of damage caused within the scope of employment only if both the damager and the damaged are subjects of the relationship of employment. An exception to this general principle is the case when the employee suffers a fatal accident and his dependents and heirs — i. e. persons outside the scope of employment — sustain damage (through the loss of support, burial expenses, etc.) and can enforce their claims within the scope of liability for damage under labour law. This is not a case of the damaged person becoming subject of the employment, or being judged in the same manner as the subject; it simply means that in case of responsibility for damage to persons outside the scope of employment liability is governed by the rules of labour law.

Yet in realizing liability for damage it may become questionable whether the damager or the damaged can be regarded as a subject of the relationship of employment. On the side of the employee this problem arises in case of certain special types of employment. On the side of the employer the problem is present in cases when the employer is a juristic person.

a) *The employee aspect*

On the side of the employee, only a natural person can be the subject of employment, and only one person for any one employment. Thus the person of the employee, i. e. the subject of employment, cannot be doubtful on the employee side. There is no problem here: what may give rise to problems is that in certain types of employment the employee is permitted to have recourse to the help of his family members in performing his duties. Such possibilities exist, for instance, with keepers of agricultural cooperative shops, house-porters, linesmen of the Hungarian State Railways. Apart from a few exceptions, family members in such cases do not become subjects of employment, nor subjects of any other legal relation with the employer. Yet at the same time they might sustain damage while performing the tasks of employment (e. g. the family member may fracture his leg while answering the house-door, or may spoil his clothes), and might cause damage as well (e.g. damage the starting device of the lift). The question in such cases is whether the family member can advance his claim directly against the emplo-

yer, or the employer directly against the family member, and whether the claim is to be judged on the basis of provisions of labour law or of civil law.

In answering these questions we must start from the circumstance that in cases mentioned above the performance of the employee's duties usually requires a helper's cooperation as follows from the nature of these duties, since they hardly can be met by one person alone. (In case of railway linesmen the inspection tour of their stretch and issuing tickets may coincide. In case of house-porters the duties are distributed over 24 hours of the day so certain duties must be attended to by family members to ensure some hours of rest to the employee). At the same time, the necessity of helping arises at greatly varying times and amounts, so it would be difficult to establish special employment for these duties with some other person, and, regarding the nature of accommodation, especially in case of linesmen and house-porters, it would hardly be possible to employ as a helper a person not belonging to the family. Hence the performance of duties of employment requires the work of family members, who thereby co-operate in performing the tasks of employment. And their co-operation is not only permitted and consented to by the employer, but the latter acually expects them to co-operate in the proper performance of duties. Thus, in essense, we are confronted with a ccvert, irregular type of employment. But from all this it follows, too, that all the conditions the employer is obliged to provide to his employee during work on the basis of employment, must be provided to the helping family member as well. (Further rights and obligations arising from employment are due and binding on the employee within the scope of his employment. Namely the full performance of duties of employment is derived from the co-operative work of the employee and his helping family member. So the employee's wages and other benefits comprise also the equivalent of the helper's work.) If the employer fails to provide proper conditions to the family member, and the latter sustains damage as a result, the employer is directly liable to the family member. As follows from the foregoing discussions, the employer will be liable pursuant to the rules of labour law. We reach the same conclusion also if we consider that in case of damage sustained by the employee — especially as concerns injury to health, corporeal integrity, damage to belongings — it is justified to have a regulation differing from civil law if only because of the circumstance that the employee is familiar with the situation prevailing in his employment, that several circumstances that may be increasingly dangerous to an outsider are not, or much less, dangerous to him; or, vice versa, any change in routine circumstances constitutes much greater danger to him since he cannot possibly foresee them, is much more exposed to their effect during his work since there is no possibility of his avoiding them. The situation of the helping family member is similar. The circumstances are known to him, their change takes him unawares, unprepared, the possibility to avoid them is reduced also in his case. Considering this similar situation, it seems justified to apply also in his case the rules of liability for damage caused within the scope of employment.

We reach the same conclusion if we study the problem from the angle of damage caused by the employee. As appears from the foregoing argumentation, the helping family member actually performs some part of the

activities to be performed by the employee on the basis of his employment. If he causes damage in the course of these activities, this constitutes —as concerns the employer — damage caused in the course of performing duties arising from employment, even if damage has been caused not by the employee but by the family member acting on his behalf. If the employee had not called in his family member to help in his work, and damage would have resulted during the employee's working, he would be liable under the rules of labour law. So it seems unjustified that liability arising from damage caused by the family member while helping in the employee's work should be subject to a different regulation. And it would seem especially unjustified if we consider that the obligation to compensate would reduce the family income even in case of a different regulation. Moreover, in cases where the helping family member has no income of his own, compensation will be paid by the employee from his earnings. Hence, if the family member were liable individually, the paradoxical situation would arise that the employee would come of better if he denied the family member having caused damage, and persented it as caused by himself. Considering all this, only the employee is held liable even if damage has been caused to the employer by the helping family member.

b) *The employer aspect*

In a socialist society, the employer is usually a juristic person. A juristic person displays its activities through the acts of natural persons. In this context, we must study the question whose acts can be considered as the juristic person's own activity.

Some time ago the view prevailed that an employing enterprise is only answerable for the activities of a certain limited number of persons (its organs, leading employees, possibly other authorized persons) as activities of its own, and is answerable beyond this sphere only on the basis of responsibility for and to others because of some neglect in selection and supervision.

Today both jurisprudence and practice accept the view that the activities of any employee must be regarded as the activity of the employer enterprise, and that the employer is answerable for such activities in the same manner as for his own. This position is reflected in the Hungarian Civil Code and appears from the provisions of the Hungarian Code of Labour, where the obligations and duties of the employer enterprise figure at every instance.

The basis of the present prevailing view is that in case of social ownership of the means of production the member of society couples his working ability with means of production that are his own. Even if the form of this structure is similar to capitalist labour contracts of commercial character, the purport is basically different. Socialist enterprises are units of the socialits society's assets and are set up for the purpose of realizing better management, better organization of the social division of labour, and for the organized performance of society's work. The employees of the enterprises are members of this collective that carries out production. The leader of a socialist enterprise is not a person managing his own property, or some capital in private ownership; he is the member of society, and, within this,

member of a collective performing a given task of production, who has been assigned the task to direct the work of an economic unit within the scope of organizing the work of society and the participation in such work. And the employee of the enterprise is not an economically and politically dependent person who sells his working ability on the labour market; he is another member of the collective, and shares the work of society within this economic unit. The employee is obliged to comply with the instructions of the assigned leader while doing his work. This is the foundation of any organized work. But, irrespective of this, he is entirely of the same rank as the leader, and is the same sharer of social property as the leader. The consequence of this situation is that the individual employees of the enterprise, and, first of all, the collective as a whole and its representatives, enjoy wide consultative and controlling rights in respect to the activities of the enterprise. It follows from this in turn that the activities of any member of the collective cannot be detached from the activities of the collective as a whole, and that no order of rank can be established by which the activities of certain members represent the activities of the collective, while those of others do not. Within the framework of a socialist enterprise, no discrimination can therefore be made to the effect that only the activities of certain persons represent the activities of the enterprise.

The conclusion that the activities of any employee of the enterprise represent the activities of the enterprise at the same time needs some addition. Those advocating the view that the activities of any employee must be regarded as the activities of the enterprise always add that this applies to the activities of the enterprise always add that this applies to the activities connected with the employee's duties and sphere of work. This provision is also contained in Section 348 of the Hungarian Civil Code. But this definition in itself is not explanatory enough. Disputes arising in practice usually raise the question whether certain activities of an employee are or are not connected with his scope of duties or employment.

Concerning the liability of enterprises, judicial practice takes the position — not entirely consistently though — that the enterprise is liable for the activities of its employee even in case of a transgression of the sphere of duties or authority. It happened, for instance, that the works manager of the Electric Power Supply Enterprise wished to test the work of the switch lever of a transformer. He switched on the current and an electrician working on the unit suffered an electric shock. In a lawsuit brought by the Social Insurance Centre against the enterprise, the latter pleaded that the switching on of transformers was not within the works manager's scope of duties, it is reserved for electricians, consequently the enterprise could not be held liable for the accident. The Supreme Court established the liability of the enterprise. The Court ruled that „the correct interpretation of the term ‚scope of duties' implies that the employer's liability for his employee's acts prevails in any case ... where the employee causes damage to a third party while doing his work." In the cited instance the works manager caused damage while inspecting the works, i. e. while doing his work.[2] Likewise, the Supreme Court established the liability of the enterprise for its employee's acts in a case where the enterprise delegated one

[2] Supreme Court P. törv. I. 20 364/1961.

of its mechanics to do some repair work at another enterprise, and this mechanic got on a tractor — which had been left unguarded by its driver — started the tractor, and caused an accident. Here too, the reasoning was that the mechanic entered the premises of the other enterprise to do his work, and caused damage while doing his work. Although this was not directly connected with his scope of duties, it suffices as the basis of the liability of the enterprise, since the only prerequisite of this basis is that the employee is placed under circumstances where he caused damage following from his scope of duties.[3]

In my opinion this question must by approached from the angle which considers the extent to which the enterprise is able to influence its employees in merit. And this influence only operates in connection with performing work in the strict sense, i. e. in connection with doing work as stipulated in the contract of employment, as well as with tasks performed beyond the scope of duties in compliance with instructions, or without such instructions. Enterprises accomplish their tasks — including the performance of contracts of employment — through their employees. In doing so the scope of duties is determined for each employee. The enterprise can organize work and supervision of work adequately, provided that the scope of duties is defined for every employee. Hence the employees perform the activities of the enterprise when performing their duties. But it often happens that, in the interest of efficient enterprise work, the employee is under the necessity of departing from prescriptions governing his scope of duties (often because such prescriptions are incomplete, or because cases arise that could not have been foreseen). On the other hand, the employee's scope of duties comprises — theoretically and obviously — only lawful activities. Causing damage usually presupposes a violation of rights. Thus. logically, damage could never be caused in the capacity of an employee if we took the position that activities sannot be qualified as the activity of the enterprise if the regulations governing the scope of duties are violated. And if such conduct were outside the scope of employment, disciplinary liability could not be brought into operation either. Hence activities implying the transgression of the scope of duties, violation of regulations relating to duties, must also be regarded in general as the activities of the enterprise itself. Besides, this position may have the effect to compel enterprises to define correctly the working regulations, to select their employees carefully, and to organize control and supervision properly.

Activites outside the aforesaid field — such as using dressing-rooms, baths, engaging in social activities — cannot be interpreted as the activities of the enterprise itself. Yet there may be exceptions even here. For instance, an employee's activites in the canteen during taking meals is not an activity of the enterprise; but if the employee, when having his lunch, gives some instruction relating to work to one of his subordinates, this is an activity originating in his scope of duties and must therefore be regarded as the enterprise's own activity.

If an employee causes damage to one of his fellowemployees, but his activity is not within the field mentioned above, i. e. not connected with his duties, his activity cannot be regarded as one of the enterprise. Yet the

3 Supreme Court P. törv. I. 20 724/1962.

liability of the enterprise might prevail nevertheless. The basis of liability in such a case may be the circumstance that the damaging conduct of the aforesaid employee was rendered possible by some activity, possibly neglect, of another employee who acted within the scope of his duties. Thus the activity of this latter employee, having acted within the scope of his duties, must be regarded as the activity of the enterprise.

III.

UNLAWFULNESS

1. The concept of unlawfulness

As we have seen in Chapter I, liability for damage is the consequence of the breach of contract of employment, i. e. of an unlawful state of affairs. Hence unlawfulness is the prerequisite of liability for damage.

Unlawfulness is of an objective character. This is manifest in the circumstance that the state of unlawfulness exists independent of our consciousness on the one hand, and that it materializes in the outside world, on the other. (Unlawfulness contains also underlying factors that do not materialize in the outside world. The manifestation of these appears as the externally visible factor. This aspect is usually defined as the subjective facet of unlawfulness. But, actually, this definition is not entirely accurate. This factor is truly subjective, as it contains internal — psychic — manifestations; but it is objective, too, at the same time in that it contains phenomena existing in reality.)

In the literature on law the controversy has arisen repeatedly whether unlawfulness requires the violation of some legal relationship — i. e. subjective right — in addition to the violation of some objective right. As concerns liability under civil law, the prevailing view is that a conduct can be qualified as unlawful if it violates an objective right and some person's subjective right at the same time, and causes damage in addition.

In respect to liability for damage caused within the scope of employment, this controversy is of no consequence. Namely in such cases the consequences of violating a contract of employment are involved. The employer or the employee have not performed, or not properly performed, the contract. This means that the employee's or the employer's rights constituting employment have not been realized, and this results in damage which is manifest in the loss of an income, or the reduction of available means. Hence liability for damage caused within the scope of employment always accrues from the violation of some personal right.

2. The proper exercise of rights

In our discussion of unlawfulness we have so far start ed from the premise that the subject of employment violates rights or obligations constituting employment, is at default in performing the obligations arising of the contract of employment. That is to say, there is express opposition, transgression, on

part of employer or employee. It may happen, however, that the subject of employment performs his obligations, or exercises his rights arising out of employment, yet the result envisaged in defining these obligations or rights fails to materialize. The reason of this outcome is that the party concerned has made use of his right not in the manner and not for the purpose as he might have been expected. In other words, he did not exercise his rights properly.

The proper exercies of rights is an essential requirement. This originates from the view that in a socialist society the purpose of law is the promotion of socialist, social-economic progress. Hence legal regulation serves specified ends. From this necessarily follows that the rights granted on the basis of provisions of law to citizens or organs are not ends in themselves, but are due to them in order to realize this specific end. Otherwise the provisions of law could not operate, contradictions would arise between the provision of law proper and its enforcement. This principle is expressed in Section 2 of the Code of Labour, saying „the rights granted under this Act shall be exercised in accordance with their social purpose."

The purport of the principle of the proper exercise of rights differs from that of the principle of prohibition of the misuse of rights. The principle of prohibition of misuse of rights means that the exercise of rights must not violate without good reason the interests of others, i. e. some other private interest or the interests of society. This is only one, the negative, aspect of the principle of proper exercise of rights. Yet proper exercise of rights also comprises a positive obligation. One must not only be careful that the exercise of one's rights does not violate social interests or any personal interest, but care must be taken also to exercise rights actually in conformity with the purposes for which these rights have been granted, i. e. proper exercise should promote the realization of interests and ends that such rights are intended to serve. This additional function of rights appears especially clearly in the domain of labour legislation, in connection with managing matters belonging to the sphere of authority of deliberation.

Hence improper exercise of rights means that the exerciser oversteps the limits set for him, although it seems as if he had remained within them. In such cases the exerciser of the right has actually assumed a right not due to him. Thus, essentially, improper exercise of rights is equivalent to a conduct by which somebody commits breach of obligation. Naturally, bringing into operation liability for improper exercise of rights and for the consequences depends on the nature of the given system of liability. Thus, for example, liability for damage is relevant only in cases where pecuniary disadvantage has resulted, whereas disciplinary liability may operate in other cases, too. On the other hand, disciplinary liability can be brought into operation only if the improper exercise of rights has taken place by dereliction, while liability for damage may possibly accrue independent of dereliction.

Provisions of law are intended to achieve certain ends; this is being realized within the scope of various legal relationships, in the course of the exercise of rights granted to individual citizens and public bodies. If the exercise of rights does not take place, this jeopardizes the realization of aims that had been set when the provision of law was framed. It follows from this that improper exercise of rights can consist not only in making

use of some right for some purpose other than for which it had been granted to the exerciser, but can materialize also by not exercising it at all. This is especially valid for the rights granted to the employer. Thus unlawful conduct can materialize not only in that, say, a manager of an enterprise exerts improperly the rights granted to him, but also in that the improperly fails to exercise such rights.

The proper exercise of rights, and the study of this issue, is of extreme importance in labour law, and within the latter, also in connection with the liability of the employer. Numerous provisions of labour statutes define the scope of authority of enterprise by drawing certain limits. This is necessary, on the one hand, because greatly dissimilar circumstances can arise in the course of enterprisal operations, and it is not possible to regulate them with a general validity for any case in advance; thus smooth operation can be ensured only if the managers are given broader powers of disposition within the scope of employment. On the other hand, this is necessary also because the employer enterprise is invested with a number of educative measures within the scope of employment (the typical case is disciplinary action). To take proper, really educative masures — taking into account all circumstances of individual and collective — is possible only if the enterprise is authorized to make a choice from among several possible measures. The broader powers of disposition, the possibility of consideration in respect to various measures, requires the exerciser of rights to keep in mind the ends to which these rights had been granted to him.

3. Release from unlawfulness

a) Concept and effect of release

Pursuant to the rules of liability under civil law, there may arise phenomena in connection with damaging conduct which preclude the unlawfulness of such conduct. Such factors precluding unlawfulness are the exercise of rights, performance of duty, consent of the damaged, justifiable defence, and exreme emergency.

These are partly cases where the law itself provide the possibility of realizing damaging conduct; or in case of the injury or collision of two legally procted interests, one of these interests is qualified under the law as more important originally and permits the causing of damage to protect the more important interest. Hence if damage is caused in such cases, no liability for damage will accure. In cases where damage must be repaired in spite of the prevalence of circumstances that preclude unlawfulness, compensation cannot be regarded as the sanction of unlawful conduct; quite the contrary, it is a consequence of an action tolerated by law.[1] This is substantially the same case as legally permitted damage, e. g. expropriation.

The jurisprudence of labour law does not concern itself with the question of release from unlawfulness. Nor does legal regulation deal with the release from unlawfulness. So we must make a study of the problem whether we may

[1] Luby S.: Systém a základné tézy obcianskoprávnej zodpovednosti. (Právnicke Studie, 1957. 2.)

speak of circumstances releasing from unlawfulness in connection with liability under labour law — including liability of the employer — and, if so, whether the conclusions of civil law can be applied to such cases.

In finding a solution, we first must answer the question whether conducts to which civil law attaches release from unlawfulness can or cannot occur within the scope of employment. I believe that the answer is clearly yes. Be it the exercise of rights or performance of duties, be it the damaged person's consent, or extreme emergency, conducts similar to any of these may occur. In this context there will be a dissimilarity according to whether such conduct is realized by the employer or by the employee. But, at the moment, this need not concern us, as this will be of consequence, if at all, only at the solution of detail problems.

Obviously, if in the field of labour law conduct which entails release from unlawfulness in case of liability under civil law is also possible, the necessity of similar measures can arise also in the domain of liability under labour law. Yet employment is a contractual relationship created between employer and employee. So its effect results in differences in several respects.

We must keep in mind, first of all, that one purpose of establishing employment is to secure to the employee his share of the national income, and to provide means of living to him thereby. In this connexion it must be emphasized, too, that the wage or salary is the basis of the employee's and his family's subsistence, and that any pecuniary disadvantage jeopardizes this subsistence.

Second, we must take into account that, within the scope of employment, provisions of law, or the contract of employment, regulate over a wide field the cases in which one party is authorized to take measures, directed at the other, which entail pecuniary disadvantage. Consequently, such cases are not in the conceptual sphere of unlawful damage, so the question of release from unlawfulness cannot arise either. Similarly, the problem of collision of rights is regulated by provisions of law on á wide basis (e. g. the provision that transfer — taking also into account the necessitating circumstances — must not ential disproportionate injury to the employee).

Finally, we must keep in mind that in the domain of labour law the parties' possibility to exercise rights is considerably resticted as compared to civil law.

From these circumstances follows:

On the one hand, that in case of damage caused within the scope of employment the occurence of factors releasing from unlawfulness is substantially rarer and their importance lesser than in civil law. On ther other hand, that the situation in such cases will be somewhat similar to the relationship existing between the parties to unlawful damage governed by the rules of civil law. Namely the employer's damaging activity does nos usually result from the exercise of some right arising out of the relationship of employment that exists with the employee; it rather follows from some other activity of the employer. (The damaging result of this activity then affects the employee active within the scope of his employment.)

Another difference is that in every case where on the employer's side a circumstance releasing from unlawfulness prevails, the damage sustained by the employee must be repaired nevertheless, for maintaining the subsistence

of the employee. This will be no longer compensation for damages, it will be refunding. The reason of refunding will be that carrying out the enterprise's damaging activity is usually in the interest of society, or more precisely, in the interest of the employer enterprise. It would be hardly tenable that the employee be placed in a disadvantageous situation because of some act performed out of enterprisal interests. The exception to this principle is — as follows from what has been explained — if the employee has given cause or possibility for such conduct of the employer. For instance, the employer had to take measures to counter the employee's act — e. g. unlawful attack — or the employee has consented, if he was in a position to do so, to the employer's activities entailing damage.

What has been outlined above will therefore constitute the scope within which the causes releasing from unlawfulness may play a role in connection with the employer's liability for damage.

In the following I shall discuss only two of the circumstances that result in the release from unlawfulness, since these two are frequent occurrences in the field of employment relations.

b) Exercise of rights and performance of duties

The mere exercise of rights must not be confused with proper exercise of rights. The exercise of rights takes place as a case relasing from unlawfulness if and when a provision of law grants somebody the possibility to cause pecuniary disadvantage to some person by exercising his rights, and the person entitled to do so avails himself of this possibility. Hence in this case proper exercise of rights leads to damage.

We speak of the performance of duties if a provision of law prescribes some activity, and the doer meets this obligation by which he might cause damage. The basis of release from unlawfulness is that this conduct is in the inter est of society, or for a purpose considered important by society It is here that it differs from the exercise of rights. In caset of exercising rights, the law expressly provides the possibility to cause damage. By contrast, in case of performing duties the possibility of some conduct or act is given legally, with the tacit understanding that this may imply damage. This is the case, for instance, when the works fire-patrol damages the belongings of employees in the dressing-room when fighting fire.

As has beeen stated in the introduction, the employer is obliged to compensate the employee for his damage in such cases. But this is an obligation to compensation independent of liability for damage.

c) The damaged person's consent

If anybody consents to some act, he is not estitled to make protest after the act for the reason that it entailed consequences disadvantageous to him. From this it logically follows that if somebody had consented to some conduct that causes damage to him, he is not entitled to claim compensation. This principle is correct in the general sense. Yet consent has some limits, especially within the scope of employment.

The rights of the individual are resticted to some extent by society. This restriction acts in two directions; first, the damage caused to the individual,

or the damaging conduct, may violate the interests of society; second, the individual might possess important rights in respect to which society wishes to protect the individual from waiving these rights out of carelessness or some other reason, or from consenting to their infringement. Thus the individual's power of decision is restricted in these two aspects. This restriction is expressed by Section 342 of the Civil Code, pursuant to which „no compensation is due if damage has been caused with the damaged person's consent, and damage does not violate or endanger social interests."

For instance, a case where the manager of the employer enterprise consents to using the enterprise's material for building the employee's house, belongs to the first group. In this case also the damaged person behaves unlawfully and will therefore be liable together with the person causing damage.

Protection of life and corporeal integrity, as well as rights arising from employment, should be mentioned in the second group. Protection of life and corporeal integrity are so important that society will protect them even against the will or carelessness of the individual concerned. The rights arising out of employment are of similar importance. In a socialist society the basis of livelihood is work. Income or other provisions resulting from work serve only the employee's subsistence, but also that of his family. It is therefore that labour statutes grant rights to employees by coercive provisions. Waiver of these rights is not recognized as legally effective under labour law. It follows from this that any consent to acts that might result in damage to life or corporeal integrity (except for medical intervention), or in the reduction of the employee's wages, or curtailment of his rights arising from employment and ensuring his living, is null and void. For instance, if the employee consents to doing work high above ground without using the safety devices, the employer is obliged to prevent him from doing so. And if the employer fails to prohibit such work, and the employee suffers an accident, the employer cannot be released from liability by pleading that the accident has occurred within the scope of work undertaken by the employee.

If, however, the employee has been in the position to consent to the employer's damaging conduct, the employer cannot be held liable for damage.

In connection with the damaged person's consent it must be clarified, too, whether this consent was not given in circumstances which perclude the validity of the consent. Whether there was some error, whether consent was not given as a result of misrepresentation or under duress. It is mostly the latter that is often referred to within the scope of employment. For example, the employee declares that he had accepted termination of his employment by mutual consent only because the manager had threatened to dismiss him summarily if he would not accept such termination. It should be kept in mind in such cases that duress and threat cannot be constituted if reference is made to a rightful claim. Accordingly, if the employee has actually committed a disciplinary offence, and this offence is so severe that it is punishable with summary dismissal, no threat that would entail voidness of the mutual consent can be established to have existed. (Needless to say, making reference to a rightful claim cannot serve as a basis for compelling the employee to waive one of his rights granted him by a protective provision of law. For instance, an employed woman has committed breach of duty; the

prospect of taking disciplinary action, or possibly not taking it, is then held out to her for making her waive her right to being transferred to an easier job to which she is entitled as a pregnant woman under provisions of law. In such a case the employer's conduct is unlawful.)

IV.

THE SYSTEM OF LIABILITY

A) The basis of principle for the system

1. Introduction

The establishment of liability always means social judgment over a conduct, or result produced by that conduct. This comprises three factors. First, that said conduct, or its result, is incorrect, since it contravenes requirements set by society. Second, that said conduct is incorrect also because some other conduct would have been possible in the given case. Third, that calling to account serves the purpose of influencing the violator to behave in the future in similar cases in conformity with the requirements of society.

The conclusion that conduct contravenes requirements set by society is of an objective nature. It compares the conduct, or the result produced by it, to the social requirement without regard to the subject of such conduct. (Thus it is irrelevant in this respect whether the violation of law or a legal right has been committed by a child, an adult, by an insane or a sound person.) This is a question of unlawfulness. This is the case if obligation arising out of employment is violated.
The second factor compares the conduct to the social requirement the violator is expected to fulfil. It is considered here whether the violator ought to have behaved in some other way, or if a different conduct could have been reasonably expected from him.

One of the sharpest controversies in literature on law dealing with liability for damage is the definition of the system of liability. Debates about the system are going on in the literature of civil law first of all, since in labour law such issues have not yet emerged, partly because of the recent nature of this branch of law. But the fact that in the field of labour law, even in the statutory material, regulation and discussion was so far practically limited to the employee's liability, also played a role here. And the latter is based on liability accruing from dereliction. Another contributing factor is that the scope of liability is restricted in cases of employees' liability, and not even the full exhaustion of this restricted legal possibility is compulsory, since both employers and the courts have power of discretion. This restriction, or the possibility of reduction, can often bridge difficulties that might arise in connection with the objective forms of the employee's liability. This situation, too, reduced the possibility of controversies in respect to the system of liability. It follows from all this that, compared to civil law where debates are focussed on the nature of the system of liability, the principal issue in labour law is the definition of the scope of liability and the manner of its restriction. Since,

however, it seems advisable to clarify the basic principles of the system of liability under labour law, we first must get acquainted with the views adopted in civil law. The more so, since the liability for damage caused within the scope of employment is still largely regulated by the codes of civil law, even in socialist conuntries.

2. Views relating to the system of liability

I. The present positions taken in the science of civil law can be divided into three groups. One is that liability for damage must be established irrespective of dereliction. This is the objective system. The other is that the general form of liability for damage must be the system based on dereliction. The third tries to reduce the differing systems to a common basis of principle and to create thereby a uniform system of liability. Apart from opposite stands emerging in the Soviet literature in the beginning, the system based on dereliction is dominating in socialist literature on civil law. It should be noted here that even those adopting the principle of dereliction admit that this principle fails to provide satisfactory solutions in certain cases. In such cases — e. g. compensation for damage arising from a source of increased dangerousness — they accept the application of objective liability. This, however, is regarded by them as an exception to the general rule.

The arguments adduced in favour of the dereliction system in socialist jurisprudence can be summed up briefly as follows:

a) Only solutions which hold liable only persons who were aware, or could have been aware, of the wrongful nature of their conduct are compatible with socialist principles.

b) If the damager would be held liable also for his unintentional acts whose consequences he was not able to prevent, this would have a negative effect, and the fear of being held liable even for unintentional acts would impair his activity, would result in inactivity, a fatalistic attitude.

c) Applying the principle of dereliction constitutes an incessant stimulus to disclose and eliminate misconduct. The awareness that bringing into operation liability can be prevented by proper circumspection serves prevention much better than does the objective system.

Views advocating the exclusion of dereliction have not been adopted decisively in socialist literature. The arguments of the adherents of objective liability can be summed up as follows:

a) dereliction as a decisive factor is uncertain, as it is a criterion that rests on internal, psychic, motives which cannot be perceived directly and externally, whereby the presence of this factor is difficult to prove.

b) It follows from this uncertainty that attempts are being made at referring dereliction to some absolute, general standard whereby it would become objective.

c) A system of liability constructed without the principle of dereliction protects social property much better. It must therefore be preferred under the socialist conditions of production.

d) With the given high degree of mechanization in modern society, the system based on dereliction provides no satisfactory solutions.

Several attempts have been made at eliminating the dual character of the liability system. This has been suggested not by insisting on the exclusiveness of the one or the other principled basis, but rather by making the two systems operate as two steps within one uniform system of liability.[1] Others try to create a system resting on a uniform basis not by discriminating the subjective from the objective system, but by discriminating between groups of facts based on the evaluation of conduct and its influencing. Such discrimination would also eliminate the central role af dereliction, since it would be replaced by the central position of social judgment on human behaviour. This judgment becomes manifest in imputableness, which comprises dual evaluation. One is that the conduct is judged unfavourably by society. Second, that society believes nevertheless that the given conduct can be improved by legal means. Thus liability under civil law can accrue only from an imputable breach of duty. Imputableness means a) mala fides, d) dereliction, and c) failure to take protective measures in situation calling for special protection, especially failure to prevent provoked or existing danger. The instances of objective liability are summed up in the latter.[2]

II. Literature on labour law deals with the system of liability mainly from the angle of the employee's liability for damage. The general view is that in case of damage caused by the employee to the employer, liability must be constructed on the basis of the system of dereliction.[3] The only exception to this rule appears — with no general character — in case of liability for custody.[4]

As concerns the employer's liability, the problem of the system receives less attention in literature. There is hardly any standard work available. Most principled positions relate to damage caused by industrial accidents. These are based partly on the principle of liability by dereliction,[5] partly — especially recently — on that of objective liability.[6] Emphasis on objective liability is motivated by the protection of the employees' interests and livelihood.

[1] Világhy M.: Opponent's report in an academie disputation (21. Sept. 1955.)

[2] Eörsi Gy.: A jogi felelősség alapproblémái, a polgári jogi felelősség. (The ground problems of the judicial liability, the liability on the civil law.) (Budapest, 1961.) *Abr.: Liability.*

[3] Nagy L.: A dolgozók anyagi felelőssége (Worker's material liability.) (Budapest, 1956.)
Nagy L.: Liability.
Nagy L.: Anyagi felelősség (Material liability.) (Budapest, 1966.)
Weltner A.: Labour law.
Александров Н. Г.: Советское трудовое право. (Moscow, 1967.)
Каринский С. С.: Материальная ответственность рабочих и служащих по советскому трудовому праву (Moscow, 1955.) Abr.: Liability

[4] E. g. In Hungary Nagy L.: A dolgozók anyagi felelőssége, (Worker's material liability), Nagy L.: Liability. Weltner: Labour law. Weltner—Nagy: A magyar munkajog. (The Hungarian labour law.)

[5] Флейшиц Е. А. Возмещение имущественного вреда, соединенного с повреждением здоровья. (Moscow 1957.) Abr.: Commentary
Майданик Л. А.—Сергеева Н. Ю.: Материальная ответственность за повреждение здоровья. (Moskow, 1953.)
Schlegel R.: Arbeitsunfall und Schadenersatzplicht. (Berlin 1959.)

[6] Nagy L.: Liability
Nagy L.: Anyagi felelősség. (Material liability.) Budapest, 1966.
Witz—Tomes J.: Nekteré theoretické otázky kodifikace československáho pracovniko práva. (Stát a pravo 1957. 2., 11.)

Nor is there uniform legislation. Soviet provisions of law relating to compensation for industrial accidents rest on the principle of dereliction.[7] The Czechoslovak,[8] GDR[9] and Hungarian Codes of Labour estabilish the employer's liability for industrial accidents irrespective of dereliction.[10]

As appears from the foregoing, both jurisprudence and statutory law contain very little material in respect to the system of the employer's liability, and not even this scanty material reflects any uniform view.

3. Definition of the system of liability under labour law

a) The system of liability in general

If we are to define the system of liability under labour law, we first must clarify the basic principles of the system of liability.

In the controversy between the followers of the dereliction and the objective system, those insisting on the exclusive prevalence of either system are clearly wrong. To define a system of liability must not be an end in itself. The purpose of liability is the best possible protection of interests safeguarded by law. Hence the system of liability is satisfactory only if it serves this purpose in the most efficient manner.

The purpose of bringing liability for damage into operation is to ensure compensation to the damaged on the one hand, and to reform the person causing damage, to change his conduct, on the other. The adequacy or inadequaci of any system of liability depends on whether it is possible to ensure compensation and to influence damaging human behaviour by applying it.

Liability for damage is based on social judgment to the effect that damaging conduct is wrong since it collides with requirements set by society, and that the violator ought to have behaved differently. Establishment of dereliction comprises the additional fact that the violator was aware, or could have been aware of the wrongfulness of this conduct. The followers of the dereliction principle are right in saying that one important guarantee of mending is the violator's awareness of his wrongful conduct. But from this they draw the incorrect general conclusion that succes of reforming can be expected only where we are confronted with intencional wrongful conduct. This would lead to a situation in wich both compensation and calling to account would remain absent in the most important categories of damage — as appears from the number and consequences, from the seriousness of damage — since dereliction on part of the damaging person could not be established in a large proportion of these cases. Those who try apply the dereliction principle to such cases all the same, actually distort its substance and in fact apply the objective principle.[11] Conversely, if they do not wish to misinterpret the substance of the dereliction principle, they cannot but accept the existence of objective liability. Emphasizing the principle that in the socialist system liability can accrue only in case of dereliction, this would mean the mainte-

[7] Decision of the Commission of Labour — 22. 12. 1961. — § 1.
[8] 190—192. §
[9] 116. §
[10] 62. §
[11] Флейшиц Е. А.: Commentary.

nance of a constant contradiction. And this contradiction is rendered even more profound by the fact that many of the adherents of the dereliction principle must admit — on the basis of practical experience — that also objective liability can have a reformative, preventive effect.

It was this situation that prompted some distinguished representatives of jurisprudence to give a definition to the uniform basic principles of liability under civil law. As we have seen, part of these attempts were limited to state that dereliction and objective liability do not exclude each other, but form parts of the uniform system of liability under civil law. These attempts brought some progress in that they tried to put an end to the debates — often not too fertile — going on between the followers of the two systems. Another step forward is made by the view which interprets dereliction and objective liability as the lower and upper step of the liability system and tries to create a uniform system this way. New roads are sought for by the theory that sees the uniform principled basis in the concept of imputableness. Three aspects are summed up in the latter i. e. mala fides, dereliction, and omission of protection. The latter comprises the cases that usually belong to the category of objective liability. This theory starts from the premise that liability for damage should be operative in cases where, according to social judgment, it is possible to exert influence in this way to prevent further damage. Accordingly, society would establish requirements that may vary with the types of facts. Anybody who fails to meet these requirements, or violates them, commits dereliction thereby and this conduct is then imputable to him.[12] Hence imputableness is the collective concept of conducts by which somebody fails to meet the requirements that have been imposed on him by society.

I believe that both theoretical disputes and experience of legislation have shown so far that based merely on dereliction it is not possible to build up a system that would satisfy all needs of a modern society. It must be admitted a the same time that the reformative nature of the dereliction system is more direct. For in this system the fault committed is disclosed in the course of calling to account and imposing sanstions, the person causing damage is informed of where he has acted wrongly. If dereliction is disregarded, the fault is not disclosed, only the wrong result is presented, and the person held liable is induced by means of the sanction to investigate the circumstances of damage himself and to draw the necessary lesson. So here education takes place in a more indirect way. Consequently, if in case of a direct damager the possibility exists to establish dereliction conclusively, and this ensures compensation and sufficient mobilization for preventing further damage, the system based on dereliction conclusively, and this ensures compensation and sufficient mobilization for preventing further damage, the system based on dereliction should be chosen. Where, however, these conditions are not given, a different solution must be found. This might be, first of all, to disregard the aspect of dereliction. But other solutions might be possible, too; e. g. to hold liable, instead of the direct damager, the person who is in a position to prevent damage more efficiently (his is the case of holding liable the person exercising supervision,

[12] Eörsi Gy.: Liability

or the person running the enterprise). But this latter solution cannot be applied in cases of damage caused within the scope of employment.

The most important group of cases where disregard of the aspect of dereliction is called for is the activity connected with machinery, and damage resulting therefrom. In civil law this is chiefly the sphere of damage resulting from the use of sources of increased dangerousness. But a considerable proportion of damage arising within the scope of employment is of such nature. In such cases these activities are not wrongful, they are most useful and must be developed. It has been suggested that in such cases increased danger results from working with machinery and natural forces over which man has not yet complete control, and these forces, quasi escaping occasionally, cause damage. But this viey is not correct.[13] Some time ago, and to a smaller extent even today, the greater frequency of damage when putting to use novel equipment or sources of energy resulted from the fact that the improvement of protection did not keep abreast with the rapid technological progress producing novel machinery. Today the „dangerous nature" of sources of increased danger chiefly arises from the circumstance that the use of such sources has become widespread, and — although the possibilities of protection have increased too — the absolute number of damages rises even if it has decreased when compared to the number of such sources. Owing to the wide use of machinery, the amoung of damages has also risen, and damage of considerable amount may arise in a single case. In using machinery, exploiting the forces of nature, technological progress creates new situations practically every day. Not only novel machinery, novel equipment is constructed incessantly, but the possibilities of protection grow constantly, too. The widening scope of employees' and workers' initiaves — especially the innovation movement — yield new accomplishments hour by hour. Various regulations cannot keep up with this rate of progress. The consequence is that in case of damage resulting from sources of increased danger it would often be very difficult to ascertain if somebody has commited dereliction or not; and very often there is actually no dereliction at all. At the same time experience shows that the use of specially dangerious equipment does not lead to damage in comparable circumstances in every case. Hence damage is not an inevitable consequence of operating sources of increased danger. On the contrary, the necessary consequence of the correct application of modern technology is the relative decrease in damage. Hence damage can be avoided.

Before proceeding, let us consider whether it is correct at all to invoke liability in cases where no dereliction can be established. Putting it in another way: is the system of liability suited for reforming, influencing in cases where the doer of the unlawful act has committed no dereliction, i. e. was not aware, and could not have possibly been aware, of the wrongfulness of his conduct.

As we have seen, liability means the imposition of sanctions. Essentially, it means social disapproval, social censure. In cases of criminal and disciplinary liability the sanctions are expressly attached to the person; very

[13] Eörsi Gy.: Liability

often they mean the curtailment of the individual's most personal rights — in case of criminal liability the right to personal freedom, in case of disciplinary liability the right to work is restricted to a certain extent — and their effect may be felt even for a longer time after the sanction has been imposed. (Former criminal or disciplinary punishment may be the obstacle to assigment to certain posts or to granting certain benefits.) Considering these circumstances it is obvious that criminal and disciplinary liability can operate only where the violator could have been aware of the wrongfulness of his act. (This accounts for the fact why the dispute on objective and subjective liability does not arise in connection with criminal or disciplinary liability.)

The case is different with liability for damage. Here we need not insist unconditionally on dereliction. This is justified by two circumstances. First, liability for damage does not affect the individual's most personal rights to such an extent as does criminal or disciplinary liability. It only reduces the violator's available means. Second, the wrongful act has caused damage to somebody. So it is considered proper to place the burden on the person who, in human terms, had opportunity to avoid causing damage, and not on the person who has suffered and could not avoid damage. And liability for damage has a most efficient influencing force even in such cases, and even in several directions. Compensation paid by the employer figures in the balance of the enterprise, in conformity with the principle of economic accounting. So, in given cases, this indicates towards the supervisory organ that there is something wrong with management, including productive or other activities. On this basis the possibility is given to inspect enterprise operations and eliminate faults. But liability for damage has also a more immediate effect. Reduction of enterprise profits affect the provisions due to the collective (e. g. profit shares). Thiw will stimulate the collective of employees to create, or making the management create, conditions which prevent damage in the future. In doing so the opportunity arises to disclose the employees' possible misconduct underying damage, and to shift damages, or part of them, to other persons according to the rules of liability.

As appears from the foregoing, liability for damage is the most suitable of all legal means for exerting influence in cases where there was no dereliction, but, according to social judgment, damage could have been avoided objectively. This means is the most suitable because, compared with other legal means, it can be employed over a much wider field, and because it exerts its effect in a most differentiated manner and affects human behaviour at several levels at the same time. In a given case it therefore reaches the human will authorized to dispose or control, and influences it in the direction of finding the possibility which prevents future damage. (As has been shown, the field of application of criminal or disciplinary liability is much narrower, and their effects are much more restricted too. The sanctions only affect the person who has committed the offence or breach of duty. They do not affect the superior organ, especially not the collective as a whole, to such an extent as does liability for damage. So it is therefore that to maintain and bring into operation the system of liability for damage is important, especially in the cases discussed above.)

In connection with disregarding dereliction it might be argued that this

is substantially a smuggling in of the principle of being liable for the outcome of an act, and also that it makes people fatalistic, curbs initiative. Neither argument is well-founded. They are not, because disregarding dereliction can take place only in cases where, according to social judgment, the possibility of avoiding damage exists on the general, social level. Employing liability for damage — i. e. sanctions — is the means by which we wish to encourage the person held liable to detect, organize protection, the possibilities of preventing damage, and to make use of them. Liability for damage would make people indifferent, fatalistic, would curb initiative only if the person causing damage were deprived objectively of taking protective measures, preventing damage. It it were left to mere chance whether future damage can be prevented or not, then the institution of liability for damage would render people actually indifferent. Since, however, damage can be prevented — and not by chance, but because the required technological, organizational, etc. means are available — this circumstance itself will make people active, will mobilize them and induce the damager to find and use all devices and means by which he is able to prevent damage. It is this very feautre that makes liability for damage superior to other legal means that are also intended to prevent damage.

We have concluded that in constructing a system of liability we must start from the requirement that this institution must ensure compensation and must result in the most efficient influencing to prevent future damage.

In cases of causing damage within the scope of employment the system of liability is easier to define than the system of liability under civil law. Under civil law the person must be found in the various types of cases (e. g. runner of the enterprise, owner of the building) whose holding liable is the most efficient measure for preventing future damage. In cases of damage within the scope of employment, we only have to consider the relationship of employer and employee. Consequently we need not look beyond the subjects of employment — the enterprise in our case — to find the person to be held liable. So the only question that may arise here is to decide if liability by dereliction is suitable, or some other solution must be chosen. This question will be studied from the angle of the employer's liability.

Since today the employee's incomes and means are acquired by work,

b) *The system of the employer's liability*

I. *The importance of reparation*

When the system of liability is devised, the importance of reparation is of great consequence. Let us study this aspect.

Damage suffered by the employee may be manifest in the following:

a) Absence of wages and other allowances serving the employee's and his family's livelihood (the term livelihood is used in a broad sence and is to denote not only the means required for subsistence in the strict sense, but also other services and benefits required for raising material and cultural standards).

b) The employee's available means are reduced (outlays, damage, destruction of belongings).

reduction of means can usually be retrieved only from wages paid for work. Hence the above types of damage indirectly result in a drop of living standards, and, if considerable, even endanger the employee's and his family's livelihood. Consequently damage violates most substantial interests in such cases, and therefore great emphasis must be placed on the reparation of damage.

II. *Determining the system of liability*

We have agreed that, as far as possible, the system of liability must be built on the condition of dereliction. The problem is whether in the cases discussed in the foregoing such basis of liability ensures reparation, and is efficient enough for preventing future damaging conduct.

As concerns damage suffered by the employee, the general rule is that the employer is held liable. So what we have to consider first is whether — with regard to the great importance of reparation — the mere circumstance that the employer is liable warrants a departure from the system of dereliction.

The material means required for meeting obligations arising out of employment are available to the employer. To establish employment, to keep employees working, is permissible only if the required funds are available. Yet the funds available to the employer, the provisions of law defining the employer's obligations, create only the possibility to meet the obligations toward the employees. So it is on this basis that the work of the employer enterprise must be organized in such a manner that obligations arising out of employment be met faultlessly. Thus it is the employer's duty to make arrangements for satisfactory performance of obligations. Owing to difference in organization, or circumstances varying daily, there is often no possibility to issue detailed, centralized regulations; but in order to devise measures, organization, etc. best adapted to local demands and promoting the operations of the enterprise, too detailed regulations are not expedient in many cases. From these circumstances it follows that provision of good working conditions, efficient organization and punctual provision of services greatly depend on enterprise management, and also on the efficient work, initiative and discipline of the entire collective. These circumstances illustrate at once why it is often extremely difficult to establish the fact of dereliction in case of damage caused by the employer enterprise. And this is especially difficult on the part of the employee. Not only employees, but also persons or organs acting acting in disputes are often confronted with difficult problems.

Yet the difficulties outlined above do not in themselves justify to disregarded the system based on reliction in cases of damage caused by the employer. These dificulties can be overcome by applying the presumption of dereliction. The real difficultly lies elsewhere.

The concept of dereliction always comprises social judgment. Namely that the person involved failed to meet social requirements he is expected to satisfy. It should be added right away that — as will be discussed in more detail in connection with dereliction — the standard, the social requirement is always related to a type and never to the individual. So whenever evaluation is made, the basis of comparison is the social requirement to be

met not by the individual causing damage, not by the abstract „citizen", but by the type of citizen with a specified duty, qualification and practice; and not by the „employer causing damage", not by the abstract „socialist enterprise", but by the type of enterprise belonging to a specified branch of industry, of specified size, equipment, etc.

It is at this point that the difficulty arises. Protection of the employees' interests, the great importance of reparation, and the necessity of uniform judgment would hardly permit reparation of damages differing with the various types and potentialities of enterprises. The immediate conclusion may be that, in order to avoid such solutions, the social requirements to be met by enterprises should be made stricter, which is the solution of the problem. There exist, indeed, possibilities to make requirements stricter, i. e. to raise the standards to be applied to dereliction. But this is only feasible until the requirement is imposed not on the type, but on the entity of the highest standards within the type. In this case we still can say that the conrete possibility to prevent damage was available to the damager, and so was the opportunity to realize his fauld and display a different conduct in the future. But as soon as we go beyond this level, we actually transform subjective liability based on dereliction into objective liability. Yet this is a distortion of the very essence of dereliction liability, without offering any advantage in return. Hence the circumstances outlined above would suggest to desist from the condition of dereliction — as the basic type at least — in case of liability for damage of the employer enterprise.

In cases of damage suffered by the employee within the scope of employment, society has therefore to impose on the employer the requirement to prevent damage. In doing so, society is not concerned with the circumstance whether the employer in the given case, or an employer of similar type, is or is not in actual command of the concrete mans of prevention. But when this requirement is defined, another circumstance must be taken into account.

In the centre of the socialist system of society stands man. The purpose of socialism is to provide to him, in given circumstances the highest material and cultural standards possible. It follows from this that society imposes on the employer enterprises the requirement to prevent within the scope of employment the occurrence of damages. But the standard of material and cultural provision due to the individual depends on the possibilities and means available to society similarly, the efforts and measures to prevent damage can go only as far as the funds available to society permit. In a socialist society, the employer enterprises are economic society, the employer enterprises are economic units which operate on the basis of economic accounting. Since, at the same time, they are parts of the national economic plan, their measures taken in the course of economic operations are relying not only on the means derived from the production and from marketing products of their own. For outlays, investments, etc. in excess of their own resources they receive assistance from central means (the illustration to what extent this affects the profits of the enterprise, or the funds due to the working collective, is beside our point). Yet is is as well obvious that no enterprise can get shares from centralized funds to such an extent as would jeopardize the planned, proportioned progress of the national eco-

nomy. This applies also to investments or other measures required for preventing damage that may arise within the scope of employment. Not even in such cases is it possible to insist on measures, or provide possibility of measures, for which the means would have to be drawn off from other sectors, as a consequence of which the accomplishments would result in considerable recession elsewhere, which would disrupt the desirable proportions. The results achieved would not be proportionate to the disadvantage arising elsewhere. Consequently, the social requirement to prevent, the occurrence of damages affecting employees by making use of the objective possibilities of the employer enterprise, is limited by the given potentialities of society. Exploitation of possibilities is not permissible if this would result in disproportionate burdens on society. It should be emphasized, however, that in determining the disproportionate burden departure must never be taken from the potentialities of a given enterprise. So, for instance, the allegation of an enterprise that some measure of this nature would result in the deficit of operations for the currant year cannot be accepted. Whether some measure would entail disproportionate burden must always be judged from the angle of society as a whole. If the own potentialities of a given enterprise would be taken into account, we actually would adopt the basis of dereliction, even its incorrect, subjective interpretation. And in this case the system of liability would not serve its purpose, would not encourage to prevent damaging conduct.

Considering the differences outlined above, I think it justified to abandon the term objective liability. The more so if we take into account that — as will be discussed later — this may lead to a solution differing from the conventional in respect to discharge from liability in various types of damage. The term I suggest for this type of liability is „liability of increased protection". The purport of this type is the requiremnt that the person to be held liable is under the obligation to make use of the highest standards of technology, science, organization, etc. to prevent possible damage in a manner that no disproportionate burden be imposed on society. This change of term is not merely of a stylistic character, it implies a substantial difference. It expresses that society expects greater efforts from the person concerned than may be expected ordinarily when the question of dereliction is to be decided. And by abandoning the term objective liability it is indicated at the same time that the upper limit of this requirement is below objective liability.

Thus I believe that employer's liability should be regulated on the basis of the system of liability of increased protection. My conclusions relating to the system of liability are of general character for the time being, so I do not study it by comparison to the various types of damage. But owing to the more than average importance of reparation on the one hand, and to the operations of enterprises on the other, this system should be laid down as the general rule. An investigation into the various types of damage, the nature of employees' sosses occurring at a given type, will determine to what extent departures from the general rule are justified in particular cases, be it in the direction of increase of severity, or in the direction of mitigation. This will be manifest mainly in regulating discharge from liability, or possibly in the application of the dereliction system in some cases.

B) *Liability of increased protection*

1. *The concept of discharge from liability*

As has been discussed in the foregoing, the underlying principle of liability of increased protection is that in such cases the prevention of damage is objectively possible, and the system of liability for damage is therefore intended to induce the damager to make operate forces, change his conduct, in such a manner that future damages are prevented, or, at least, their occurrence reduced. This basic principle determines the scope of the liability system at the same time. This cannot extend beyond actual, objective possibilities to prevent damage. If such possibilities are not given, liability for damage cannot fulfil its influencing function. If there is no possibility to prevent damage, the damager is called to account in vain, as he will not be able act differently in the future either.

If we accept the conclusion that the system of liability of increased protection can be applied only in cases where prevention of damage is objectively possible, we must face consequences in two respects. One is the aspect of framing provisions of law. It would be mistaken to establish liability for damage in cases where the possibility of prevention is not given. The other is the occurrence of actual damage. For, if the basis of holding the damager liable is the circumstance that objective possibilities of prevention exist, the person held liable must be given the opportunity to prove that the objective possibility of preventing damage did not actually exist in the given case. To put in another way, this means that the person held liable must be given the opportunity to discharge himself from liability by alleging that damage could not be prevented,

What are the criteria in case of the employer's liability for damage under labour law on whose basis it can be ascertained that damage was not preventable? Causal nexus must be examined in this connection first of all. If damage has been caused by a certain person, it would be obviously unwarranted to call to account some other person. Yet this is but one facet of the questions to be studied. The point is that damage arises within the scope of a certain activity, within the scope of employment in the cases of our concern. As a result of damage, the employee's rights — belonging to, and protected within, the scope of employment — are violated. Rights due to the employee within the scope of employment materialize as corresponding obligations on the part of the employer. To meet these obligations is the employer's responsibility. It follows from this that the employer is obliged to do everything in his power to meet these obligations. So he is not supposed to remain passive when some external activity or conduct interferes with the fulfilment of obligations; he is expected to act to prevent such interference in order to have the obligation fulfilled and to prevent infringement of the employee's rights thereby. Consequently, he can be discharged from liability only if he is able to prove conclusively that he had no possibility to prevent such interference.

Thus discharge from liability has two criteria. One is activity by some other person which prevents the fulfilment of some obligation arising out of employment. The other is the unpreventability of such activity. (If the activity of such other person was not unpreventable, the causer of damage

will no longer be this other person; it will be the one who failed to prevent this activity. So causation will be manifest in the failure to take action necessary for prevention.)

Before discussing these two criteria in more detail, let us make a brief survey of the positions taken in literature on law, and by legal regulation.

2. *Conditions of discharge in case of liability for damage caused by the employer within the scope of employment*

In connection with defining the conditions of discharge, there exist, essentially, four views in jurisprudence and in legislation. The first accepts as a reason for discharge only the damaged person's constributory act. The other accepts vis maior and unpreventable external causes as possibilities of discharge. The third defines unpreventable external cause and the employee's unpreventable exclusive causation as reasons for discharge. The fourth only recognizes unpreventable external causes.

Let us now make an attempt at defining reasons for discharge.

As concerns the employer's liability for damage under labour law, it is correct — in my opinion — to accept as the basis of discharge from liability the allegation to unpreventable external causes, which comprise both vis maior and other external causes. (An explanation will be given in the detailed discussion of this concept later on.)

In respect to damage caused by the employer within the scope of employment it is, however, not sufficient to make allegation to unpreventable external cause. The reason is that, viewed from the angle of the employer, the activities of his employees can never be regarded as an external factor, i. e. one that represents conduct by an outsider. Consequently, if allegation would be made only to unpreventable external causes, this does not include the conduct of the damaged employee. Hence the unpreventable conduct of the damaged must be given due regard in addition.

I should like to add that the reasons for discharge mentioned here — i. e. external cause and the employee's causation — represent the basic type. The facts in given cases of liability may extend or restrict their scope as required.

What we have to do next is to give a closer definition of these concepts. I first shall give an analysis of „external cause", then discuss the concept of unpreventability; the problem of the damaged person's conduct vill be dealt with in a special part.

3. *The concept of „external cause"*

The term external cause means that the causer of damage is outside the person held liable, is alien to the latter.

In case of the employer's liability for damage caused within the scope of employment, we may speak of external cause only if this cause is outside the employer enterprise. In this respect the term outside is not only a territorial, local definition. It has a threefold meaning in this case: partly personal, partly territorial, partly relating to some activity.

The first, „personal" ascept means that the causation of damage must not originate in a person whose activity is to be regarded as the activity of the employer enterprise. For if such activity is to be regarded as the activity of the enterprise, we are no longer faced with an external cause. In the foregoing we have clarified that any employee's activity that is within the scope of his employment must be regarded as the activity of the employer enterprise. It follows from this that the conduct of the employee, if he has caused damage within the scope of his employment, cannot be qualified as external cause.

The „territorial" meaning of the term external cause is of an auxiliary character to a certain extent. The point is that in given cases outsiders — really external persons — may be staying at the premises of the enterprise. These persons can be divided into two large groups. The one comprises persons who stay at the premises with the permit or consent of the enterprise. Consent may be tacit, or may be inferred from relevant facts, which is a very frequent case (e. g. opening of the shop, fixing office hours, in such a manner that customers can enter without special permit, etc.). Such persons may be connected with, or participating is, the operations of the enterprise — e. g. experts — or are staying there as visitors, or for doing business with the enterprise, or for some similar reason. The second group comprises persons who are staying at the premises without a permit from the enterprise, but the latter is not in the position to prohibit them from staying there. These are persons who are there legally, although possibly without the permit or consent of the enterprise (e. g. official persons who are entitled to enter the premises without permit). Finally there may be persons who are staying there illegally, without the permit of the enterprise, maybe despite express prohibition.

The employer enterprise is under the obligation to do everything to protect its employees from suffering damage. This is an obligation arising out of employment. This involves another duty of the employer, i. e. to instruct — if necessary — outsiders entering the premises, before they are admitted, to observe rules of conduct required for preventing damage, and to take appropriate measures lest outsiders should cause damage to the employees. (Whenever damage is mentioned, I do not only refer to accidents. The term comprises cases where, say, a person admitted to the premises steals some employee's belongings, or a person applying for a job steals a leaving employee's work-book from the desk of the clerk with whom he is talking.) Considering the employee's obligations, it is justified not to regard such persons as outsiders, not to regard damage caused by them as having resulted from external causes in any case where the employer's liability for damage caused within the scope of employment is implied.

The case is different with persons who are staying at the premises without the permit or consent of the enterprise, be their staying legal or not. The enterprise cannot be held liable for the damaging acts of such persons, since the latter are present without the employer enterprise's permit and consent, and the latter is not in the position to influence their conduct. (A further problem may arise here, i. e. in such cases it has to be decided whether damage was unpreventable or not.) What has been said above applies even to cases where official delegates are present and the

enterprise is aware of their staying there, since the enterprise is not in the position to restrict the activities of such persons (liability for damage caused by such persons lies with the commissioning organ). Consequently, if damage is caused by persons staying at the premises without the permit or consent of the enterprise, such damage must be regarded as having resulted from external causes.

In connection with the term „territorial" it should be noted that it indicates not only the premises proper, but any other area, building, means of commucation, etc. under the control of the enterprise and serving enterprisal operations. The criterion is that the enterprise must exercise actual control over all these areas, etc., must be in the position to prohibit persons from entering them, to instruct admitted persons as to conduct, to keep a check on their movements, activities. For instance, the area of some field work carried out by the enterprise qualifies as the premises of the enterprise if the above conditions are fulfilled. Railway-trains, buses belong to this category; by contrast, the street in which the scavenger is working cannot be regardes as the premises of the Street Cleansing Department, nor can the room of some enterprise in which the man of the postal service repairs the telephone be regarded as the premises of the Post Office Administration.

Finally, the term „external" also relates to activity. This is to mean that in cases where the cause of damage lies in the activity of the employer enterprise, no allegation to external causes can be accepted. While the former — the personal and territorial sences — refer to human factors, the sence relating to activity comprises all other causes, including forces of nature, etc. For instance, bursting of a boiler is correlated with the activities of the employer enterprise and is therefore no external cause. If, however, fragments resulting from the explosion hit the premises of some other enterprise and injure an employee there, this will be an external cause in respect to that other enterprise.

In connection with causes that cannot be qualified as „external" I should like to emphasize that this distinction has the effect at the same time that in such cases it need not, or must not be considered whether damage was unpreventable or not. The employer is liable for such causes. The reason is that we regard these as the employer's own activities. Consideration of unpreventability is permitted only in cases where it can be shown conclusively that the cause was truly „external".

4. *Unpreventability*

a) *The concept of unpreventability*

I. *The conditions of unpreventability*

To judge preventability and unpreventability gives rise to much more disputes than any of the problems discussed so far. An event may be unpreventable because there is no possibility whatsoever to prevent its taking place; or because, although such possibility exists, prevention is not possible in given circumstances. The latter may occur because in the given case no adequate means of prevention are available; or because, although such means

are available, there was no possibility to employ them owing to the unexpected, sudden occurrence of the event. Two criteria must therefore be examined when the question of preventability is to be decided. First, whether there exists a possibility to avert external action directed at causing damage. If no such possibility exist, the employer must be discharged from liability. If prevention is possible, the damaging action may have happened so suddenly that there was no time enough to avert it although the objective possibilities existed. This is the second criterion that must be examined within the scope of unpreventability.

II. *Views relating to the determination of unpreventability*

Whichever of the two criteria of unpreventability we wish to study, we are at once confronted with the question of the standard, the basis of comparison. Must unpreventability exist in terms of an absolute standard, absolute possibility, that applies to everybody, be it regarded from the angle of means or of possibility in time? Or must it exist in terms of the person alleging to reasons of discharge? In other words, must unpreventability be judged on an objective or on a subjective basis? In the objective view, discharge must be established if at present there exist no means within the power of man to prevent the event. The subjective view holds that the means existed, but the person pleading for discharge had no acces to them. Concerning the possibility of prevention in time, the objective view is this: the external action was so sudden that any measure within the power of man was impossible: the subjective view holds that measures would have been possible in human terms, but not in terms of the abilities, in the circumstances of the person pleading for discharge.

The dispute about the objective or subjective judgment of unpreventability is not a recent one. It has been going on for quite a time now, although not over such a wide range, but mainly about the valuation of vis maior.

A detailed discussion of these debates is beyond the scope of this paper, so I limit myself to present the essential features.

In respect to judging vis maior, socialist literature on law accepts the objective view, according to which vis maior is a cause which cannot be averted by any means within the power of man.[14] The subjective view appears, too, this regards as vis maior also events for the prevention of which the possibility actually existed, but prevention was not possible in the given case owing to the abilities and circumstances of the obliged person.[15] In view of the fact that the application of either method encountered difficulties in practice — objective valuation was too strict, subjective was too mild and, essentially, became identical with the subjective interpretation of liability based on dereliction — several attempts were made to improve them. It was tried to introduce the distinction of the inevitable from the accidental, and it was suggested that vis maior is always objectively accidental as conserns the person pleading for discharge (at the same time, the advocators of this view regard accidental events — the casus — taken in the everyday cense as belonging to the chain of the unconditionally necessary

[14] E. g. Luby.

[15] This phenomenon is observable in the earlier judicial practise.

causality.[16] Others reject the aforesaid stands in part, and emphasize the extraordinary nature[17] or destructive nature[18] of vis maior. Again others try to overcome the difficulties by making subjective views stricter and by introducing objective elements.[19] Another opinion seeks solution in the correction of the objective school of thought.[20]

In looking for a solution we obviously must start from the circumstance that the system of liability based on the requirement of increased protection was devised on the premise that in cases coming in this sphere liability based on dereliction can provide no satisfactory solution, whereas the prevention of damage is objectively possible at the same time. It follows from this that to establish discharge and unpreventability in a given case is possible only on the basis that causing damage cannot be prevented objectively. Hence we must start from the objective basis when unpreventability is to be considered.

b) The manner of prevention

We have agreed that we must start from the objective basis in judging unpreventability. Thus the prerequisits of prevention, i. e. the availability of the means of prevention, must be valuated in the same way. Yet, at the same time, the view making reference to the somewhat relative character of the objective category of preventability, is also correct.[21]

This relative character originates from the fact that the manner and bossibility of prevention are incessantly changing and improving. Technical progress, which produces novel machinery and methods, creates also the possibility to prevent the action of natural forces, to eliminate hazards entailed in the operation of machinery or in human interference, which used to be unpreventable not so long ago. This progress is reflected also by judicial practice.

Thus objective potentialities must be taken as the basis whenever unpreventability is to be determined. But this objective basis is relative in that it is changing and improving incessantly with technological, organizational, etc. progress.

It should be noted here that activities aimed at prevention are not supposed to be just formal acts; they must be actually suitable for exploiting given possibilities to prevent damage. Soit is not sufficient to post waning-boards such as „No admittance" or the like is situations where the hazard of damage is extreme. Entrances must be kept locked or guarded constantly in such cases.[22]

[16] E. g. Генкин. Лунц, Антимонов.

[17] Иоффе О. С.: Ответственность по советскому гражданскому праву (Leningrád, 1955.) Abr.: Liability

[18] Туманов В. А.: „Случай" и „непреодолимия сила" з советском гражданском праве. (Виюн, Moscow, 1951.)

[19] Агарков М. М.: К вопросу о договорной ответственности (Moscow, 1945.)
Агарков М. М.: Вина потерлевшего в обязательсвах из принения вреда. (Советское Государство и право, 1940. 3.)

[20] Eörsi: Liability.

[21] Eörsi: Liability.

[22] Municipal Court of Szeged Pf. I. 20 968/1967.

c) Temporal possibility of prevention

Two circumstances may be relevant here. One is that prevention did not take place beause measures had not been taken in due time. The other, that the event occurred so suddenly that there was no objective possibility to act.[23] In judging foresight, a relative valuation of objective possibilities must be made, similar to those discused in connection with the manner and means of prevention. So it is not foresight or estimation connected with the category of dereliction that must be considered in such cases.

In valuating temporal possibility, it must therefore be considered whether or not the means available for prevention at the present standards of progress could have been put into operation during the time available. As concerns discharge from liability, it is altogether irrelevant whether damage was due to natural or human factors, or possibly caused by animals.

d) Vis maior

It follows from the foregoing that in case of discharge from liability based on allegation to „external causes" the category of vis maior is of no use. To make use of the concept of vis maior would be of importance only if it would be applied as an absolute and objective concept. If so, the question of preventability would be irrelevant, since mere allegation to such a cause — qualified as a superior, irresistible force — would be an unconditional excuse. Yet the situation ist not like that. At the present state of technological progress, a considerable part of elemental events that might be qualified as irresistible force can be averted in a very wide field. Where the event proper cannot be averted, the imminence can be known in most cases (this is the situation in countries with adequate flood-warning systems). Thus the possibility exists to take precautionary measures for preventing damage. And in places where the hazard of such events is increased, it is everybody's duty to prepare for preventing or mitigating their consequences (in regions where earthquakes are frequent, this is taken into account in building). Today the sphere of cases where unpreventability is obvious without any special investigation — e. g. an earthquake — is rather limited in practice; this applies also to cases where the event could not be foreseen to prevent damage thereby. The correctness of my suggestions appears also from judicial practice. For instance, a wind-storm does not qualify as vis maior except if in the expert opinion of the Meteorological Office it is not only of rare, but simply of unprecedented velocity.[24] But I think that investigation into the question of preventability cannot be discarded altogether even in such a case. Suppose there is such a wind storm. Mere allegation to this fact is no excuse, for it may well be that warning had been given. If so, there was possibility to prevent damage. There may be cases where not even such a wind-storm will serve as excuse. If, however, in the given region such stroms are unusual, i. e. had not to be expected, but sprang up so suddenly that it was impossible to prevent damage, this circumstance, as an unpreventable external cause, will serve as a reason for discharge, irrespective of the fact whether it is otherwise

[23] Eörsi Gy.: Kártérítés jogellenes magatartásért. (Indemnity for unlawfull conduct.) (Budapest, 1958.) *Abr.:* Indemnity.

[24] Supreme Court Áf. V. 23 762/1953.

qualified as irresistible force or not. Hence the category of vis maior is unnecessary, even harmful, for it might induce to omit investigation into unpreventability. This, in turn, might lead to an unwarranted discharge from liability.

C) The system of liability based on dereliction

1. The concept of dereliction

In connection with the employer's liability for damage, the basis of dereliction only serves auxiliary purposes. Considering, however, that we inted to build up the system of liability partially on the principle of dereliction, we now must clarify what we mean by dereliction.

We have agreed in the foregoing that dereliction is a subjective factor. It expresses the damager's relationship with his unlawful conduct and with the result.

The relationship with our own conduct, i. e. our guilt, is determined by two components. One is volition, the other is consciousness. I. e. did the perpetrator will the consequences of his conduct or not, was he aware, did he foresee the consequences of his conduct or not. Both components can act in the negative direction, and — more intensely or less intensely — in the positive direction. The volitional component is negative if neither the consequence, nor the conduct was willed; in tensely positive if the conesquence was willed; slightly positive if the consequence was not willed, but the conduct was. The foresight component is negative if the consequence was not, and could not have been, foreseen; intensely positive if the consequence was foreseen; slightly positive if the consequence was not foreseen, but could have been foreseen. The combination of positive and negative effects determines the degree of blameworthiness. The two extreme cases are these: both components are positive, i. e. the perpetrator willed and foresaw the consequence, which is the most severe degree of guilt; both components are negative, i. e. the perpetrator did not will the conduct, nor the consequence, did not foresee and could not have foreseen the consequence, which means guiltlessness. Depending on the nature of the components, the various degress of dereliction are determined within these two limits.

The obligations entailed in the employer's liability for damage are not affected by the degree of dereliction, so this will not be discussed here. If the question is to be decided whether the employer can or cannot be held liable at all, the differentiation of dereliction from guiltlessness is of importance.

2. Diferentiation of dereliction from guiltlessness

This is a controversial issue of jurisprudence. The various views can be divided into two major categories, the objective and the subjective school of thought, and into categories resulting from the combinations of these two.

The objective view compares the damaging conduct and foresight to an average standard. Whoever acts in accordance with this standard is guiltless. This view has many adherents in socialist literature on law.[25]

[25] Иоффе, Новицкий, Лунц, Генкин.

Yet the objective view was confronted with a number of difficulties in practical application. It is not the average man that exists in real life; real people are different individuals, having different cultural attainments, technical grounding, certain habits, experience, physical conditions. To neglect all this has led not wrong decisions. Some were excused from liability, others were held liable without good reason. The subjective theory wished to eliminate these difficulties by establishing the fact of dereliction compared to the individual's abilities, potentialities. It was argued at the same time that it is only this solution that is proper from the viewpoint of socialist law, since people should be called to account only if they have committed a fault. And a fault is committed only if the person in question had the capacity and the opportunity to act in a different manner.[26]

The subjective view, however, was going to the other extreme; it gave support to various manefestations of backwardness and ignorance, weakened the reformative effect of rules relating to liability, diminished their role and importance in the further economic consolidation of socialist organisations in the development of moral and mental capacities of people, in the transformation of their moral and spiritual structure.[27]

Recognition of the shortcomings of these two views gave rise to never theories, partly resulting in the combination of the former. Some of them take the subjective view as a basis and try to introduce objective elements, some of them try to correct the objective departure by means of subjective elements. Some of them suggest that in the valuation of the average citizen the age, physical condition, cultural standard, etc. of the damager should be taken into account.[28] Others start from the capacities of the damager, but introduce as the objective standard of evaluation the particularities of the given case,[29] the objective importance of the phenomenon in connection with which the causer of damage had been active.[30] There is a school of thought which tries to establish the fact of dereliction or its absence by valuating several factors, which are partly objective (the nature of the activity in connection with which the violation of law was committed, requirements arising therefrom circumstances of the case), and partly subjective (personal traits of the causer of damage, his preparation for his activity).[31] Another theory is reforming the objective view by taking as a basis for judging conduct not the average citizen, but compares the individual's conduct to averaged and abstract requirements which society imposes on similar persons.[32]

Thus in making a distinction between dereliction and guiltlessness, we compare a situation of consciousness (foresight or its absence) connected with a concrete unlawful conduct to the predetermined standard. In one case — in case of the subjective theory — the predetermined standard is the

[26] Schneider R.: Die materielle Verantwortlichkeit der Arbeiter und Angestellten in den sozialistischen Betrieben. (Berlin, 1954.)

[27] Иоффе О. С.: Liability.

[28] Шварц Х. И.: Значекие вины в обязательствах из причнения вреда. (Moscow, 1939.)

[29] Антимонов Б. С.: Гражданская ответственность за вред причиненный источником повышенной опасности.

[30] Шлифер В. .Г.: Вопроси о договорной ответственности з советском гражданском праве (Советское Государтсво и Право, 1956. 9.)

[31] Иоффе О. С.: Liability.

[32] Eörsi Gy.: Liability.

individual's capacity, his possibility to foresee. In the other — the objective theory — the standard is the capacities, the potentialities of any average man, or — in the corrected view — of a similar person. In this connection it should be mentioned hat not even the terms subjective or objective theories are in entire accordance with the facts. Namely even the extreme subjective view, i. e. comparison to the individual's own capabilites, is actually objective to a certain extent. For the elements of consciousness cannot be grasped per se, they can only be evaluated on the basis of certain external criteria, manifestations. Any evaluation of the capabilities, potentialities of the causer of damage will only be of approximate accuracy. It will be a certain average, although one that is very near to the person concerned. (Even the best psychological tests give their results on the basis of the averages of former test, former experience, conclusions from certain phenomena, so they only approximate reality.) This example, too, illustrates why the argument of the adherents of the subjective view, by which they protest against any objective comparison from the outset, is not tenable. The dispute actually is focussed on the degree, extent of objectivization. (Some believe that the dispute arises from the circumstance that the objective wiew approaches the problem from the social angle, the subjective from the individual angle. But this interpretation is not correct. The interests of society are best served by the standard which best ensures education, influencing, since it is the sanctions imposed on this basis that will turn the causers of damage most efficiently in the direction of future irreproachable conduct. In this respect the view taking as the basis the abstract citizen, possibly the model citizen, will yield just as wrong solutions, will violate the people's sense of justice, i. e. will actually be in contradiction with realistic socxial evaluation, just like the extreme subjective view.)

In solving this problem we must start from the understanding that society imposes requirements on its members. The difference between the systems of liability based on dereliction and disregarding dereliction lies exactly in the fact that in the latter society contents itself with stating that abstaining from unlawful conduct is possible in the field of similar cases, but does not investigate whether in the given case the violator could have been aware of this possibility, and why he had not abstained from unlawful conduct; in the former cases it is investigated whether the violator inteded to commit an unlawful act, whether he knew that he commits one. (Preceding causative factors, i. e. what had elicited these elements of volition and consciousness, are usually not investigated in case of liability for damage. One purpose of the sanctions imposed on the basis of liability is to induce the damager to disclose these preceding factors and to try to eliminate their effects in the future. Such preceding causative factors are subject to investigation mostly in criminal and disciplinary procedure. This is justified also because of the fact that the sanctions imposed in cases of such liability affect the perpetrator's person to a much greater extent than do the sanctions of liability for damage.) When society imposes on its citizens the requirement to abstain from unlawful conduct, it essentially shapes a conviction at the same time — or constructs a state of affairs, to put it in another way — and it is the deviation from the latter that entails the imposition of sanctions. Such conviction is actually a generalization abstracted from social processes. Given processes take place in

given persons in given circumstances, and the result of these processes is a certain conduct. So if we are to evaulate the individual's conduct, we must compare it to this generalization, to the social requirement derived from this generalization.

This purpose is served neither by the subjective, nor by the objective theory. The subjective view compares the individual's behaviour to the individual itself, i. e. not to a social requirement, but to one of the phenomena that serve as the basis for determining such requirement. Thus, essentially, two processes or phenomena are compared which are accidental in the given case. It is exactly therefore that this operation can yield no result that would be adequate from the social point of view. Yet it is equally true at the same time that the objective view, which determines the social requirement uniformly for everybody, is actually nothing else but a repetition of the requirement formulated in the provision of law. Namely the objective requirement of proper circumspection, attention, etc. is expressed by provisions of law. Hence the objective theory actually eliminates the principle of dereliction, although it seemingly maintains it.

As we have seen, whenever society imposes requirements it always generalizes, draws conclusions from certain spheres of cases, from the conduct of certain persons, Conclusions and generalizations will yield results that differ with the scope of cases taken as a basis. The wider and more ramifying the sphere observed, the less features and conclusions will be contained in the generalization, the more differences will appear when individual cases, conducts are compared to the conclusions and generalizations. If the field of observation is smaller, the result will tend to be the opposite, generalization will show more features, will be richer, and the individual cases will show much less deviation from the results of generalization. The question is how broad the basis of generalization — determing the social requirement — should be for establishing dereliction in order to make liability for damage serve its purpose properly.

The solution must start from the premise that the institution of liability is not intended to reform citizens in general. Life of society, social production, require a very high degree of division of labour. It is not people „in general" that participate in the work of society; the participants are workers, engineers, accountants, judges, etc. And these are not moving and acting in a vacuum, they are interacting amidst the many other phenomena of this world. It follows from this, too, that whenever social requirements are defined we cannot start from people from the citizen in general; we must start from people of specific occupations and positions. Moreover, not only from people of comparable occupations and positions, but from people living and being active in similar circumstances. Only on the basis of such a restricted sphere is it possible to define concrete requirements which actually have a directive, reformative nature, and only in this way is it possible to show conclusively the wrongful nature of unlawful conduct.

As concerns the employer's liability for damage, our above conclusions will have the effect that the requirements to be met will evidently be different in case of an enterprise with one seat and one operating with several scattered seats, or an old enterprise with many branches and a new small one. When defining requirements, we must proceed from the average requirements

to be met by the enterprises of a similar sector, or of a similar branch of industry.

Buth what has been said so far is only one aspect of defining requirements. We might say that this indicates the width of the bases of comparison. We must study the other aspect, the depth of requirement, as well. This means that it must be decided whether average or better than average conduct should be imposed as a requirement within the various types. The relevant views are not in agreement and not clear-cut either. The preamble to the Civil Code refers to a measure above the average stating that „the Bill does not consider average diligence to be satisfactory as a rule".[33] Another group of views sets as the standard the average within a given type[34]

I believe that we should discriminate between increased diligence and conduct above the average. Increased diligence wishes to express that in case of certain types the requirement stricter than the average is taken as the basis within the given type. This would be the case if the conduct of outstanding persons were taken as the social requirement. As we have seen, the definition of the social requirement means to draw certain general conclusions. It follows therefore from its nature that it usually must represent the average. In my opinion, average, and not the better than average, must be taken as a basis for defining the social requirement. The better than average standard would be equivalent to the realization of the objective view in a considerable part of the casès, and would thereby distort the purport of dereliction. (That higher requirements are expected to be met by outstanding workers, by trade union functionaries or old skilled workers, is another question. Namely in such cases the scope serving as the basis of the type is being restricted, and not all workers, but only those mentioned above are considered when the social requirement is defined. In certain respects — e. g. maintaining discipline — the requirements to be met by such persons will be higher than case of ordinary workers. The situation will be reversed in other respects, e. g. speed or physical working capacity.)

So we conclude that the average must be taken into account also in respect to the employer's liability for damage under labour statutes.

Thus the establishment of dereliction in case of liability of increased protection will be subjective, since it will not be considered if the objective possibility of preventing damage existed; what will be investigated is whether such concrete possibility was available to the person causing damage. However, the subjective category of dereliction will be relative at the same time. It will be relative in that conduct is always compared to the social requirement determined on the basis of the average of similar types in similar circumstances. And this social requirement is relative also inasmuch as it is not constant, but is changing incessantly. The requirements imposed on employer and employee are getting stricter. This is the result of technological progress by which it is now possible to prevent damage which seemed inevitable not so long ago. The increasing self-respect of the employees acts in the same direction; growing co-operation and mutual helpfulness of people free from exploitation permits the imposition of ever stricter requirements to have more respect for interests of society and its members.[36]

[33] Preamble to the 339. § of the Civil Code.
[34] Eörsi Gy.: Indemnity.
[35] Eörsi Gy.: Indemnity.

3. *The proof of dereliction*

A further question arises in connection with applying the principle of dereliction: is dereliction on the part of the damager to be proved by the damaged, or is the damager expected to prove that he is guiltless. The former is the probative system, the latter the exculpatory system.

There are views according to which this distinction is unnecessary. It is argued that pursuant to the rules of socialist civil procedure, the Courts are obliged ex officio to bring to light the truth, so the provisions of law in this respect are irrelevant as it is the judge's duty to order the parties to adduce proof, and to do all steps to find the truth.[36] This position clearly is wrong. The importance of the burden of proof is that if the party obliged to adduce proof is unsuccessful, he must bear the consequences. If, therefore, the damaged were obliged to prove the guilt of the damager, and he would not be able to do so, the damager would be discharged of his obligation to compensate. Under the exculpatory system, the damager is obliged to compensate if he is not able to prove his guiltlessness. The settling of this question is not in contradiction with the procedural principle that the judge himself is obliged to do everything to establish the truth. This duty exists even if provisions of law contain instructions in respect to the burden of proof. There may be cases where truth cannot be brought to light conclusively despite a most careful and circumspect procedure. It is here that the question arises who is to bear the consequences of such outcome. Settling the problem of the burden of proof plays a role here, as it can determine which party ist to suffer disadvantage from the failure to prove the truth conclusively in cases with an unsatisfactory outcome.

The settling of the problem of burden of proof, especially the manner of settling, has another aspect, too. Namely it may aggravate considerably, or, quite the contrary, alleviate the position of one party in enforcing his claim for compensation or in his defence against such claim.[37] Thus in case of the probative system, where the damaged must prove dereliction on the part of the damager, the former may find himself in a very difficult position in many cases, e. g. he is not able to collect the facts of proof; this might keep him back from trying to enforce his otherwise rightful claim, as he is unwilling to run the risk of paying the costs of proceedings in case of an unsuccessful lawsuit. So the other role of the burden of proof should be not to place either party in a disproportionately difficult position, and to impose on the one party the proving of those facts which the other cannot know and disclose sufficiently. This may vary with the different cases of liability.[38] It should be added that this method is also suitable to reveal more clearly the shortcomings in the operations of various employer organs or enterprises. It will not be in the interest of the enterprise to obscure the issue, to conceal the truth in such cases; having to bear the burden of proof, it will do everything within its power to disclose the circumstances. And this may contribute considerably to the measures to be taken by the supervisory organs in oder to eliminate the shortcomings brought to light.

[36] Иоффе О. С.: Liability.
[37] Eörsi Gy.: Indemnity.
[38] Иоффе О. С.: Liability.

If we wish to decide whether the probative or the exculpatory system should be applied in cases of the employer's liability for damage caused within the scope of employment, we must start from the conclusions we have made in the foregoing. The aim is to apply a system which puts no obsttacle in the way of enforcement of claims, and which induces either party to prove the facts to which it has better access.

As regards the relative position of employer and employee, it is obvious at the first glance that the employee has usually but scanty possibilities to adduce proof of the employer's dereliction. In simple cases, or if the employee concerned is in a leading position, the chances may be better; but in intricate cases, or if the employee holds a subordinate post, this may encounter difficulties. And this often might have the result that the employee would not even advance his claim. Hence it seems absolutely desirable to choose the exculpatory system in cases of the employer's liability where the proof of dereliction is required to establish liability.

D) *Taking into account the damaged person's conduct*

1. *Introduction*

It very often happens that the employee's conduct contributes to his suffering damage. The employee's contributory action raises the question of causal nexus first of all. Two types of case can emerge in this connection. One is where damage has resulted exclusively from the employee's conduct. The other is where the employee's conduct is only one of the causes bringing about the damage, or increasing existing damage. This is substantially similar to cases where damage is caused by several persons.

This category comprises also the cases of so-called mitigation of damage, since the employee is instrumental in increasing damage through his failure to take measures which could have prevented such increase.

The employee's dereliction and guiltlessness can be involved in either case. So it may happen that damage was caused exclusively by the employee's faultless conduct. But it may as well be that his conduct amounted to dereliction. It may happen that his contributory action was faultless, or amounted to dereliction. All these types of conduct may occur in cases of the employer's liability arising from increased protection, or in liability based on dereliction. Let us have a look at such cases. Let us first study the exclusive causation by the damaged, then cases of his contributory act. (I should like to emphasize once more that there is no difference between the two typs of case, except that in one case th damaged is the sole causer, while in the other he is only one of the causers. The difference in judging these cases originates in the latter fact.)

2. *Exclusive causation by the employee*

In cases where the employee's own conduct is the cause of damage, the employer is no causer at all. Considering, however, that damage resulted in the course of the operations of the employer enterprise, damage appears as if having been caused by the employer. It follows from this that the

employer can be exculpated by the employee's conduct only if the latter was actually the sole causer of damage. Hence it must be ascertained in such cases whether the employer was or was not able to prevent the damaged employee's conduct. This must be decided in accordance with the system of liability to be applied.

In case of liability of increased protection we must therefore ascertain in connection with the causation of the damaged whether the possibility of prevention existed objectively or not. Both aspects must be investigated in such cases, i. e. if adequate means and possibilities of prevention were available, and if prevention was possible in terms of time. This differs in no respect from cases where we are faced with other „external causes". (It makes no difference in this respect — i. e. from the angle of investigating preventability — that in connection with the employer's liability of increased protection we have mentioned in the category of reasons for discharge the causation by the damaged employee in addition to „external causes". We only have done so because in case of damage caused within the scope of employment the employee is never „external", never a person outside the enterprise as concerns the relation to the employer.)

In case of the liability system based on dereliction we have to ascertain whether the concrete possibility of prevention had existed or not, i. e. whether the person to be held liable has, or could have, foreseen the damaged person's conduct, and could have prevented damage thereby. Both in the present and the former case the employer cannot be exculpated if it turns out that the possibility of prevention had existed, since by omitting to make use of the possibility to prevent he had become a causer of the event. (Whether he can partially be discharged owing to the damaged person's possible contributory action, is another question.)

In case of the exclusive causation of the damaged, the question whether the damaged employee was guility of dereliction or not is irrelevant. This is obvious, since in case of exclusive causation by the damaged there exists no causal nexus between the conduct of the person to be held liable and the damage suffered, so there exists no basis for calling the latter to account. And the correlation between the employer and the damage suffered is not affected by the nature of the damaged person's — i. e. the real causer's — conduct.

This position is taken also by judicial practice: in connection with the employer's liability for damage, in cases of the employee's exclusive causation, it is never investigated whether the causer's conduct should be qualified as dereliction or not.

In connection with discharge from liability on the basis of exclusive causation by the damaged, I should like to emphasize that such cases must be distinguished from those where the claim for compensation is rejected because the demeged has omitted o take some step in the course of enforcing his rights (e. g. has submitted his claim afer the fixed deadline has expired). In such cases there is no calling to account not because the person to be held liable was not causer of the damage, but because the damaged person failed to enforce his claim properly.

3. *The employee's contribution to causing damage*

a) *The concept of contribution*

As we have seen, cases where the employee himself is the exclusive causer of damage present no particular difficulties. Since damage is ascribable exclusively to the damaged person's conduct, it is justified to make him bear the burden alone, and not to hold liable the employer, who did not take part in causing damage. Cases where the damaged employee only contributed to the occurrence of damage, present a number of problems.

The damaged person's contribution to damage means that the partial causer of damage is the damaged person himself. Two problems must be solved in this connection. One, does, or shoul, such a situation affect reparation? Two, if so, in what manner ought this circumstance to be taken into account.

In connection with the purpose of liability for damage we have concluded that this institution is intended to encourage through reparation the elimination or reduction of unlawful, damaging conduct in the future. It would follow from this principle that if the damaged person also was a causer of damage, and his contribution to damage, be avoided. Since in our case the damaged person has caused damage to himself, his influencing within the scope of liability for damage means that he can demand compensation for the damage caused only from himself, i. e. he is not entitled to claim compensation from any other person for the damage that has resulted from his conduct. Thus damage suffered by him will not be compensated for the part in question. This solution seems to be self-explanatory, yet the situation is not so simple as that.

b) *Violation of the social requirement*

The contributory act of the damaged person means that the latter himself has also destroyed, damaged, i. e. reduced his property. Provisions of law prohibiting citizens from damaging or destroying their own property do not exist as a rule. If they exist at all, they do not prohibit destruction of property, they only contain restrictions as to the manner of destruction. If somebody, for example, burns down his house, this is unlawful conduct. If, however, he destroys his house by demolishing it, this does not violate prohibitions. (Administrative or building regulations which may make demolition of certain buildings conditional on special permits need not be discussed here.) Exceptions to this general rule are cases where property is a protected monument or has artistic value, and the owner has therefore no right of free disposition. But in such cases it is not destruction or damaging that are prohibited; the owner's right of disposing is restricted in general. Consequently, if somebody damages or destroys his property and this conduct is not prohibited, not even disapproved, it obviously cannot be qualified as such if the owner only co-operates in damaging or destruction. This conclusion would seem to have the effect that the damaged person's contribution to causing damage must not be taken into account. This contradictory situation has led the scholars of jurisprudence to try to find a satisfac-

tory solution for bearing the loss resulting from damage caused by the damaged person's conduct.

Several views have emerged from disputes about this problem in civil law. One view holds that the damaged person's conduct by which he causes damage to himself, is unlawful conduct. Although he does not violate the personal rights of anybody else, he does violate the interests of society.[39] Another opinion is that by contributing to damage, the damaged person violates the rights of the other person causing damage. (This would mean, essentially, that the damaged person increases damage by his own conduct, and causes damage thereby to the other person causing the damage, since the latter would be held liable for greater amount of damage. So this additional amount should be refunded to the person causing damage, i. e. part of the compensation would be returned. In practice this is carried out by reducing compensation accordingly.[40] Another theory holds that the damaged person violates the rules of socialist coexistence by not devoting sufficient care to his rights. So the violation of the rules of socialist coexistence justify that he should bear the consequences of damage caused by himself, although his activity was not unlawful.[41] Finally, there is a fourth view holding that the damaged person's own fault is not unlawful conduct, but is judged unfavourably by society and considered at the same time a conduct that could be reformed. Thus the aims of preventive legal policy warrant the imposition of sanctions.[42] In my opinion, the views which try to establish unlawfulness in cases of the damaged person's contributory action are artificial and not tenable. If the first view were accepted, it would follow logically that causing damage to one's own property ought to be considered an unlawful act even if it is not combined with any other person's unlawful conduct. But this is not so. There exists no such general restriction of proprietary rights. The second view is extremely artivicial and based on a nonexistent right. The third and fourth are substantially identical, and both make a correct approach to the problem. The point is that, within the pattern of socialist society, the co-operation of the members of society is a social requirement. This co-operation must be manifest also in that nobody is supposed to behave in a way that would violate others without good reason, would place unwarranted burdens on others. (It follows from this principle that in case of unlawful assault nobody is supposed to fehave in a manner that would aggravate the consequences of such assault and place unwarranted consequences on the assaulter.) In other words, society expects everybody to do everything in his power to prevent or mitigate damage. A suitable means of inducing people to observe this social requirement would be to make them bear that part of the loss to which they had contributed.

This suggested solution would be acceptable also for civil law, and also

[39] Антимонов Б. С.: l. c.

[40] Иоффе О. С.: Liability.

[41] Флейшиц Е. А.: Basic issues of the liability on the civil law for the damage caused in the state of health.
ség alapvető kérdései. (Вион. Moscow, 1955.) *Abr.:* Basic issues.
Szpunar A.: Zachowanie sie poszkodowanego jakopodstawa dozmniejszenia odszkodowania. (Nowe Prawo, 1957. 6.)
Luby S.: Systém a základné tézy obcianskoprávnoj zodpoveddnosti (Právnicke Studie 1957. 2.).

[42] Eörsi Gy.: Liability.

for cases of the employee's contributory action within the scope of the employer's liability for damage under labour law. But in respect to the employer's liability for damage caused to employees this conclusion must be widened. First, it must be kept in mind that the contributory act of the employee often implies breach of his duties, which might result in a disciplinary action. Second, that employees often suffer damage because they are not able to utilize their working capacity on account of the employer's unlawful conduct. For example, the employer withholds the employee's workbook and this prevents the employee from entering another employment; or he has been disabled partially by an industrial accident, which prevents him from continuing in his original sphere of work. In a socialist society, every member of this society is under the moral obligation — so this is also a social requirement — to participate personally in the work of society. It follows from this duty, too, that if anybody is prevented from doing his usual work, or from utilizing his working capacity, because of some unlawful measure, he is obliged to do everything in his power to join in the work of society in some other way. So he is not supposed to wait inactively for the removal of the obstacle, is not supposed to become resigned to being unalbe to do his former work because of his partial disability; he is expected to look for some job he is able to perform (e. g. jobs for which no workbook is required, or for which reduced working capacity is sufficient).

It follows from the foregoing that within the scope of employment the social requirement imposed on employees in respect to the prevention and mitigation of damage is of increased content.

Another question must be studied in connection with the contributory act of the damaged person. This is discharge from the consequences of violating the social requirement of preventing and mitigating damage. It may happen that the employee suffering damage does not meet the above requirement under the influence of some other, more important, social requirement. In this case he must be excused from the consequences of his conduct, and the person causing damage cannot be discharged from liability for the relevant proportion of damage. Such cases occur especially when damage is suffered as a result of gallant acts connected with work, or of help given to others.[43] The Czechoslovak statutes on liability for industrial accidents and occupational diseases contain provisions for such cases.[44] Pursuant to these provisions, if the employee's action is inteded to avert immediate danger to his or somebody other's life or health, or to prevent a damage, his contributiory act cannot serve as an excuse for the employer.

c) *Dereliction on part of the damaged person*

So far we only have clarified one component of the valuation of the damaged person's contributory act, i. e. the violation of a social requirement. In the following we also must study the question whether the possibility of preventing damage was actually available to the damaged, i. e. whether by making him bear a proportion of the loss it is possible to influence him

[43] Ignatowicz J.: Odpowiedzadnosé materialna zakladu pracy za wydpadki. (Warszawa, 1955.)

[44] Szpunar A.: Zachowanie sie poszkodowanego jakopodstawa dozmniejszenia odszkodowania (Nowe Prawo, 1957. 6.)

for a better future conduct. The problem in this connection is what standard should be applied to establish the above fact.

As we have seen at the definiton of systems of liability, sanctions imposed for some reprehensible conduct will have the best reformative effect if the perpetrator is aware, or could be aware, of the reprehensible nature of his conduct, i. e. his conduct qualifies as dereliction. The employee's liability for damage caused by him within the scope of employment will be in accordance with this principle. Although we are not concerned here with the establishment of liability, it would not seem warranted to abandon the prerequisite of dereliction. Thus the employee's contributory act should be taken into consideration only if his conduct had amounted to dereliction. Section 123/A of the Code of Labour contains provisions to this effect, and the same position is reflected by judicial practice. The question is, however, whether all conclusions drawn in connection with dereliction in the foregoing can be applied fully to the valuation of dereliction shown in the course of the contributory act.

Relating to the contributory dereliction of the damaged, two views — essentially completing each other — are found in the domain of civil law. One is that it makes no difference whatever if dereliction is to be imputed to the damager or the damaged. This position is usually found in Soviet civil law.[45] The other view is that dereliction of the damaged must be judged more leniently than that of the damager. So the social requirement will be different. The reason is that the social requirement to take utmost care not to cause damage is binding on everybody, whereas people cannot be expected to be on the alert constantly and to the same extent to prevent the occurrence of damage.[46]

The position that it is not possible to be on the alert incessantly to prevent damage to the same extent as not to cause damage, is correct by any standard. The social requirement itself is milder in the first and stricter in the second case. Whenever the contributor's dereliction is considered, comparison is being made to types, like in valuating dereliction as has been discussed. The difference is that the individual's conduct is compared in terms of a milder requirement to the average conduct of the type.

It should be added right away that in cases where the social requirement relating to the prevention and mitigation of damage is extended in scope, i. e. other factors — duties arising out of employment, the duty to participate in society's work — appear in addition, the standards of judgment become stricter as a matter of necessity. True, the requirement to prevent and mitigate damage is binding on everybody, but it cannot be demanded reasonably that everybody be prepared and concentrate all his attention on this. On the other hand, the obligation to participate in the work of society does not require such a negative, defensive attitude — the latter involves difficulties, for one never can know from where and when some menacing event might come — it rather requires positive action. The obligation to participate should govern everybody's attitude anyway. (Society condemns work-shirkers more severely than a person, say, who is not effi-

[45] E. g. Агарков, Антимонов, Иоффе, Флейшиц.
[46] Eörsi Gy.: Liability.

cient enough in fighting fire.) This situation assumes special emphasis in cases where the damaged employee's contributory act involves breach of his duty arising out of employment. (The breach of duty proper must be judged by the same standards in every case, be it connected with damage or contribution to damage, or not.)

I should like to note that even those advocating the view that dereliction should be judged by the same standards both for the contributory act of the damaged and the act of the damager himself, are aware of the fact that the basis of equality is somewhat defective here (except for cases where the contributory act involves breach of duty of employment). What has been said above can also be inferred from the fact the holders of the above view do not usually content themselves with a lower degree of dereliction, but insist on the establishment of gross negligence as a prerequisite of holding liable the damaged person for his contributory act.[47] This position is reflected also in Soviet civil law,[48] as well as in the regulations governing claims for damages resulting from industrial accidents.[49] I think that similar considerations were in the background of Czechoslovak statutory regulations on liability in case of industrial accidents, according to which the employer must compensate for a larger proportion of the damage than has to be borne by the employee, even if the latter has contributed to damage.[50] In my opinion, it would seem to serve better the aim if the liability for contributory act were not made conditional on the degree of dereliction, and if the standard of judgment were changed depending on the nature of the contributory act.

4. *Valuating the employee's contributory act*

In the foregoing we have clarified how the conduct of the damaged person should be valuated. Let us now consider how the contributory act of the damaged person affects the employer's liability. We shall consider cases in which contribury acts are involved, i. e. both employer and employee were instrumental in causing damage. (Cases, in which the employee is the exclusive causer have been discussed in paragraph 2.)

Let us first consider the case where the employee is not to blame. In case of the employee's contributory act, the starting factor of damage is the employer's injurious conduct. It is justified to call him to account therefore, in order to influence him towards proper conduct. Since, at the same time, the damaged person is not to blame, it would be unnecessary and unfair to take steps against the latter. So the conclusion is that the employer alone must be held liable for damage in such cases. Whether his liability is based on the requirement of increased protection, or on dereliction, is irrelevant.

There is a seeming contradiction here. As we have agreed, if the employee is the exclusive causer of damage, the employer will not be held liable, even if the employee was not to blame for the damage, while in case

[47] Флейшиц Е. А.: Basic issues.
[48] Basic principles of the Sowiet civil law 76—79. §.
[49] 5. §.
[50] 150/1961. Sb.

of the empleyee's contributory act the employer is liable if the employee was not guilty of dereliction. But, actually, there is no contradiction here. In the first case, the employer has not displayed any such activity as would have led to damage; so it would be unfair to call him to account in whatever manner. This would have no effect to improve conduct. Yet in the second case the employer's conduct is disapproved by society, hence calling him to account is justified. One objection to this reasoning might be that to hold the employer liable is correct, but how should it be justified to hold him liable also for that portion of the damage, which was caused not by his, but rather by the employee's activity. This objection possesses some rationality. Yet the difficulty lies in the circumstance that is is usually impossible to ascertain what the ratio of the various causations is, to what proportion they contributed to damage. Damage occurred constitutes an indivisible unity, which cannot be dissociated according to the ratio of causation.[51] It must be taken into account at the same time that damage would not have occurred without the employer's reprehensible conduct. Comparing this with the employee's irreprehensible conduct, the requirements of both reparation and reforming warrant to hold the employer liable for damage in full. If a solution to the contrary were applied, the guiltless employee's damage partly would not be repaired.

Let us now consider cases where the employee is guilty of dereliction in contributing to causing damage. In such cases, the conduct of both employer and employee is reprehensible. The purpose of reforming requires influencing of both employer and employee to improve their conduct in the future. It follows from this that both of them will be liable for damage. This is manifest in practice in that the employer repairs the portion of damage imputable to him — both in the liability system based on the requirement of increased protection, and in the system based on dereliction — while the employee has no claim to compensation for the rest of the damage. This solution is a correct expression of the principle that everybody has to bear the consequences of his reprehensible conduct.[52] And it induces at the same time the person concerned to a better performance of duties arising out of employment.

5. *Determining the degree of the contributory act*

We have seen that if the contributory act involves dereliction, the damaged person is also liable, and is not entitled therefore to partial compensation. The further problem to be decided is in what manner that proportion of the damage should be determined which must be compensated for, or which must be borne by the damaged employee himself.

In cases where the damaging conduct and the contributory conduct rest on the same basis, the solution is simpler. This will be the case when the employee's contributory act is to be judged in case of the employer's liability established on the basis of dereliction. Two homogeneous situations have to be

[51] Иоффе О. С.: Liability.
[52] Eörsi Gy.: Indemnity.

compared here. They are homogeneous because, concrete, real faults are implied in both, i. e. that both employer and employee had acted in a reprehensible manner, not in accordance with social requirements, and that they could, or should, have been aware of the wrongful nature of their actions. But this homogeneity will be relative only inasmuch as the standards for judging these wrongful conducts will be different, as we have seen. They will be different, on the one hand, because the employer's and the employee's conduct are compared to different types, and, on the other hand, because the judgment of contribution is usually more lenient even within these types. But, despite this relativity, the two instances of dereliction can be compared, can be proportioned to each other as basically homogeneous entities. The ratio of these two will determine also the ratio of sharing the loss, i. e. the ratio for which the employer is liable, and the one to be borne by the employee.[53]

The situation is more complex under the system of liability based on the requirement of increased protection. We do not have two homogeneous, comparable conducts in this case. To overcome this difficulty it has been suggested to distribute damage. Yet this is not feasible. Damage occurred represents an indivisible unity which cannot be dissociated by the ratio of causation. Distribution of damage on the basis of causation would substantially thwart the operation of liability. Namely the damaged person is nearly always involved in the causation of damage. Thus liability and discharge from liability would rest on the same set of objective causes.[54]

It happens — instances are found especially in judicial practice — that in such cases attempts are made to prove the dereliction of the employer causing damage. The two instances of dereliction would form a homogeneous basis of comparison in this way. Yet this is no correct method either. Firts, it contradicts the principle that the employer's dereliction need not be proved to hold him liable. Second, proving dereliction would be artificial in many cases. It would often result in the interpretation of the „objective" possibilities of prevention — constituting the basis of liability — as subjective possibilities, i. e. would result in the objectivization of dereliction. If, by contrast, this were not done, it would very often impossible to prove dereliction on the side of the party causing damage; and this would lead to a situation where the employer causing damage would practically be discarged from liability as a result of the distribution of damage, despite the fact that the objective possibility of preventing damage had existed, and he, the employer, should have been liable therefore. Namely there will be found dereliction on the employer's part, but there will be found such conduct on the employee's part, so the proportioning of the two instances of dereliction would only result in the employee's liability, i. e. the employer would be excused and the employee would have to bear all the loss, or a considerable portion at least. Such a solution would turn the entire system of liability upside down.[55]

[53] Флейшиц Е. А.: Basic issues.
Szpunar 1. c.
Eörsi Gy.: Liability.
Иоффе О. С. Liability.
[54] Eörsi Gy.: Indemnity.
Флейшиц Е. А. Basic issues.
[55] Eörsi Gy.: Liability.

A correct souliton can be reached only if we give up the idea of comparing the two conducts. This means, then, that the dereliction of the damaged must be valuated in se. Thus, substantially, we must determine to what extent he has become unworthy of compensation as a result of his conduct or dereliction. This position is dominating in jurisprudence.[56]

V.

Causal nexus

1. The importance of causal nexus

Causal nexus is usually enumerated among the prerequisites of liability for damage. This means that a causal nexus must exist between the conduct held liable and the damage caused, i. e. only that person can be held liable whose conduct was the causative factor of damage. Indeed, the existence of causal nexus appears most clearly here, but, as concerns liability for damage, it plays a role elsewhere, too.

Reference to the causal nexus means that there exists a relationship between two phenomena, and in such a manner that one phenomenon constitutes the basis of the occurence of the other. But there exists relationship not only between wrongful act and damage. Causal nexus must exist also between the various elements — prerequisites — of liability for damage, moreover within these elements themselves.

The views relating to causal nexus are answering the question in what cases it is possible to ascertain whether such causal nexus actually exists between the various elements. Thus a real nexus, and not a seeming one is involved here.

It should be added that the existence of such nexus must be ascertained in a manner which the jurist, too, can make use of. Hence the views relating to causal nexus do not interpret such nexus as the precondition of liability for damage; they rather provide the method by which it is possible to determine whether or not causal nexus had existed in reality — in real life — between the various elements of liability, or, to put it in another way, between the factual prerequisites of liability. It is at this point that difficulties arise in solving this problem.

As concerns causal nexus, the method of determining the existence of nexus, the provisions relating to liability for damage, contain no directives. And no regulation to this effect is contained in provisions relating do disciplinary liability, nor in the provisions of criminal law, whereas the establishment of causal nexus is one prerequisite of holding somebody liable also in these fields. Yet there is a very sharp and long-lasting theoretical controversy in the background of the lack of such legal regulation.

The disputes going on in the scientific field are made difficult by the fact that the problem of causal nexus is, primarily, philosophical and not a legal one. Thus, essentially, the disputes are going on at two levels. First

[56] Eörsi Gy.: Liability.
Флейшиц Е. А. Basic issues.

it must be clarified if and how the existence of causal nexus can be ascertained, and the philosophical criteria for doing so must be defined; second, it must be determined how the conculsions of philosophy can be applied to the field of law. The latter problem is aggravated by the fact that a formula must be devised which the practical jurist can use in his daily work, and by which he is able to differentiate promptly and clearly between the cases coming up in practice.

2. Socialist theories relating to causal nexus

As concerns the problem of causal nexus, socialist jurisprudence stands on the basis of dialectical materialism. Causality is interpreted as an objective connexion that exists outside and independent of human consciousness. Yet despite the generally accepted theoretical basis, there are several views in socialist jurisprudence how to establish and evaluate in respect to law the relationship of two phenomena. The difficulty lies in the circumstance that whenever we try to study some phenomenon we must detach it from the universal context, we must isolate it. The controversy emerges in how we should detach the various phenomena from the universal context, from what preconditions we must start to be able to regard one phenomenon as the cause, and the other as the effect of this cause, after having isolated the two phenomena. In order to reach a correct standpoint, we must make a short survey of the theories developed in socialist jurisprudence.

a) Let us mention first the view based on the differentiation of the inevitable from the accidental, which is widely accepted in socialist jurisprudence. The followers of this view[1] hold that liability only can result from a conduct of which the effect is an inevitable consequence. Accidental consequences preclude liability. The reason of this view is that, since calling to account is intented to reform, to hold liable for non-caused or accidentally caused effects would be harmful and would make no sense.[2]

There are minor or major dissimilarities between the views based on the differentiation of the inevitable from the accidental. But these only relate to questions of detail. Thus, for instance, some writers identify the concept of cause with that of inevitableness,[3] others define different criteria for differentiating the inveitable from the accidental.[4] the latter are mainly consequences of the fact that attempts have been made to disprove the arguments of those opposing this theory, and to answer the cases adduced by them. These additions did not change the substance of the theory, but the concept of inevitableness was sometimes distorted in order to parry attacks, and some writers even adopted the subjectivistic view.

The tehory of the causal nexus of the inevitable and the accidental has been exposed to severe attacks. The opponents of this view can be divided into several groups.

[1] E. g. Пионтковский. Лунц, Матвеев, Антимонов, Генкин, Шаргородский, Сергеева, Флейшиц, Luby

[2] Шаргородский М. Д. Некоторые вопросы причинной связи в теории права (Советское Госу дарство и Право.) (1956. 7.)

[3] Provaznik V.: Odskodnovanu. (Soudce z Lidu, 1952. 9.)

[4] Шаргородский М. Д.: 1. c.

The one refers to the notion that inevitable and accidental are in dialectical interaction, that accidental is the manifestation form inevitable. It is therefore that no discrimination can be made between accidental and inevitable causality. This distinction is of no use for the jurist.[5]

The other group believes that the distinction on the inevitable and accidental basis of the nexus of two phenomena is correct and possible, but does not regard it as suitable for solving the problem of legal liability.[6] mányi Intézet Értesítője 1958. I. 2.) *Abr.:* Causality.

It was probably this criticism that prompted the adherents of this theory, to try to find various criteria for the differentiation of inevitable from accidental, easier to recognize in practice.

b) Discrimination between inevitable and accidental is rejected by the theory that starts from the concept of different degrees of causation. According to this theory, the act causing the effect is not homogeneous, it can produce the effect to different degrees, and there may be principal as well as less important, secondary causes.[7]

c) The discrimination of inevitable from accidental is rejected also by the view constructed on the categories of possibility and reality. According to this view, the conditions must be studied and those only creating the possibility of the effect must be isolated from those which have turned possibilities into reality. It is the circumstances turning possibility into reality that lend their causative force to the individual particularities of the consequences preduced. If these circumstances have a nature of objective repetition and are correlated with human conduct, the inference must be that this has created the concrete possibility of the effect. If the same circumstances do not repeat themselves objectively in a given situation, the conduct correlated with them only creates the abstract possibility of the effects, precluding thereby liability.[8]

d) Another view, having found acceptance in criminal law, considers a discrimination between the inevitable and accidental categories of causation as unnecessary. The only importance it attaches to such distinction is that the former is easier to predict. Otherwise, if an objective causal nexus exists, the question of liability must be decided by examining the question of culpability.[9] Considering the fact that the adherents of this view studied the problem only from the angle of criminal law, where the examination of criminality is always necessary, they rather oversimplified the problem. Hence their theory cannot be used in respect to liability for damage.

e) Another theory makes attempts at selecting the causes in a different manner. Leaving the objective character of the chain of causality, unchanged attempts are made here at selecting a point, based on evaluation coming from outside, where the jurist has to cut through the chain of causality extending into infinity. This method does not introduce evaluation, upon the

[5] Иоффе О. С. Liability.

[6] Eörsi G.: Az okozati összefüggés a polgári jogi felelősség területén. (Causality in the domain of the civil liability.) (Állam és Jogtudományi Intézet Értesítője. 1958. I. 2.) *Abr.: Causality.*

[7] Трайнин А. Н.: Состав преступления по советскому уголовкому праву.

[8] Иоффе О. С. Liability.

[9] Gerő T.: Az okozati összefüggés a büntetőjogban. (Causality in the criminal law.) (Jogtudományi Közlöny, 1958. 1—2.)

overt pretext of subjectiveness or objectiveness, to the causal nexus; it emphasizes certain causes, and disregards others, from among equivalent ones that cannot in themselves be arranged into ranks; in doing so, it imploys evaluation coming from outside and not affecting the objective character of the chain of causation. This selected cause is the „cause in the legal sense", which is always human conduct. The underlying principle of selection is determined by the objective rules which also determine in the given field the attempts at reflecting and changing reality.[10]

3. Criticism of theories relating to causal nexus

As has been shown in the foregoing, the problem of causal nexus has provoked wide disputes and given rise to various views even in socialist literature on law.

To find a correct solution of the problem we must start from the premise that there is a cause behind every phenomenon, and that there exists an objective relationship between cause and resulting phenomenon. Hence a certain conduct can be regarded as the cause of a certain affect if, pursuant to objective laws, this conduct must produce the resulting effect. It ought to be emphasized here that what is involved here is not that, according to experience, similar conducts produce similar effects several times or often, but that, according to objective laws, a certain consequence must result from such conduct. Judicial practice is correct in pointing out that to establish a causal nexus it is not sufficient to refer to common knowledge[11] or to invoke presumption.[12]

Yet the question is whether we may content ourselves with objective, i. e. really existing, nexus as a criterion, or have to go farther. And if we have to go farther, on what basis should further differentiation be made. As we have seen, the controversy between the various theories lies just here. It is obvious at the first glance that the acceptance of the mere existance of an objective nexus defines the sphere of liability rather widely. As we also have seen, criminal law tackles the problem rather lightly saying that studying the question of culpability confines accountability within realistic limits anyway. In case of liability for damage — be it under civil law or under labour law — problems arise in instances where dereliction, i. e. the subjective element, is not considered. The limits can be narrowed down in two ways: either we interfere more or less arbitrarily with the causative process, or we view the process as it is, but take into account only certain phenomena for establishing liability.

The first method was chosen be the adherents of the theory based on the discrimination of the inevitable from the accidental; but this is the case also with the theory built on the different weights of causes, or on the categories of possibility and reality. As we have seen, none of these theories were able to provide a staisfactory solution. The differentiation of the inevitable from the accidental renders the field of liability too narrow. It is therefore

[10] Eörsi Gy.: Causality.
[11] Supreme Court Áf. II. 20 724/1953.
[12] Municipal Court of Budapest 41 Pf. 21 288/1964.

that its followers try to widen it. Yet this either falsifies inevitableness, or yields a solution only by drawing into this orbit the study of prevision; or they have no other choice but to come to the decision that considerations of legal policy may render necessary to establich liability independent of causation.[13] Yet this latter is out of the question in case of objective liability.

Nor do the solutions based on the different weights of causes, or the theories based on the categories of possibility and reality, provide adequate help. The followers of the former fail to reveal, how the categorization devised by them is to be applied in practice. The latter view leaves it entirely to the administrators of law to decide whether there exists causal nexus or not.

A different method was chosen by the theory which tries to find within the causative process — leaving the latter intact — the conscious-volitional, unflawful human conduct that can be influenced theoretically. This is the „legal cause". If such a cause is found, liability is established. The chief advantage of this theory is the criticism of the various selective theories — including the theory of the inevitable and accidental that holds a dominating position. Namely this criticism exposes the shortcomings of these theories in a most lucid manner, and in addition, points out the contradictions of the attempts known so far.

When giving the reasons of their stand, the advocators of the theory based on the distinction of the inevitable from the accidental confuse the specific with the general, or, more correctly, try to evaluate the specific by the criteria of the general. Yet the general must play a role in the course of making law, and not in establishing the concrete causal nexus of a specific case. Having found that in real life there exists a correlation that is considered as harmful, the State takes measures to eliminate the causes that produce such correlation. One method of elimination is the introduction of the institution of liability for damage by which it is tried to influence people not to display an attitude whicht gives rise to the correlation considered harmful. The regularity, which induces the State to take defensive measures, becomes manifest in the large number of accidental events. To establish regularity means to make abstractions from these events, to extract the substance. In the last analysis, the law demonstrates how the relationship of two phenomena would appear if they were brought into connection with each other detached from their universal contexts. Indeed, it is possible in the realm of the phenomena of nature to induce processes that take their course isolated, and to prove tehereby the operation of rules. There is usually no possibility to do so in the field of social sciences. Whenever a provision of law is framed after the recognition of regularities, we always must keep in mind that such regularities usually cannot be found in their pure state in real life, but that they appear in some particular form affected by a universal context. (The movement of celestial bodies is a similar case. Knowing the data of a planet, we are able to compute the data of its revolution round the sun, period, orbit, and the like. Yet in reality we never find the computed values, since the data are modified by the effect of the other celestial bodies.) Hence, if the provision of law only considered the regularites, and, in particular, only their form manifest in inevitableness, and excluded accidental correlations, this would mean to disregard a considerable proportion of cases. As though somebody

[13] Шаргородский М. Д.: 1. с.

tried to scoop out water from a barrel by using a sieve, to use a rough-and-ready example. Thus legal regulation defines the type and system of liability since the possibilities of influencing will be different which must be evaluated legally whenever the undesirable effect realizes, and in doing so the circumstance whether the nexus between the conduct to be evaluated and the effect was inevitable or accidental is disregarded.

The theory based on the „legal cause" reaches correct conclusion. Only I do not think that the term „legal cause" is felicitous one. It would seem to pretend as if the chain of causality proper contained a phenomenon among others that bears the label „legal cause" and the only problem involved would be to discover it. Actually the thing in question is that there exists a chain of causality expressing objective correlations. In connection with liability for damage, the legal approach evaluates only some of the innumerable phenomena, attaches consequences to certain phenomena only. When liability for damage is being established and the yardstick devised by law is applied to study the cause figuring in the chain of causality, one cause, the one serving the purpose of our yardstick, is selected. Yet if the yardstick changes, the selected phenomenon, the cause, will change too. Even within liability for damage, the yardstick will be different, we will select and evaulate some other type of human conduct, depending on the system of liability and on the circumstance whether we are confronted with liability under civil law or under labour law. The phenomena and causes selected in case of disciplinary or criminal liability will be even more dissimilar. So there exists no particular legal cause in the chain of causality, or, more correctly, there exists a specific „legal cause" in each case; but these causes are not identical, they are different „legal causes" according to the nature and system of liability. The use of the term „legal cause" tends to conceal these differences and may result in misinterpretation of the writer's intentions.

The correctness of what has been said so far can be tested easily in connection with liability for damage resulting from the use of sources of increased dangerousness. Here the theory based on the discrimination of inevitable from accidental does not take us anywhere. Suppose the driver has been careless and has therefore knocked down a pedstrian. It would be extremely difficult to show that the owner of the car has caused this damage as a matter of inevitableness. It may be that causation was not evitable even on part of the driver, and that it was only accidental. In such cases the maker of law detects the involved human conduct that can be influenced, and that in this case this conduct is to own and operate the car. This cause is remote, but it is expedient to invest it with legal relevance. So this will be the „legal cause". That upkeep of the car will figure among the causes is obvious, hence several types of human conduct will be comprised in the chain of causation. So the activity of the driver is a human cause, and so is the conduct of the keeper. Within the scope of liability for a source of increased dangerousness, civil law evaluates the conduct of the keeper. So, in this respect, this is the legal cause. But if the driver has caused damage intentionally, his conduct will possibly be evaluated also by civil law, whereby it may become the „legal cause". Thus it is not the causal nexus that changes, or contains some legal cause; it is the provision of law that lays down further

conditions which are necessary for establishing liability and which evaluate this or that phenomenon. In the case discussed it will be the conduct of the employer that we select from the chain of causality for studying.

So, after all, we must conclude that we are not able to bring about any change in the objective causal nexus proper. Hence any theory that tries to select from among the causes in any manner, is wrong. Not even the jurist can transform, can remove correlations existing in reality. He, too, must work with objective reality. But he possibly submits to evaluation only certain elements of this objective correlation. So he does not change real correlations, he only pays attention to some of them and not to all. In a given case these are certain human conducts. But only in a gives case, since — as has been indicated in the introduction to this chapter — causal nexus and correlations are present also in certain prerequisites of liability — in case of damage for example — and the theory relating to causal nexus, as the method for establishing the prevalence of real correlations, must be applied also here.

It also follows from what has been said here that the distinction between direct and indirect cause, often appearing in literature on law, must be rejected, or that the view ascribing importance only to direct causes is wrong. This in turn, raises a problem reffered to by several authors,[14] viz. how far we can, or should, proceed on this line. This problem appears especially if damage arising in the second, third or further steps is considered, mainly because of unlawful conduct. In view of the fact that it is not possible to annihilate, to make dissappear, the objective chain of causality proper, it is only the provision of law that can provide a solution here. This can be accomplished in two ways. One is, if the provision of law itself prescribes how far we must go back on the chain of causality. This is usually effected in the indirect way, by determining the types of damage caused (e. g. only damage caused within the scope of employment can be considered, or unrealized profits must not be taken into account). The other method is that the maker of the provision of law — possibly by giving certain guidance of principles — leaves it to the administrator of law to come to a decision in the given problem. The combined application of these two methods usually appears in practice. It should be noted, however, that not even this latter method represents any arbitrary selection of cause on part of the administrator of law. Namely the latter decides by interpreting the provision of law, i. e. by clarifying the intentions of the legislator, whether in the given case it is justified to desist from going back further along the chain of causality.

4. *The causality of negligence*

To determine the nature of negligence emerges as a special issue in connection with the question of causal nexus. I. e. the question whether or not negligence can be evaluated as a nexus of causality. Two opposed views are known in socialist literature. One rejects the possibility of the causality of negligence, the other considers it possible.

[14] Eörsi Gy.: Causality.
[15] E. g. Шаргородский, Флейшиц, Антимонов.
[16] Шаргородский М. Д. i. c.

The opponents of the causality of negligence are to be found usually among the followers of the discrimination of inevitable from accidental.[15] They insist that the nature of cause can be attributed only to things that produce effect. The effect is caused not by negligence, but by some other circumstance. Negligence can be qualified as unlawful, entails liability, because measures have been omitted by which the harmful effect could have been prevented.[16] And the nexus between negligence and effect is accidental at most.[17] It is argued, too, that those advocating the causality of negligence are actually adopting the views of philosophical idealism. They shift the objective category of causal nexus to the subjective sphere, as they evaluate the causative force inherent in non-feasance depending on what importance is attached to this by the provisions of law.[18] There are some views according to which the causal nexus in case of non-feasance is no longer existing in reality, but is quasi presumed to exist.[19]

Concerning the causality of negligence, those taking the position of rejection are making substantially the same mistake as is made in connection with the theory based on the discrimination of inevitable from accidental. The outcome is either that calling to account does not take place in a considerable proportion of cases without good cause, or that calling to account requires the introduction of other factors. In my opinion we must start from the premise that non-feasance is also activity. I shauld like to add that, within the scope on universal context, the same conduct, even if manifest as non-feasance in the one aspect, will be active by any judgment in the other. Hence it is not possible to remove it from the causal nexus as a nonexistent factor. On the other hand, the circumstance whether this nexus is a matter of necessity or accidental, is irrelevant in respect to liability for damage, as has been shown in the foregoing.

VI.

COMPENSATION

1. *The scope of liability for damage*

After defining the basis of liability, the next step we must take is to clarify how the person held liable must answer, to what extent he must repair damage. The answer to this question is the definiton of the scope of liability.

In defining the purpose and function of liability for damage, we have said that liability for damage reforms through reparation. Thus compensation has two facets: one, it repairs damage caused; two, it is a sanction for unlawful conduct. From the conclusion that liability for damage reforms through reparation, and reparation means the removal of the disadvantage caused, it follows that reparation must consist in full compensation for the damage caused.

The principle of full compensation, which ensures reparation to the full

[17] Флейшиц Е. А.: Basic issues.
[18] Шаргородский М. Д. l. c.
Иоффе О. С.: Liability.

extent, satisfies in principle also the other — sanctionative-reformative — aspect of liability, since full compensation also means a sanction of adequate weight. To depart from the principle of full liability can therefore be justified in cases only where education, influencing require a milder sanction, and the purpose of reparation can be served by such milder sanction, i. e. the departure from full liability, as well. (This is the case of damage caused by employees.)

2. *The damage*

a) *The concept of damage*

Provisions of law usually do not define the concept of damage. The general point of view in jurisprudence is that damage means some disadvantage, and that the latter must materialize with the person suffering from unlawful conduct. But this conclusion provides no sufficient orientation. Namely disadvantage may affect the person of the injured (e. g. his corporeal integrity is affected, or he suffers some moral injury), or some of his belongings or his property. Disadvantage may be manifest also in that the exercise of the injured person's right becomes impossible, or can be exercised only delayed or incompletely.

Yet not all disadvantages resulting from unlawful conduct can be taken into account; only those can be considered which can be repaired, compensated for, by the means of liability for damage.

Repair within the scope of liability for damage means that the person causing damage is under the obligation to restore the original state through repair, or make replacement in kind; if he is not able to do so, he must make replacement — give compensation — expressed in pecuniary means and ensuring the restitution of the original state. This is possible only if the disadvantage can be expressed in terms of the legal tender, i. e. in money. Hence damage must be a disadvantage that van be expressed in terms of money. The consequence of unlawful conduct can be both pecuniary and non-pecuinary disadvantage; but within the scope of liability for damage, only disadvantages of pecuniary nature, i. e. those that can be expressed in terms of money, are taken into account. Hence the concept of damage for the purpose of liability is narrower than the everyday meaning of the term.

b) *Damage of non-pecuniary nature*

It follows from the aforementioned restriction of the concept of damage that non-pecuniary damage cannot be regarded as damage for the purpose of liability for damage. The term pecuniary damage is not to mean that the infringement of rights must affect some property directly. The unlawful conduct may affect, for example, the injured person's health, corporeal integrity, or may prevent the exercise of his rights of non-pecuniary character — e. g. the right to work. What is essential here is that the disadvantage resulting from the injury must be expressible in terms of money.

As concerns the reparation of damage of non-pecuniary character, the unanimous stand taken by jurisprudence and legal practice is that no recompense or solatium can be granted in such cases. Whether in cases where the consequences of non-pecuniary damage can be removed by material means (e. g. correction of some deformity by surgical intervention or prosthesis) the costs of the latter can be refunded is another matter.
But this already constitutes pecuniary damage.

c) *The scope-of pecuniary damage*

As we have seen, only pecuniary damage is considered in connection with liability for damage. The definition pecuniary damage applies not only to cases where the damaging act affects some of the injured person's things, or, in everyday usage, some of his property. E. g. the person causing damage smashes a window, wrecks some machine, and the like. Pecuniary damage arises also if the person of the injured is assaulted, or the exercise of some of his rights is frustrated, if this results in a reduction of the injured person's means.

In respect to their nature, pecuniary damages can be divided into several groups. In certain types of damage, existing means are reduced as a consequence of the damaging effect (property is destroyed, damaged, expenses, costs have to be borne, etc.). In the other group the damaged person is deprived from some future increase of his means, some income, possibly without the simultaneous reduction of his available means. The first group is damage suffered. The second is profit lost.

Cases belonging to the sphere of damage suffered are again divided into two groups. One comprises the reduction of available means resulting from the damaging conduct. The other comprieses expenses. The latter are not the primary consequences of damage caused, they are usually of an incidental character. Many of them serve the purpose of mitigating the cosnequences of the damaging act. Another difference should be pointed out in this connection. Damage usually occurs independent of the damaged person's will. Yet expences — although consequences of the damaging act — are incurred in the majority of the cases only upon the damaged conduct. Yet whether or not this reduction materializes, actually depends on the damaged person's decision to hire somebody. It may happen that he finds no suitable help, does all the household work by himself, even if this implies difficulties. No help is being paid for in this case, thus the reduction of available means does not take place.

Profit lost means an increase in means of which the damaged person has been deprived because of the damaging act. A causal nexus must exist between the damaging conduct and the damage caused, and, within the damage proper, between the various factors of damage. In case of profit lost, the damaging act has cut through the causal nexus. (But regarded from another angle, causal nexus exists in that the unlawful conduct caused the interruption of the chain of causality.) When the case of profit lost is established, this is actually an attempt at constructing the non-realized part of the chain of causality. Inference is made from the existing situation how the future would have worked out. Hence while damage suffered is usually a measurable, existing reality, lost profit is a mere presumption how the

future would have taken its turn if damage had not interfered. Thus the establishment of profit lost always involves a certain measure of estimation. To reduce this instability as far as possible, efforts should be taken in such cases to establish available factsas accurately as possible for providing a firm basis of estimation and presumption. Hence the case of profits lost can be established only if there exists a realistic basis for presuming that an increase of means would have materialized to the advantage of the damaged person in the absence of the damaging conduct, and if the pecuniary value of this increment can be assessed in a realistic manner.

In the beginning, it was a matter of controversy in socialist law whether lost profits can be refunded within the scope of liability for damage. Yet this initial attitude has changed in the course of progress, and the possibility of refunding lost profit is recognized in socialist law by now.

In connection with damage caused within the scope of employment there is an exception to this principle. If damage is caused by the employer, the employee is entitled to claim refund of lost profit. But if damage is caused by the employee, the employer has usually no title to claim such refund.

d) Inclusion of incomings

Damage means the reduction of the damaged person's available means. It logically follows from this that incomings, increase of means, which result from damage, or from the consideration of damage, to the advantage of the damaged mitigate the damage suffered. Two types of case belong here. One is the services or sums received from the insurance system; the other is the sums that the damaged has saved or received in some other way in connection with the damage.

In this respect the concept of insurance comprises social insurance, life, accident insurance or insurance against damage. In case of social insurance and insurance against damage, the damaged can only enforce claims for damage in excess of the services received, in case of life, accident and pension insurance, the services received on the basis of insurance cannot be included in the assessment of damage, except for payments made by the insurance system for a specified purpose (e. g. medical expenses).

The other group comprises cases where certain savings emerge as the result of damage caused, or the damaged may draw certain profit. Gains resulting from the sale of material, etc. left over after objects have been damaged, or cases where the damaged is set free from regular expenses, belong to this category. One example is the discontinuance of travel to the working-place when the employee gets disabled.

The third group of cases resulting in savings comprises situations in which the damaged can draw some income by utilizing his working ability or some of his belongings as a result of damage suffered. E. g. the employee dismissed unlawfully can utilize his worktime and do work elsewhere.

Savings and incomings materialize partly independent of the damaged person's will, but they are partly conditional on his decision, like expenses. But when the opportunity of saving or profiting arises, it cannot be made

conditional exclusively on the damaged person's decision to avail himself of the opportunity, or not to do so. It follows from the principle of mitigating and preventing damage that if damage can be mitigated by some saving or other measure, the damaged is obliged to avail himself of such opportunity. If he fails to do so — although he was in a position to do so — this will be charged to him in accordance with the rules govering the contributory action by the damaged.

e) Assessment of damage

If damage cannot be redressed by repair or in kind, the sum of money required for redress must be paid as compensation. For this purpose it must be clarified how the value of damage expressed in money should be calculated.

If, as a result of damage caused, some object is damaged or destroyed, the calculation of the amount of damage must start from the amount for which the damaged can obtain or repair the object. The question is how this amount can or must be determined. Obviously, the basis of departure is the prince of the damaged or destroyed object, or the prince of material required for its repair. (We speak of destruction if the object can no longer be used properly as a result of damage, and of damaging if the object can be used properly again after repair.) But in determining theprice, the problem is that the same object may have several prices (retail trade price, cost price, etc.), and that in case of price fluctuation there may be different prices at different times, e. g. at the time the damage has been suffered, or at the time of adress.

For solving these questions we must start from the principle that the purpose of liability for damage is reparation. The principle of reparation is statisfied only if the possibility is created for the damaged to obtain for the sum received as compensation the object that has been lost or destroyed.

In the damaged person wishes to replace his destroyed thing he can obtain it only on the market. Consequently the market price must be taken as the basis in such cases.

If we agree that the amount of damage must be assessed by taking as a basis the market price, it is still to be decided which price is to be understood, i. e. the production price, the wholesale price, retail price, etc. Considering that the purpose is to ensure reparation, a price must be taken as the basis for which the damaged is able to obtain the thing in question. Hence if he is in a position to buy at factory or wholesale price, the basis should be this price; if he only can obtain replacement at retail price, the basis should be the latter.

It may happen that certain things are obtainable in retail trade at two different prices, i. e. there is an official price for which the thing in question is available only in limited quantities, possibly on allocation, and there is a higher, so-called free market price, too. What has been said above applies to such cases as well. If the damaged can buy at fixed price, the latter must be taken as the basis. If there is no such possibility, the amount of damage must be assessed on the basis of the free market price.

Having clarified all this, one more question arises: the price of what time must be considered. Prices may change during the time that passes from damage to compensation. So it must be becided whether the amount of da-

mage should be calculated on the basis of the price valid at the time damage was caused, or at the time of compensation. The positions taken in this respect are not uniform, nor is judicial practice. There are two views at present. One is that the price at the time of damage should be taken as the basis. It starts from the fact that damage has arisen at the time the damaging act was committed; hence that price must be taken into account, which was represented by the thing in question at that time. The subsequent change of price was entirely indenpendent of the person causing damage, so it would be unjustified to hold him liable also for such change. The other view is that the price valid at the time of compensation should be considered. This starts from the premise that reparation can be ensured only if the amount of damage is calculated in such a manner that the damaged person is actually enabled to replace his lost thing. And this is made possible only by a price valid at the time of compensation.

In my opinion the view that disregards the price valid at the time of damage and takes as the basis the price at the time of compensation in case of price changes, is correct. But this should be applied not only if there is a rise in price, but also if the price has dropped meanwhile. Consequently, if the price has dropped, the damaged person should only be entitled to compensation based on the price valid at the time of redress. This is the solution that serves the principle of reparation to the full. If we accepted the view that the person causing damage has caused not more damage than was arising at the time the act was committed, and that subsequent changes of price are therefore independent of him, he ought to be freed, by the same token, from the expenses that have arisen later. Although it is a fact that at the time of the act only damage of a lower amount was caused, the circumstance that the damaged was at the time of compensation not any more able to obtain the lost thing at the former price must also be imputed to the person causing that damage. Namely the latter could have repaired damage at once. No one had prevented him from doing so. If he failed to do so because at that time it was not possible any more to clarify the actual amount of damage (state of unconsciousness, attempted repair, etc.) these circumstances are in causal nexus with the damaging conduct and so it is justified to charge them to the person causing damage. And if the latter failed to repair the damage at once for reasons imputable to him (delay, etc.) it is absolutely justified to charge the change of price to him. This is the method that fully ensures the restitution of the state existing at the time of damage. For this is always to be understood as the restitution of the actual state, and not the price situation.

To take into account the price at compensation even if there was a drop in price since damage occurred, is also in conformity with the principle of reparation. The person suffering damage is entitled to compensation equivalent to his loss, but not to more. But if he were given compensation on the basis of the price at damage in case of a drop in prices, he would be able to buy more than his loss. And to profit from such a solution would not be justified,

To depart from taking as a basis the higher price at compensation should be possible only if the damaged without reason delays the enforcement of his claim, and the increase in price takes place meanwhile. In such a case it is the attitude of the damaged that accounts for the circumstance that he is not

able to replace his lost thing at the price valid at the time of damage. To charge this to the person causing damage would not be justified.

It may happen — is even typical in case of damage caused by the employer within the scope of employment — that the object damaged or destroyed is not new, but used. The amount of damage must be calculated on the basis of the market price in such cases, too. If a similar second-hand objects are available on the market, the amount of damage should be determined on this basis. If there they are not, the amount of damage should be determined on the basis of the market price of the new thing, taking into account the degree of wear. The conclusions made in connection with the change of prices are valid also for such cases. Hence the market price at the time of compensation should be taken as the basis for calculating the amount of damage, be it higher or lower than the price at damage.

Considering expenses incurred as a result of damage, it should be noted that this usually requires some activity, not included in the causation of damage, on the part of the damaged or some other person. But this activity must be in causal nexus with the damaging act or the damage suffered. Consequently no expenses can be taken into account which have become necessary not because of the damage, but because of the used condition of the object. It follows from this, too, that the person causing damage cannot be charged with expenses without due deliberation. The person suffering damage is evidently under the obligation to do his best to mitigate damage, or to prevent the increase of damage. He is even obliged to bear expenses to this end. At the same time he is entitled to make every effort to remove the disadvantages he is suffering as a result of unlawful conduct, and in doing so he may incur expenses.

In case of expenses it should always be considered whether they were necessary and justified. As concers the question of necessity, the first thing to ascertain is if the expenses, the measure resulting in expenses, was suitable for mitigating the damage, for removing the consequences of damage. This is not to mean that the desired effect must actually materialize; the measure may happen to be was unsuccessful. But this does not affect the possibility of charging the expenses. The requirement is that the measure taken be objectively suited for mitigating the damage, for removing its consequences. It may happen, too, that the measure taken is not objectively suited for mitigating the damage, i. e. was not necessary, but the damaged person was not aware of this (Maybe his knowledge was limited, or he had no sufficient graps of the situation when suffering damage.) Since, therefore, outlays proved to be unnecessary, the inference might be that these expenses cannot be charged to the person causing damage, and they must be borne by the damaged. Yet this would not be fair in every case. In the last analysis, the expense was induced by the fact that the person causing damage had displayed unlawful conduct. And the damaged is actually the victim of assault, and acted in defence. Hence, as long as the damaged is not acting mala fide in spending money unnecessarily, these outlays must be included in the damage and charged to the person causing damage. But if the person suffering damage is guilty of neglect, he must bear these expenses.

In respect to necessity, not only the suitable nature of the measure and outlay must be considered; it has to be decided whether these were necessary

in the manner and to the extent they were carried out. In doing so our departure must be that everybody is expected to act with the greatest possible economy when managing his affairs. Only measures and spending to the absolutely necessary extent are permissible. If this is overstepped, the excess must be judged as an unsuitable measure. Hence if the damaged was negligent, he must bear the excess. But as concerns the extent of spending, there exists an objective limit. Namely spending mitigating damage is not permissible to such an extent that the total value of the damage still existing and the money spent be in excess of the amount of damage which would have occurred in the absence of measures mitigating the damage. As concerns the manner of measures and spending, here the principle is directive, too, that only the most economical measures are considered as justified. So it is not permissible to make luxury spending. The limit on spending, i. e. that the amount of damage must not be exceeded, does not apply to cases where health and corporeal integrity are injured by damage caused to the employee. This is based on the principle that the greatest value of society is human life. Everything must be done to protect and maintain corporeal integrity and health, irrespective of cost.

f) Changes occurring subsequently in the extent of damage

In the foregoing we have discussed how the pecuniary value of damage can be calculated. We started from the understanding that damage is known in its entirety by the time the claim for damages is enforced. But it may happen after the enforcement of the claim that consequences arise which affect the extent or amount of the damage. This may be the case if, for instance, the employee causes damage by delayed action as a result of which the employer has to pay penalty. The employee causes damage by delayed action as a result of which the employer has to pay penalty. The employee is held liable for it. Claim for damages is advanced against the employer in addition to penalty later on, from which the employer suffers further damage. Thus a new consequence of the damaging action — not foreseen at the time the claim for damages was enforced — emerges. A comparable situation may arise if the employer causes damage. The change of prices also belongs to the sphere of subsequent changes; this problem was discussed in connection with calculating the amount of damages.

The solution in connection with subsequent changes is that these have to be taken into account if their causal nexus with the damaging act can be proved conclusively.

g) General compensation

Determination of compensation can take place after the accurate assessment of damages. Resulting from the principle of reperation, compensation must not be in excess of the damage suffered, so assessment of damage is a prerequisite in determining compensation. It may happen, however, that — although the occurrence of damage is beyond question — the amount cannot be assessed accurately. This often happens in cases where expense and outlays emerging in the future are involved. General conpensation serves the elimination of difficulties involved in determining such expenses.

As concerns general compensation, we often see instances of wrong conclusions and application in practice. First it should be mentioned that general compensation is determined also in case of non-pecuniary damage. Essentially, this is the substitute for incorporeal compensation or solatium for the violation of rights attached to the person, as applied in the practice of the past. But such application of general compensation is wrong, since to establish incorporeal damage is incompatible with socialist morals.

The other hazard, also appearing in judicial practice, is that to determine a general compensation only conceals some leisure in taking evidence and is applied also in cases where the amount of damages could have been established accurately. Even if general compensation is established, the factors of which damage is composed must be revealed. If this is omitted, general compensation tends to shift to the category of incorporeal damage.

Thus great care must be taken whenever general compensation is to be established. It ought to be applied in most exceptional cases only. As regards the occurrence of damage, no uncertainty is admissible. It can only arise in respect to the extent of damage. The ruling that the amount of pecuniary damage cannot be assessed accurately must be based on the preceding action of the court by which it tried to take all available and expedient evidence for ascertaining the amount of damage.[1]

It should be understood clearly that general damage is pecuniary damage. It only differs from other types of pecuniary damage that the amount is uncertain. Hence general compensation is essentially a lump sum. It follows from its nature that claiming back is not possible on the grounds that the actually incurred expenses did not amount to the sum of the general compensation granted.[2] But if general compensation is to be paid as an annuity, and it turns out subsequently that the expenses taken as the basis need not be paid, or smaller sums must be paid only, or over a shorter period of time, a reduction of compensation can be applied for. The contrary may happen, too, and an increase of general compensation may be granted. Moreover, if additional expenses have to be paid subsequently, and it can be established accurately that they would considerably exceed the sum granted as a general compensation, the latter may be increased.

[1] Supreme Court P. törv. II. 21233/1963.
[2] Supreme Court 804/10.

Part II

THE EMPLOYER'S LIABILITY FOR DAMAGE

I. Introduction

Damage caused by the employer can be divided into four groups. These are the following:

a) Damage caused by preventing from doing work, i. e. by violating the right to work;

b) damage resulting from injuring the employee's life, health or corporeal integrity;

c) damage occurring in the employee's belongings brought to the premises;

d) damage resulting from the violation of other rights arising out of employment.

Of these types of damage, the first three are of consequence in practice; the cases in the fourth category are rare.

The general principles governing the employer's liability for damage have been stated in Part I. In the following we shall study to what extent these general principles are materializing in the various types of damage. Thus, substantially, we have to answer the question whether in case of a given type of damage the principles laid down in Part I. are really suitable for ensuring reparation and for influencing the person causing damage. At the same time, we must find an answer to the problem that in cases where the general principles would permit several solutions which of them would prove correct for the given type of damage.

In the following we shall consider the various types of damage one by one for the sake of lucidity; only questions will be discussed which depart from the general principles of Part I., or which relate to details that have not been mentioned in Part I.

II. Damage caused by preventing from doing work

A) Introduction

A number of cases belong to this category of damage. These can be subdivided into several groups:

a) The first group comprises cases where the employee cannot choose but to terminate employment immediately because of the employer's breach of duty. Such cases are

— the employee quist employment immediately because of direct and grave endangerment of his life or body;

— the employee quits employment immediately because the employer fails to employ him in the post agreed upon in the social study contract.

b) The second group comprises cases where the employer withholds, or

hands over belatedly, at termination of employment the employee's work-book or other documents which are required for accepting other employment, or hands over them to the employee in due time but not made out as required.

c) The third group comprises cases of unlawful termination of employment.

d) The fourth group comprises cases where the negligent measure of the employer does not affect the maintenance of employment, but the employer fails to meet certain conditions as a result of which the employee cannot perform his work or can rightfully refuse to do work (e. g. the employer fails to provide a safety belt for work to be done high above ground).

Cases of damage by injury to health and corporeal integrity leading to temporary or permanent diasbility would seem to belong here; but these will be discussed in a special chapter since they raise a number of other problems.

In the cases listed above, the damaging conducts show dissimilarities. But their common feature is that damage results from the non-performance or faulty performance of duties undertaken in the contract of employment, and that the employee suffers damage because he is not amle to exercise his right to work, is not able to perform work. (I shall not discuss here those types of damage which usually occur incidentally — expenses connected with obtaining the withheld work-book, for instance — but may occur also independently in the absence of other damage.) The situation in which the employee is unable to work may arise within the scope of existing employment, or at its termination, or may materialize in not getting possible future employment. These differences are of no consequence as concerns principles, they only are of importance in certain questions of detail (e. g. to determine loss of earnings).

The cases of the employee's refusal to work listed in paragraph d), as well as those listed in pharagraph a) differ from the other cases to some extent. Namely in these cases the nonperformance of work seems to be the consequence of the employee's conduct. It was the employee who refused to do work, who terminated employment immediately. This is apparently so, but essentially it is not. It is the employer who displays unlawful conduct, a conduct that violates the contract of employment. So it is the employer who fails to provide conditions making possible for the employee to perform his duties undertaken in the contract, to do work. Hence it is the employer's conduct that hinders performance of work. In such cases the employee is entitled to demand performance, i. e. the provision of conditions making work possible, and has the right to terminate employment if his efforts are unsuccessful. These cases will not be discussed here since they are beyond the scope of liability for damage. (If, however, the employee suffers damage in addition, he can claim reparation. This is expressed in cases mentioned under o) and d).)

Upon a closer study of the four groups listed above, it will appear that, regarded from the angle of liability for damage, there are pairs of groups which show a certain indentity. This consists in the following. In cases mentioned under a) and b) the employee's employment has been terminated, and the annulment of termination is out of the question. The employee has to find a new employment. He suffers damage because finding a new employment encounters difficulties in cases under a), and because it takes some time in cases under b) and might be possible under less favourable conditions than those of the former employment. Thus damage realizes in the loss of earnings

first of all, but may arise also as actual damage suffered (expenses). In cases mentioned under c) employment has been terminated, but is restored automatically after annulment of the unlawful terminating measure, and the employee continues working. Since employment is restored, and restored reatroactive to the time of the unlawful measure, the employee is entitled to demand his wages he has not received during the period in question. This will be a claim to performance. In cases mentioned under d), employment does not cease, only the performance of work is suspended until the prescribed conditions are met. The employee is entitled to wages for the time passing till the cessation of the unlawful state, since employment had existed during that time. Consequently, the claim to wages for the time lost in cases under c) and d) does not belong to the sphere of liability for damage (This is not altered by the circumstance that the employee does not wish to return to his former employer by the time the unlawful termination is annulled. The wages due for the period following unlawful termination are due by the title of performance also in such cases.) The employee's damage in such cases is usually damage suffered, mostly expenses. Loss of earnings occurs seldom, usually within the scope of secondary employment or parttime occupation.

The differences outlined here warrant a separate discussion of cases belonging to groups a) and b), and to groups c) and d). The former may be called damage caused by preventing the employee from doing his work, the latter damage caused by terminating employment unlawfully (this latter definition does not refer exactly to paragraph d), but it would seem advisable to take as the basis the more frequent and more typical cases when applying the term.)

B) Damage caused by the prevention from doing work

1. The system of liability

a) Factors determining the system of liability

In Part I, in connection with the system of liability, I have concluded that in cases of damage caused by the employer the system to be applied should be principally the one which rests on the requirement of increased protection and where the employer's dereliction is not prerequisite. But discharge from liability may be different within this scope at the various types of damage, and liability based on dereliction may be employed in some cases. I have adduced two factors for justifying the primariness of liability irrespective of dereliction. One is the importance of reparation. The second is the circumstance that dereliction would have no sufficient influencing effect as a rule. Let us now consider to what extent these factors can be efficient in case of damage caused by violating the right to work.

First I have mentioned the importance of reparation. The injury suffered by the employee in the cases just discussed is very serious. The right to work is one of the most substantial personal rights. On the one hand, the basis of livelihood in our social system is work. If, therefore, somebody is prevented from working, he and his family are deprived from the source of livelihood thereby. On the other hand, work is not only the source of livelihood, but is

becoming increassingly one of the necessities of life in the course of progress. Work provides the opportunity to people to improve their capabilities, to become useful, creative members of society. Deprival of the possibility to work impairs all this.

The other factor we considered was that dereliction would not have sufficient influencing, mobilizing effect. The reasons were explained in detail in Part I. The conclusions drawn there fully apply to the cases discussed now.

In connection with the type of damage just mentioned, the grave violation of the interests of society as a whole must be emphasized in addition to the two factors mentioned above. Society can make sound progress only if its able-bodied members praticipate in the work, take their share in the creation of the national income. Any factor that prevents the sharing of work is counteracting these requirements.

Thus it is evident that in case of damage caused by the prevention of work, the importance of reparation is extremely high. Measures to be taken against damage of this nature are of special importance also because of the grave injury the interests of society suffer. And the inadequate efficiency of liability based on dereliction exists unchanged at the same time. All these circumstances combined justify the conclusion that in the cases discussed here the system of liability should rest on the requirement of increased protection, and dereliction should be disregarded.

b) Discharge from liability

Concerning liability irrespective of dereliction, we have concluded in Part I. that the employer can be discharged from liability only if damage has been caused by an unpreventable external cause, or exclusively by the unpreventable conduct of the damaged employee. The question is whether discharge on this basis serves our purposes in the types of damage discussed in the foregoing.

As concerns the reason for discharge mentioned second — exclusive causation by the damaged — the answer is easy to give. In Part I. we have shown that in case of the employee's unpreventable and exclusive causation damage is caused solely by the employee. No right or obligation arising out of employment is violated by the employer in such cases, so there is no reason for holding him liable for damage. Nor can this be justified by considerations of equity. Whoever causes damage to himself must bear the consequences, and cannot expect of society to compensate him for his loss. (If we wish to give some relief is such cases all the same, this can be accomplished within the scope of some insurance scheme.) Hence the employee's unpreventable and exclusive causation results in the employer's discharge from liability also in case of damage caused by the violation of the right to work.[1]

The other possibility of discharge, i. e. causation by an unpreventable external cause, is much more problematical. The problem is not whether damage caused by some „external cause" can or cannot occur in the cases discussed above; the question is whether it is justified to discharge the employer from liability on the allegation to such a cause. This consideration arises because of the importance of reparation.

[1] Mt. 62. §.

We concluded in the foregoing that the violation of the right to work, deprival of the possibility to do work, is one of the gravest injuries the employee can suffer within the scope of employment. This jeopardizes in the most direct manner the employee's and his family's subsistence at the same time. It is at this point that the requirement arises to ensure the employee's livelihood in every case where the interference with working is not the result of the employee's conduct. It would not be fair to deprive the employee of the sums required for subsistence only because the performance of his work comes up against obstacles due to some external cause, and not because of some activity or omission of the employer. (E. g. his work-book is lost in postal delivery, or cannot be handed over to him because of some elementary damage.)

There is much to be said for this reasoning. It is desirable, indeed, that society should provide for people in case they are not able to work. (The only exception to this rule is where the employee has caused prevention from working himself.) Yet it is to be asked if this should be solved within the scope of liability for damage. Would such a solution not be in contradiction with the principle of employing liability for damage only in cases where the causer of damage can be reformed, influenced thereby? For if the employer would be held liable also for damage caused by an unpreventable external cause, would be punished because of an outcome he was not, and will not, be abie to perevent, the institution of liability will certainly have no reformatory effect. So it would be advisable to ensure the employee's livelihood by some other means in such cases.

In my opinion, this argument is well-founded. It is because there is no reason to burden the employer for events whose prevention is beyond his power. The solution must be sought for outside the sphere of liability for damage. (It may happen that to provide livelihood for the employee will be charged to the employer even so, but this will be no liability for damage.)

This conclusion requires some addition in cases where doing work is hindered by the circumstance that the employer has not handed over to the employee his work-book or some other certificate. It may happen that after the failure to hand it over and prior to or during the employee's requiest in this respect some external cause arises which makes handing over impossible. For example, the employer does not hand over the work-book at the termination of employment. The next day the employers office is burgled and the work books found there are stolen, including the withheld book Or the employer fails to hand over the work-book is destroyed in a railway-accident. The employer is obliged to hand over the work-book or other certificates to the employee upon termination of employment or upon notice given by the employer, on the last day spent at work.[2] If he fails to do so, he is at default as concerns the performance of his obligation. The consequences of this conduct must be borne also in respect to liability for damage.

If the employer is not able to excuse the failure to hand over the work-book, i. e. this failure is not the result of some unpreventable external cause or of the employee's unpreventable conduct, the employer creates a situation in wich the employee is not able to take possession of his work-book in due time. If some subsequent external action (e. g. burglary) ren-

[2] MT. V. 32. §

ders the handing over of the work-book impossible, this is the consequence of the employer's conduct amounting to breach of duty. So it would be unfair to place the burden of loss on the employee. The employer must bear the disadvantages, and this must realize in that his possible allegation to unpreventable external cause will not be accepted. This is clearly so, since the cause was not actually unpreventable: if performance would have taken place in due time the handing over of the work-book would not have been thwarted by the external factor. Hence performance in due time would have prevented the action of external factors.

One more conclusion follows from this. If the external factor would have acted in the same way also in the absence of default while the work-book was already in the possession of the employee (e. g. both the employer's offices and the employee's house collapse in a flood and the employee's work-book is lost) there is no reason to make the employer bear the total loss.

Summing up we may conclude that in case of damage caused by preventing the employee from working, liability must be based on the system where dereliction on the part of the employer is no prerequisite of establishing liability. The employer can excuse himself of liability if he is able to prove that damage has been caused by unpreventable external causes or esclusively by the emlpoyee's unpreventable conduct.[3] In cases where working is made impossible by the belated issuance of some certificate, an unpreventable external cause acting after the deadline of performance does not exuse the employer, except for cases where the external cause would have had the same effect on the employee.

2. *The employee's contributory act*

a) *The scope of the contributory act*

In Part I we have discussed the reasons for which the employee's contributory act must be taken into consideration, as well as the basis of evolutnion. It follows from the conclusions drawn there that the employee's contributory act must be considered also at the types of damage discussed in the foregoing. In view of the fact that the employer is liable for damage caused to the employee by preventing him from working, and such liability exists irrespective of dereliction, two conducts are present in such cases: liability without dereliction of the part of the employer, and the conduct of dereliction of the employee. Since these conducts are not homogeneous it will not be by a comparison of these two that the portion of loss from which the employer can be excused will be established. In such cases the basis for determining the portion of loss to beborne by the employee will be the degree of the employee's dereliction.[4]

In the cases discussed here the employer caused damage by failing to meet certain conditions, to comply with prescriptions, preventing thereby the employee from working. We have agreed that also the damaged must do everything in his power to prevent and mitigate damage. In these cases

[3] Mt. 62. §.
[4] Mt. 62. §.

such activities must be directed at removing obstacles to working, and at making use of given possibilities to work. Ar a consequence, the employee's act contributing to, or increasing damage usually materializes in two respects. One, he does not take all possible efforts to remove obstacles to working. Two, he does not work, although he is in the position to do so. Let us study these cases in more detail.

b) *Removal of obstacles to working*

Measures aimed at removing obstacles to working will differ with the subtype to which damage belongs.

In case of immediate termination for good reasons, or because of breach of the social study contract, the obstacle is removed by the act of terminating and quitting employment. So there is no necessity of other action to remove obstacles.

In cases where the work-book or other certificates (e. g. record of service) are not handed over or not issued to the employee, or there is delay in their ussuance, or they are not made out as required, the employee is obliged to take without delay every measure necessary for obtaining his work-book or other certificates, or for correcting wrong entries. If he is faulty of omission in this respect, he must bear the consequences[5] It follows from this that if the employee fails to take over his work-book despite the employer's demand, he will have to bear the consequences. Especially so if a longer time passes after his failure to take over the work-book. This conduct of the employee cannot be excused on the grounds that the employee has brought an action of appeal against the employer, and wished to wait for its outcome. The employee is not entitled to refuse acceptance of his work-book even if the entry in the work-book is incorrect; he must take over the work-book also in such cases.[6] (That the employee can request the correction of the wrong entry in the course of action for appeal, and can enforce his claim to compensation for damage resulting from such entry, is another matter.) The employee is under the obligation to request the employer to hand over the work-book, the certificates, to correct entries; moreover, if this is of no avail, he must take more efficient steps, e. g. to turn to the supervisory organ, or the labour dispute arbitration board. Delays in this field are charged to the employee.[7] The more so if the employee caused delay in correcting wrong entries in the work-book, e. g. fails to hand over his work-book for this purpose.[8]

All practical rules relating to work-books apply also to other certificates accordingly.

c) *Failure to do work*

The purpont and scope of the damaged person's obligations connected with the utilization of his working capacity, of his participation in the work of society, have been defined in a most comprehensive manner in practice.

[5] Supreme Court 796/9.
[6] Supreme Court Pf. II. 22 130/1951.
[7] Supreme Court Pf. IV. 20 587/1955.
[8] Supreme Court Pf. IV. 21 995/1954.

It should be noted that in considering such cases, the main problems present themselves in difficulties of proving. It is difficult to ascertain whether the employee has actually tried without delay to get an other employement, has taken measures to this end. It often happens, too, that the employee is unable through no fault of his own to present adequate evidence, despite the fact that he had done everything in his power to find employment without delay. (E. g. the enterprises, naturally, do not issue certifications to people contacting them for some post, etc.). Since the causer of the unlawful state was the employer enterprise, the organs acting in such cases collect proof from the enterprise concerned to show that the employee could have entered new employment at once, or how much time it would have taken to do so. Moreover, a general certification to the effect that there is manpower shortage at several enterprises, or in certain industrial branches, will not suffice; the enterprise must specify the openings where the former employee — considering his circumstances — could have met his obligation to accept a post. The failure to accept such a post can be imputed to the employee only if in case of diligent search he could have been informed of openings in due time, and if it was due to his neglect that he did not actually enter new employment. Neglect of his obligation to enter new employment can be established only if available proof shows conclusively that the former employee was neglectful. It ought to be noted here that all this does not relieve the organs settling labour disputes of their responsibility to take all possible steps to disclose the facts of the case. Also these organs are under the obligation to act in order to bring to light the truth. But what is of importance here is that if proving by the former employer, or possible additional official inquiries are unsuccessful, the neglect of the obligation to enter new employment may not be imputed to the former employee.

In connection with finding openings and entering new employment, it must be clarified first of all within what period of time the damaged employee is obliged to try to find new employment or work. The situation will differ according to the case, i. e. whether withholding of the work-book or certificates — or their incorrect execution — is involved or the employee quits his post immediately.

In the first case, the employee may reasonably expect that as a result of his request or complaint the obstacle to working — e. g. the incorrect entry in the work-book — will be removed shortly, after which he will be able to get a post similar to his former employment. Consequently the employee is not obliged to try to find employment during this time. For instance, if he has filed a complaint with the labour dispute arbitration board because of an incorrect entry in his work-book, he may wait for the decision of the board before taking other steps. The period of time involved in such cases is short, a few days, during which the annulment of the unlawful measure can be expected. But to wait longer than until the arbitration board passes its decision of first instance is not permissible. (In this respect it is irrelevant whether the board decides to the advantage of the employee or the employer. Namely if the board dismisses the appeal, or grants it, but the employer declares that he would not comply with the decision and resorts to legal remedy, protraction of the case must be taken into account. The former employee is not supposed to wait longer is this case, but must try

to find a new post. (He is under the obligation to do so even before the decision of first instance is passed if the case is likely to be protracted because of some other circumstance, e. g. the outcome of a criminal procedure.[9]

The situation will be different in the latter types of case, i. e. when the employee quits his post immediately. The employee cannot expect re-employment at his former post, so he is under the obligation to take steps immediately for finding new employment.

Difficulties may arise from the employee's circumstances, or regarding his person, which prevent him from finding new employment. E. g. delay in this respect can be escused if it resulted from the circumstance that the employee's children were taken ill and the employee has to attend upon them. Likewise, the employee is under no obligation to find new employment while he is ill, or undergoes rehabilitation after an accident. It should be noted in this connection that delay must not be imputed to the former employee if he is able to prove that he could not have found new employment anyway.[10]

The next question to be clarified in connection with a new employment is what kind of activity is to be expected from the employee having suffered damage. The general rule is that, depending on his circumstances and qualifications, the damaged person must make use of all means available to him in order to work. So he is obviously obliged to contact, first of all the local employment agency,[11] all local or nearby enterprises where he may expect employment. He is not obliged to contact enterprises that are far from his home,[12] especially not if, considering his disease or age, working at a distant place would be a disproportionate burden to him. Exception to this rule are cases where the person concerned usually works at distant places because of the type of his occupation, and has worked so also in his former employment, (e. g. has moved from the country to a town, and probably would have to do so again over a similar distance, between similar or the same places), or is not likely to find a post at his place of residence because of his qualification. This requirement is limited by personal circumstances (e. g. a pregnant woman), as a result of which the person concerned is not obliged to accept work outside his residence, or could reach his reach his place of work only by a long walk — for lack of adequate transport facilities — which might put an excessive burden on his health.[13]

Another problem to be considered within this sphere is the extent to which the former employee can be obliged to utilize his working capacity. One extreme view is that the damaged person is not obliged to accept employment, working conditions and wages other than those of his former employment where he suffered damage, and until he finds such employment he is not obliged to work. The other extreme view is that he is obliged to accept any type of work, anywhere and for whatever wages, legal wages of course. That neither of these views is correct, is evident. All the less, since in many cases it is not possible to find a post equivalent to the former employment, e. g. for lack of the work-book or other certificates. The gene-

[9] Ministry of Labour, decision № 158.
[10] Nagy L.: Liability.
[11] Ministry of Labour, decision № 158.
[12] Supreme Court Pf. III. 21 791/1955.
[13] Ministry of Labour, decision № 158.

ral governing principle is that, in order to prevent loss of earnings, the former employee is obliged to accept even such posts as are below his qualification and inferior to his former scope of work, provided this implies no considerable disadvantage to him if all his circumstances, including age, physical fitness, preservation of his skills of qualification, etc., are considered.[14]

It follows from the above principle that nobody is obliged to accept work that might endanger his health or corporeal integrity. For instance, it happened in a labour dispute that an employed woman was not blamed for having established herself in an easier job — carrying lower wages — because the advanced stage of her pregnancy would not have permitted her to do her original work.[15]

If often gives rise to disputes whether extraordinary strenuous work, efforts may be expected from employees in order to utilize their working capacity in the best possible manner. It can, and must be expected from any citizen to display average conduct for participating in, and is the course of, the work of the community. (Obviously, this average changes, increases as the self-respect of people is growing, as woork is increasingly becoming one of the necessities of life.) Nobody can be obliged permanently to do strenuous work, efforts, above the average. Hence if the person concerned does not accept such work, he does not violate his obligation to find employment.[16]

3. Compensation

a) The components of damage

The type of damage discussed here — i. e. damage caused by prevention from working — is mocposed of the loss of earnings, as well as of expenses, outlays. Damage resulting from an earlier outlay, the non-realization of some former order may occur in addition.

Legal regulation does not cover the definition of damage. Legal provisions, if dealing at all with cases discussed here, only state that the employee is entitled to compensation for his damage. Hungarian labour statutes also adopt this position.[17]

The conclusions I have drawn in Part I in connection with assessing damage and determining compensation, are directive also in the cases discussed here. But the general conclusions drawn there need some addition, especially as concerns the calculation of lost earnings.

b) Damage suffered

I. Reduction of available means

Reduction of available means in connection with damage caused by prevention from working is no frequent occurrence. Such a case may occur if the countervalue of some payment made by the employee is lost. E. g. the employee

[14] Ministry of Labour, decision № 158.
[15] Municipal Court of Budapest 49. Pf. 23 859/1958.
[16] Eörsi Gy.: Indemnity.
[17] Mt. 62. §

enrols for an evening course at a school, but must change his place of work because of the employer's conduct, is not able therefore to attend the course, whereby the fees paid for the semester are lost. Or it may happen that the employee is not able to enter new employment because his work-book is being withheld, and cannot travel to the health- resort for which he had paid because he must find employment and get back his work-book.

The conclusions in Part I. relating to the reduction of available means fully apply to the cases considered here, need no addition, so there is no need to discuss this problem further. What I should like to emphasize is that the damage resulting in the reduction of means can be considered only if it is in causal nexus with the damaging conduct.

II. Expenses, costs

Expenses and costs incurred in the cases we consider here can be divided into two groups. One group comprises expenses incurred in connection with enforcing the claim. The other group is made up of expenses for compensating disadvantages resulting from damage suffered.

Expenses connected with the enforcement of claims comprise correpspondence costs, incurred in the course of the labour dispute. Within the scope of the latter, the fees of the counsel representing the employee, as well as the employee's travel expenses can be charged to the damager (counsel's fees may not be charged in addition to those adjudged in the labour dispute).

Expenses resulting from damage comprise those which the employee has to pay because of the absence of employment — e. g. the employee had to quit his post, or his work-book or other certificates are withheld, or incorrect entries have been made in them — as a result of which the employee is not able to receive medical care, treatment, etc. otherwise due to him under social insurance scheme. Such expenses can be charged only if they were unavoidable during the period in question . For instance costs of an operation cannot be charged if the operation had been indicated earlier, but the employee postponed it, and to perform the operation within the period in question was not justified by medical opinion. And to charge such expenses is permissible only for services and for the time they would have been due to the employee as a result of insurance.[18]

This category also comprises expenses which the employee has to bear for the issuing of various documents, e. g. a new work-book.

c) Loss of income

I. The scope of loss of income

In the cases discussed here, the category of incomes lost comprises the following:

a) loss of wages and other allowances due on the basis of employment;
b) loss of income outside the scope of employment.

In the following I shall only discuss the first group. The latter will be dealt with in connection with damage resulting from injury of health and corporeal integrity.

[18] Ministry of Labour, decision № 158.

II. Loss of earnings proceeding from employment

The loss of incomes proceeding from employment can also be divided into two groups. The one is the loss of incomes possibly proceeding from employyer's unlawful measure. The second is loss of incomes due to the impossibility to enter new employment or to do work.

aa) Loss of earnings proceeding from employment that exists at the time of the unlawful measure.

If, as a result of the employer's unlawful conduct, the employee had to terminate employment it may happen that as a result of termination the employee will lose some benefits based on the time he has spent in employment, but falling due later. For instance, the profit-sharing regulations may prescribe that profit shares can be paid only to persons who have spent a certain time with the enterprise and are still employed there at the close of the calendar year. If the employee quits employment and does therefore not fulfil the above condition, he may lose his profit share. Reparation of the consequences of the employer's unlawful conduct will be complete only if the employee is placed in a position as if such conduct had not taken place at all. Hence the employee must be regarded as if he had fulfilled the conditions. Since, however, his employment existed only until termination, he will be only entitled to the proportion of the benefit — profit share in our example — that is due till termination. (The problem of determining incomes lost during the time following termination of employment will be discussed later.)

Needless to say, claims can be raised in such cases only if the basis for such claim had existed in fact. The employee terminating employment with immediate effect is not entitled to compensation on the allegation that if he did not have to terminate employment he would soon have received a special bonus or a reward. Nor can a claim for compensation be raised if the employee would not have been entitled to benefits for some other eason.

bb) Loss of earnings due to the impossibility to work

The basis of compensation in such cases is the circumstance that the employee was prevented from doing work because of the employer's injurious measure. There is work to do, the objective possibilities of doing work exist, only the employee is deprived of them. It follows from this that a refund of lost earnings is possible only if the damaged can prove that the possibility of working existed and that he had been deprived of this possibility by the employer's damaging conduct.

Yet in the cases mentioned above this principle is not realized uniformly. There may be differences depending on whether the work-book and other documents are withheld or not issued as required, or the employee terminates employment with immediate effect. This dissimilarity has been mentioned in Part I, but the underlying reasons must be discussed in brief also here.

Cases belonging to the first group are connected with the termination of employment. In cases where the work-book is withheld, or wrong entries are made, termination itself is not necessarily unlawful, and the employee may

have lost his job in a lawful manner. Having lost it, is doubtful whether he can find one soon. Yet compensation for the loss of earnings can be granted only if it is established that the former employee was deprived of the possibility to enter a new employment actually because of the damaging conduct that materializes in withholding his work-book etc. Thus the person concerned did not actually work at the time the damage was caused, consequently wages proceeding from future employment can be taken into account only if conclusive proof is adduced that such opening existed for the former employee. On the other hand, the possibility to do work exist in reality in cases where the employee legally terminates employment with immediate effect. The damage the employee has suffered is not the thwarting of some prospective employment, but interference with the continuation in a given post. If damage had not been caused, the employee could have continued, or started his work, according to the social study contract. It follows therefore from the difference between these two situations that if the work-book or some other prerequisite is missing, it must be proved that an opening existed and that the employee was deprived of making use of it by the lack of his work-book, etc. On the other hand, in cases of quitting with immediate effect, the fact of lost earnings can be established without any proof of available openings. (It may happen in such cases that the employer tries to prove that an appropriate opening was available to the employee and that the latter neglected his obligation to enter employment by not making use of it.)

III. Determining the earnings lost

When non-realized earnings are to be determined, it must be considered in every case what it is the employee has been deprived of as a result of the damaging act. As has been mentioned in Part I, cases will differ also here, i. e. whether the employee was prevented from continuing in his employment under the same conditions, or was hindered from entering into a new employment. The former category comprises cases of quitting with immediate effect because of direct and grave endangerment of life and body, the latter includes cases such as withholding the work-book. Consequently, if the amount of the lost income is to be determined in the first category of cases, the point of departure must be the earnings which were due to the employee prior to the event causing damage. The presumption is justified here that the employee would have had such income in normal circumstances, in the absence of the damaging event. If, on the other hand, the result of damage materialized in that the employee was deprived of the possibility to enter a new employment reparation must consist in ensuring him those earnings of which he was actually deprived as a result of unlawful conduct. This may be more, or may be less than the former earnings, as the case may be. (It follows from this that if the employer has withheld the work-book, but the former employee could not have found new employment even in the possession of his work-book because there were no openings, the employee will not be entitled to compensation.)

C) Damage caused by unlawful termination of employment

1. Types of damage

Two groups of case belong to this category of damage. One group comprises cases where damage is the result of the unlawful termination of employment. Termination of employment is unlawful if, for instance,

— the reasons give by the employer in the dismissal notice do not actually exist, or notice could not have been given because of some prohibition or restriction,

— the formal requirements are not met in giving notice,

— the employer declares summary dimissal in the absence of disciplinary decision to this effect, or in the absence of disciplinary offence, or if the disciplinary decision of dismissal has been passed with a substantial violation of the rules of disciplinary action.

The other group comprises cases where the employer fails to provide some working condition, or the employee is unable to do work because of inadequate instructions (e. g. he is requested to do work other than his scope of duties, or the instruction violates some provision of law), or the employee rightfully refuses to do work.

This type of damage shows close relationship to the type discussed in the foregoing, i. e. damage caused by preventing the employee from doing his work. This has been mentioned in the introduction. The difference lies solely in the character of damage, or, perhaps more exactly, in the fact that in case of the type discussed here the wages lost because of the absence of working are compensated for not within the scope of liability for damage. Thus in these cases damage usually materializes as damage suffered, and, within this definition, mostly in the form of costs and outlays. Thus for instance, as costs incurred for removing obstacles enforcing claims (correspondence, travel expenses, counsel's fees), and outlays resulting from the loss of social insurance benefits in case employment is terminated (e. g. medical treatment fees). Reduction of available means happens seldom within the scope of damage suffered. This may be the case when some earlier outlay becomes useless (e. g. university tuition fees).

Claims for profit lost are encountered even less often in this category of damage. This may happen in cases where e. g. the termination of employment prevents the employee from working in his spare-time job or secondary occupation.

2. The system of liability

As appears from the nature of damage belonging to the type discussed here, the problem arising in connection with damage caused by prevention from working does not present itself, i. e. whether liability should be made stricter as compared to the general principles laid down in Part I. In the cases discussed here, damage evidently affects the employee's and his family's living standars, as the latter is affected by any unexpected, extraordinary expense. But the employee's basic subsistence is not jeopardized (taking for

granted here that he will receive his lost wages, even if belatedly). This conclusion applies also to cases where the unlawful termination of employment materializes also in the loss of the employee's other incomes (To cite the above example, if he has to give up his secondary occupation as a result.) Namely, basic substence is provided for by the first employment and incomes from secondary occupation are only of a supplementary character.)

Consequently, in case of damage caused by the unlawful termination of employment, the general conclusion applies, i. e. the employer is held liable under liability requiring increased protection. He can excuse himself by proving that damage was caused by unpreventable external cause, or exclusively by the employee's unpreventable conduct.

3. The employee's contributory act

Here the situation is entirely similar to the cases discussed in the foregoing, i. e. damage caused by prevention from working.

The employee's contributory act materializes mainly in two spheres also here. One: he does not make efforts to remove the obstacle to working. Two: he does not avail himself of the opportunities to do work. This latter is realized only in cases where the employment is determinated because of the employer's conduct.

As concerns judgment and evaluation of how the employee is obliged to act in order to remove obstacles and make use of opportunities, the conclusion drawn for the type discussed before are fully valid also here. So this need not be repeated here.

4. The damage

As concerns the assessment of damage suffered by the employee the conclusions drawn for the type discussed before are directive also here. They require no addition, so they will not be discussed here again.

III. Damage caused to the employee's belongings brought to the employer's premises

1. Introduction

The problem of the employer's lability for damage in respect to the employee's belongings brought to the premises is rather unclarified, both theorectically and practically, and gives rise to many controversies. Even the very existence of this liability, its nature and scope are open to debate. So it will be useful to sum up the principles underlying this type of liability.

Considering the fact that even the basis of such liability is often challenged, let us first clarify whether the employer is under any obligation within the scope of employment in respect to the employee's belongings.

2. Obligation arising out of employment in respect to movables

a) The basis of obligation of safekeeping movables

In studying whether the employer is under any obligation arising out of employment to provide safekeeping of the employee's movables, we must start from the premise that it is the employer's duty not only to employ the employee in a sphere of work as stipulated by the contract and to pay him the wages and grant him other allowances as stipulated, but also to create the most favourable possibilities to do his work. This is obvious if we keep in mind that the employee's basis of livelihood is the wages paid to him. So the employee must be given the opportunity to work with the full employment of his creative capabilities. Favourable conditions include not only labour safety devices, sanitary establishments, etc. but also the awareness that the employee's belongings brought to the premises be safe during work. If the employee is worrying during work because he had to leave his belongings somewhere else, this distracts his attention, which results in a decrease of performance, may lead to inferior work, even to accidents. But if the employee is worrying of the destruction or damage of his belongings kept on him, this may have the same inhibiting effect. These dificulties can only be overcome if the employer is obliged under employment to create circumstances in which the employee's belongings are in a safe place.

Arising from this obligation, the employer has two measures to take. One: to provide adequate facilities for the employees to put clothing and other belongings which are not being kept on them during work in safe places. Two: to provide adequate guarding, watching, etc. for keeping such belongings safe in the cloak-rooms and safes, and, in addition, to see that also other movables be protected from damage while the employee is staying at the premises.

As concerns the first duty, i. e. to provide adequate facilities for keeping clothes and other belongings, the realization may vary with the nature of the employer enterprise, with the type of the employee's work. If the employee's working-place, scope of duties are of such a nature that the can keep his things at his place of work, e. g. a clerk, the employer need not take any special measure for protecting the room. But if the employee cannot keep his things near him, the employer must provide adequate facilities for keeping them safe. The fact that the employee cannot keep his things near him may have several reasons. For instance, the type of work requires the wearing of working-clothers or protective clothes, the working-place is small, jammed, the employee changes his place during work, etc.

As concerns the second duty of the employer, i. e. to keep the employees' belongings safe and to prevent damage to these belongings in the premises, this requires measures in two directions.

One is to create safety of the employee's deposited belongings.[1] Safety can be provided in various ways, just as the employer can provide room for depositing clothes and other movables in various ways depending on the

[1] For many years judicial practice has held the position that the provision of the Code of Labour pursuant to which the employer is obliged to provide cloak-rooms for the employees involves also the duty to provide safekeeping of the belongings in these rooms. (Supreme Court, P. I. 303 602/1952.)

nature of the enterprise, the employee's work, etc. The important thing to do is to see that loss and damage of the movables be prevented. In cases where the employee can take care of his belongings without interfering with his work or the regulations of the enterprise, the employer is not required to take special safety measures. E. g. the clerk keeps his coat and briefcase in his room, the driver keeps his briefcase in the car. But even in such cases the employer is obliged to provide safekeeping if the employee has to leave his regular place of work for some reason (e. g. has to take files somewhere). This means that the employer is obliged to make doors of rooms locking and provide in addition a guarding system to prevent pilfering by incoming outsiders. For example, if the room locked by the employee is broken open and his coat is stolen only because there was no adequate guarding of the building, the employer will be liable for damage. To keep belongings watched by the employee it is not necessary that he works in an enclosed room. E. g. there is no need for special measures in case of agricultural outdoor work if the workers can place their things in such a manner that they can always watch them and there is no such coming and going of people that such watching would be impossible. If, however, the employees cannot keep their belongings watched, the employer is obliged to take special measures for safekeeping.[2] Such facilities may consist of locking cupboards, cloak-rooms, parking-place for bicycles, guardsmen for dressing-rooms, etc., depending on the circumstances of the employer enterpise. The solution is left to the discretion of the employer, but if it is inadequate, he must be held liable. I should like to emphasize once more that this obligation of the employer arises out of employment, and that this is not a case as though employer and employee had tacitly entered a contract of safekeeping outside the scope of employment.

The other obligation to take measures is that the employer must ensure that the employees' movables — also those which are not deposited in cloak-rooms — be protected from damage, destruction in the premises. This requires provision of adequate inspection, and other necessary conditions. Filthy, contaminating materials must be stored and handled properly, potential dangers should be made known, regulations must be observed in loading and transport work, and provisions must be made to prevent endangerment of the employee's belongings by incoming outsiders. The employer's obligation of protection does not include wear and soiling involved in the nature of work as usual in the enterprise (e. g. in an alumina factory or a railway engine-house the soiling of the employee's clothes by dust or smoke in the air). Namely, such circumstances must be taken into account by the employee by the time he accepts employment. If, however, wear and soiling are of such a degree that they would result in disproportionate burden to the employee, the employer is usually under the obligation to provide working-clothes for sparing the clothing of the employee 1. (1. Pursuant to Section 80/A of the Code of Labour, working-clothes must be made available if the work involves a high degree of soiling and wear, or if this is justified by protection from weather or other circumstances inherent to the operations of the enterprise.)

[2] E. g. a court has granted compensation to a cashier for his coat that was hanging at the siede of the pay-box in a shop and was stolen from there. The court has ruled that while performing his duties the cashier is not able to watch his coat, so the employen ought to have provided adaquate facilities for keeping the employee's belongigns safe. (Supreme Court P. I. 24 132/1955.)

b) The scope of obligation

We have agreed that it is the employer's duty arising out of employment to take measures for protecting the employees' belongings brought to the premises. But in establishing the employer's liability we have to clarify not only the nature the basis of the employer's obligation, but also its scope and limits.

I. Categorization of movables

A position often taken in practice is that the employer can be held liable only for certain pieces of clothing and outfit that are usually taken to the place of work. This discrimination of things from those usually taken to the premises is intended to serve the restriction of the employer's liability. This discrimination between movables, and the resulting restriction of liability, is usually supported by two arguments. One is that the enterprise's primary duty is production and not the safekeeping of the employees'belongings. So it is only to be expected from the employer to keep safe those belongings of the employees which they necessarily take with them to work. The other argument is that it would result in a lot of abuse if the employer were held liable for any belongings of the employee since — after a possible loss of things — the employee might insist that he had had in the cloak-room or his briefcase some piece of jewelry, camera of high value, etc.

Indeed, there is much to be said for these arguments. The employer cannot be charged to an excessive degree with safekeeping the employees' belongings, and it is equally true that a comprehensive liability — comprising all ad any belongings — might give rise to corrupt practices. Yet — in my opinion — the restriction of the category of movables as indicated above would not be acceptable.

If the employees' belongings are considered from the angle of how frequently they are taken to the place of work, we may categorize them as follows:

A) Belongings which are necessary for appearing at the prace of work; these include:

aa) Objects which the employee usually wears or keeps on him during work, i. e. which he does not deposit in the cloack-room. These are e. g. shoes, shirt, watch, necklace, etc.

ab) The employee's other pieces of clothing and outfit which he usually takes with him to his place of work. These include e. g. overcoat, hat, umbrella, briefcase. Pieces of clothing and personal belongings belong here irrespective of quality, i. e. not only those of average quality. It should be kept in mind here that the employees often attend at their place of work various events after working hours, go to the theatre or other gatherings. They are often unable to go home for changing, so they show up at the place of work dressed for the event, and bring with them clothing of better quality, gold watches, pieces of jewelry etc.

ac) The employees' vehicles. Part of the employees go to work using vehicles of their own. In many cases this is not only a matter of comfort or saving, but a necessity since the place of work cannot be reached in other ways (e. g. at some mining plants in the country, or building sites). The

undisturbed working of employees requires the safety of their vehicles brought to the premises.

B) It often happens that the employee has to bring to the place of work belongings in addition to those mentioned under A). Housewives often do shopping while going to work. It may happen that certain things require repair and the employee has no choice but to take them with him since there is no time after working hours to fetch them from home and to reach the repair shop before it is closed. Thus belongings of this group are not in the category of things usually taken to the place of work, but they are taken there very often nevertheless, since the employees would otherwise not be able to do shopping, have them repaired, etc. and to run their households as required.

C) Finally, employees' belongings should be mentioned which do not belong in any of the above categories. The necessity of bringing them to the place of work does not arise in connection with these as a rule.

This categorization may from the basis of our further considerations. I should like to add right away that this categorization is of importance not in the exclusion of liability, but rather in the nature of liability, and in the prohibition of bringing to the premises certain things.

II. Restrictive measures of the employer

As we have seen, a very wide range of movables is implied here. The question may arise therefore whether the employer can restrict in some way or other the limits of his obligations. Possibilities to this end are if the employer prohibits bringing in certain objects, or orders the employees to deposit such objects at specified places, or issues orders to report the bringing in of certain objects. Let us study these possibilities.

a) To prohibit bringing in certain objects may be necessary because there are no facilities for their safekeeping or adequate guarding, or because certain things may represent some hazard to production (e. g. explosives, contamination). The employees' belongings were categorized into there groups in the foregoing. The first group contains things which are necessary for going to work, the second comprises things whose taking to the place of work, is often necessary for running the household and for the employee's activities outside his place of work, the third group consists of the employee's other belongings.

In case of the first group — pieces of clothing and personal outfit, vehicles — no prohibition of bringing them in can be issued since these are necessary for going to the place of work. Vehicles represent a certain exception here Namely in case of vehicles that are usually left in the street without special attendance — cars belong here — the employer may prohibit to bring them to the premises. But in case of vehicles which cannot be left without attendance for a longer time without risking their stealing or damaging — especially bicycles — the employer is not entitled to prohibit their bringing in, except if sufficient facilities for their safekeeping are provided outside the premises. As concerns the second group of belongings, these are not necessary for going to work i. e. for performing the duties of employment. It may happen that the protection of these from damage or loss repre-

sents disproportionate, possibly unsurmountable, difficulties to the employer. So it may be justified to prohibit bringing in these, or some of them. But in doing so it must be taken into account that such a measure might place the employees in a very difficult position. To attend to the duties of the household and to other duties outside the scope of employment may be rendered much more difficult. This, in turn, may affect their performance, may result in asking for short leaves more often, which interferes with efficient working, etc. Considering all this, the bringing to the premises of movables belonging to this group can be prohibited only if bringing them there would represent hazards to production, to the storage and handling of products, if the, provision of facilities for safekeeping would mean disproportionate burden to the employer, or if the movables in question cannot be kept adequately because of their large dimensions or other properties. As concerns the third group, bringing to the premises of the objects belonging here is usually not necessary and not justified, so the employer may prohibit their bringing in at any time.[3]

b) The employer may prescribe that things brought in be deposited at a specified place. This may be in the interest of better attendance, protection from damage, safety of production, etc. (the typical case is the placing of clothing in the cloak-room provided by the enterprise). Such a measure does not violate the employees' interests. The employer may therefore prescribe in respect of any movables that the employee is obliged to deposit them in the cloak-room or some other specified place. This does not apply to things that are usually worn while doing work.[4]

c) It may be prescribed that certain specified movables must be reported before bringing them to the premises. This serves the purpose of preventing abvuses, subsequent disputes. Such orders can be issued in respect to any object, including those worn during work. The requirement of preliminary reporting is usually justified in case of things representing high value.[5]

On the basis of what has been explained so far, the scope of the employer's pertinent obligations may established as follows:

a) Except for certain types of vehicle, things required for going to and doing work (pieces of clothing and personal outfit, vehicles of transport) cannot be subject to restrictions of bringing them to the premises. But the employer can prescribe that movables — except those usually worn or kept at hand also during work — be deposited in specified places (cloak-room, safe, parking area), and that movables departing from the average, or representing high values, must be reported before bringing them to the premises.

b) If it is justified by circumstances of production, disproportionate burden entailed in safekeeping, etc. the employer may prohibit to bring in things required for running the household or for activities outside the scope of employment. The obligation to report in advance and to deposit things at specified places can be prescribed in any case in this category.

c) Bringing to the premises employees' belongings not coming under the above categorization may be prohibited by the employer without giving any

[3] Mt. V. 100. § (3).
[4] Mt. V. 100. § (3).
[5] Mt. V. 100. § (3).

reasons. If no prohibition is issued, the obligation of reporting in advance or despositing in specified places (e. g. at the porter's lodge) can be prescribed.

I should like to stress that the restrictions enumerated above do not affect the employer's liability existing in respect to safekeeping the things brough to the premises. If, however, the employee fails to observe the restrictions, this will have its effect on the employer's liability.

3. The system of liability

a) The principle of establishing the system of liability

In Part I, we have conculded that the employer's liability for damage should usually be constructed on the basis of the system of liability requiring increased protection and not requiring the employers' dereliction, and that departures from this principle are possible in case of certain types of damage.

One factor affecting the system of liability is the importance of reparation. If belongings are damaged or lost, the cost of repair or replacement affect the employee's and his family's living standards considerably, although the basic subsistence is not jeopoardized. Thus the weight and importance of reparation is greater than average in such cases. Considering this, the application of a stricter system of liability, not requiring the condition of dereliction, seems justified.

Yet the case is not so simple if considered from the angle of the employer. On the one hand, the employer's obligation to protect belongings is not of equal consequences in every case. And, on the other hand the employer's influence to prevent damage is not the same in every case.

As concerns the weight and importance of the employer's obligation, the latter is stricter in case of belongings of the first category, i. e. things that are necessary for going to and doing work. If these would not be taken to the premises, the employee would not be able to meet his obligations of employment, whereby he is proctically forced to take them with him. At the same time, the employee is expected to concentrate all his attention primarily on his work, so he cannot be engaged in watching and protecting his belongings. It is exactly therefore that protection and safety of these must be provided by the employer in the entire area of the premises. He is obliged, to take all possible measures to this end. The case is different with belongings of the second and third category. As has been shown, the employee's situation is not so pressing here as in case of belongings of the first category. The same applies especially to belongings of the third category. Hence it would not be justified in the two latter cases to demand more from the employer in meeting his obligations than the possibilities available to other enterprises of similar type for meeting such obligations.

If the possibilites to exert influence on the prevention of damage are studied, we also find differences between the three categories. As concerns the first, the employer is usually in the position to anticipate what kind of, and how many things will be brought in as a routine. So he can prepare for taking adequate measures to protect them. This must be taken into account already at the stage of establishment and organisation. In case of the second and third category the fluctuation is much greater as concerns both quantity

and type of belongings, and it is difficult to anticipate them. In the organizational stage of the enterprise or production, it is difficult to prepare for circumstances arising from the bringing in of such objects. So it is justified to make differences in the sphere of the employer's liability for damage. But no difference arises in this respect if the employer provides locking cloak-rooms or special places for safekeeping such movables. Namely in such a case the employer has actually taken charge of the direct safekeeping of these objects. He is then in the position to take all measures for preventing damage. So in such a case the category to which movables belong is irrelevant.

So we may conclude that to apply the system of liability irrespective of dereliction is justified in case of belongings of the first category, i. e. things required for going to and doing work, as well as in cases where the employer has provided locking cloak-rooms or other places of safekeeping, or has ordered to deposit movables in specified places. On the other hand, in case of belongings of the second and third category, it would be justified to hold the employer liable for damage only in case of his dereliction.[6]

Hence the employer is liable irrespective of dereliction, and can be discharged of liability only if damage has been caused by unpreventable external cause, or the employee's unpreventable conduct, in the following cases:

a) for movables belonging to any of the categories if these are deposited in cloak-rooms· places of safekeeping or other places specified for this purpose by the employer (whether the thing is lost or only damaged makes no difference in respect to liability);

b) for movables belonging to the first category even in cases where these are not deposited in cloak-rooms, etc.

On the other hand, the employer will be liable only in case of dereliction on his part for movables belonging to the second and third category, expect if these are deposited in cloak-rooms, etc. as this circumstance entails liability irrespective of dereliction. (A further problem may arise in oases where the employee violates the prohibition of bringing in certain things, or has not complied with the requirement of preliminary reporting; this will be discussed later.)

It may be asked whether to be liable for any and all belongings of the employees kept in the cloak-rooms, etc. is not a disproportionate burden to the employer. This objection is not well-founded, as to provide these facilities is not specially burdensome. It is the employer's obligation to provide adequate safekeeping of the employee's belongings deposited in the cloak-room. It makes no substantial difference in this respect whether there is only one suit and watch in a locker, or somebody puts also his camera or stamp collection there. If the cloak-room is guarded adequately, or can be locked as required, the more expensive things will not be lost either. If, by contrast, the safekeeping of a gold whatch or camera is not arranged for as required, any employee would run the risk of losing also less expensive belongings. Moreover, if the employer feels that things of higher value cannot be kept safely in the cloak-room, he may order to keep them in a safe, or may even prohibit to bring them to the premises within the limitations discussed before.

[6] Mt. V. 100. § (1)—(2).

b) *Discharge of liability*

In part I we have concluded that the employer can be discharged of liability for damage if damage has been caused by unpreventable external causes, or exclusively by the employee's unpreventable conduct. No reasons have emerged in our foregoing discussion that would call for generally different reasons of excuse in the cases considered above.

In Part I we have shown that if the causation is within the sphere of the employer's operations, this is not an external cause. Three additions must be made here in this respect. All apply to cases where the employer is liable for damage to movables which are necessary for going to work but are not deposited in cloak-rooms or safes. These additions are connected with the activities of the employer.

One addition is connected with doing work, and with wear usually involved in the routine operations of the employer enterprise. In connection with the employer's obligation to protect, I have mentioned that this obligation does not comprise protection from dangers closely connected with the operations of the enterprise and with doing work there. (It may happen to a driver that there is a breakdown, a blown tyre. In the course of repair the driver's clothes are soiled, possibly torn. But this the driver must have taken into account when he chose this occupation. Or if somebody is employed as a clerk in an engine-house or alumina factory, ha cannot hold liable the employer for the soiling of his clothes from smoke or dust in the air.) In these cases damage is caused by factors inherent in the operations of the enterprise. And the employer enterprise cannot protect anybody against these, so it would not be justified to hold it liable. Consequently we must exclude liability for damage of this type, just as has been the case in the preceding chapter in connection with occupational diseases.

The second addition relates to cases occurring on the premises of the employer when the circumstances are not entirely under the employer's control. This question has been discussed in connection with damage caused to health and corporeal integrity. It may happen that the employee suffers damage on the employer's premises while participating in some event organized by a community organ, or while taking his meal provided by the catering company. The solution here is identical with the conclusions drawn in the preceding chapter. If damage is caused by a circumstance that emerges on the employer's side, the latter will be liable for damage. Namely in such a case he employer has violated his obligation to protect the employee's belongings. Hence if the the employee's clothes are torn because the chair on which he was sitting was broken, the employer is liable for the damage. He will be liable equally if the porter failed to exercise adequate control as a result of which outsiders entered the premises and stole some of the overcoats of the employees who where attending a trade union meeting. But the employer will not be liable if the damage occured because the catering company's waiter spilled food on the employee's suit.

The third addition is connected with the area. In Part I we have said that a site of work outside the employer's premises must be regarded as belonging to the latter if it is under the employer's exclusive disposition

and control. It follows from this that if damage occurs to the employee's belongings in places other than those mentioned above, the employer can excuse himself of liability by proving unpreventability. An exception to this rule is if damage has been caused by a circumstance that emerged on the employer's side, like in cases of damage caused to health or corporeal integrity (e. g. the paint tank given to the employee was badly worn, burst, and the spilled paint destroyed the employees clothes.)

c) *The proof of dereliction*

In conncetion with the system of dereliction we have concluded in Part I that in case of the employer's liability for damage we must apply the exculpatory system. So we presome dereliction and it is up to the employer to prove his guiltlessness. This system must be applied also to cases of dereliction in connection with types of damage discussed here.

d) *The effect of violating rules relating to the bringing in and reporting of movables*

In the foregoing we have seen that the employer is authorized to issue orders relating to the bringing in and deposition, or reporting the bringing in of the employee's movables. It may happen that an employee violates such regulations. Thus, for instance, if a cloak-room is provided, he deposits his belongings not used during work not in the cloak-room, or does not report the bringing in of certain objects, etc. In such cases the employee places the employer, in a position which the latter could not have anticipated, for which he is not prepared, or quite the opposite of which was expected when enterprise work, control and supervision was organized; on the other hand, the employee renders assessment of actual damage difficult or impossible (e. g. by his failure to report). The employee must bear the consequences of his conduct in such cases. This may materialize in that the case will come under a milder rule of liability, or the burden of proof will be reversed, or the employee loses his title to compensation, or receives but partial compensation as the perpetrator of a contributory ast. (It should be noted that when the regulations for deposition, reporting, etc. are issued, the employees must be notified in every case of the consequences of violation, including their effect on liability.)

a) If the employer prescribes the obligation to deposit things in the cloak-room or in some other specified place, he makes arrangements to meet his obligations of safekeeping accordingly. This is manifest not only in that he provides adequate guarding in such places but possibly also in that he makes fewer arrangements to this end in the other areas af the premises. If the obligation to deposit as prescribed is violated, the employer faces an unexpected situation. But the consequences will vary with the different groups of movables:

aa) In case of belongings of the first category, i. e. things that are necessary for going to and doing work, the employer will be liable for damage irrespective of his dereliction even if these belongings are not deposited as prescribed. It would follow from this that the system of liability should not be changed, and that the violation of the regulations should be

valuated only as the contributory act of the damaged. But I think that the violation of the regulation to deposit has changed the situation to a greater extent. Namely, as has been indicated, the employer, considering the arrangements he has made for meeting his obligation of safekeeping, might have done less in this respect in other areas of the premises. Considering this it would seem more correct to employ liability based on dereliction — relating to belongings in the second and third category — also for cases where belongings of the first category are not deposited as prescribed.

ab) As concerns the immovables of the second and third category, the violation of the desposition regulations is qualified even more strictly. Namely in case of such regulations, the employer makes no other arrangements for safekeeping, he is not even prepared for the presence of such things in places not reserved for deposition. So it is reasonable to mitigate the employer's liability in such cases. This is effected by holding the employer liable in case of his dereliction, but to shift the burden of proving dereliction to the damaged employee. The employee's sonduct may also serve as the basis of distributing damage in accordance with the rules of contributory acts.

The violation of the deposition obligation does not affect the system of liability in the aforesaid cases if damage would have occurred anyway. This exception relates actually to two types of case. The one is the occurrence of an event, e. g. fire, which damages also things deposited properly. The other is the case where deposition could not yet be effected (e. g. damage occurs in the premises as the employee is walking toward his workshop), or if the deposited belongings are again with the employee (e. g. after working hours).

b) The employer can prescribe the obligation to report in advance when things of higher value and the like are to be brought to the premises. This is intended primarily for preventing subsequent disputes, or possible abuses. If the employee fails to comply with the obligation to report, this has the following effects:

ba) In case of belongings of the first category, it does not affect the system of liability, but in case of loss or destruction the employee must prove that he had actually brought in the object in question;

bb) in case of belongings of the second and third category, the situation is similar to the above, thus the burden of proving that the object had been brought in rests on the employee.[7]

The reason why the solution for the two latter groups differs from the first is that the category of belongings indispensable for going to and doing work is much more limited and proving is easier thereby, whereas an extremely wide range of objects enter in the latter two categories. It may happen, too, that objects of considerable value are brought to the premises among these; if the employer gets informed of this, he will probably take special precautionary measures, or, most likely, will give instructions to place these things in a safe.

c) Employers can prohibit to bring certain objects to the premises. As has been mentioned, this does not affect movabables belonging to the first category. Such prohibitions are usually prescriped because the enterprise

[7] Mt. V. 100. § (3).

cannot keep certain objects for reasons regarding production, safety, etc. In some cases the reason of prohibition lies in the nature of the object (e. g. reasons of safety). Since the employer is not prepared for safekeeping such object, it is reasonable to mitigate his liability for damage. Consequently the employer's liability based on dereliction will be applied, but dereliction must be proved by the damaged employee. The employee's conduct may lead to splitting the damage in addition.

IV

DAMAGE CAUSED BY INJURY TO HEALTH AND CORPOREAL INTEGRITY

1. *Introduction*

As concerns the effect on employees, the most important type of damage is the one caused by injury to health and corporeal integrity. It should be mentioned in this connection that injury to health or corporeal integrity do not in themselves entail liability for damage, do not create a claim for compensation (disciplinary or criminal liability may of course emerge in this connection. Liability for damage emerges only if the employee suffers damage because of injury to his health or corporeal integrity. (E. g. he is not able to work for some time, his clothes are damaged, etc.). In connection with damage caused by injury to health and corporeal integrity not only the definition of the system of liability must be studied. First we must decide to what extent certain activities of the employee can be regarded as having been displayed within the scope of employment, and whether it is justified to hold the employer liable for damage occurring during such activities.

The problem is twofold: First, it must be decided whether a given activity is within the scope of employment, in other words, whether there exists a causal nexus between the employee's activity and his employment. Second, whether the employer can exert influence in the future to prevent damage occurring in the course of these activities, i. e. whether it is possible to influence the employer by bringing into operation liability for damage to prevent similar damage in the future.

2. *Activities belonging to the scope of employment*

a) *Scope of the employee's activities*

I. *Activities connected with doing work*

The typical case of usual activities is present if the employee performs at his place of work the duties specified in the contract of employment. In doing so, the employee is active within the scope of his employment beyond any doubt. In this connection I should like to remark that the term place of work comprises not only the working-place in the strict sense assigned to the employee (workbench, desk, sales counter, etc:) but the entire area of the employer's premises. The local relationship is actually established at the mo-

ment the employee enters the premises. But the employer's premises must be distinguished clearly from the other areas of operation. Premises are the buildings, ground, etc. where offices, workshops, etc., are located. The area of operation is that part of this country in which the employer enterprise is active. E. g. the premises of the Budapest Automobile Transport Enterprise are the buildings which comprise its offices, workshops, etc., while the area of operation is the entire territory of the city of Budapest. One enterprise may have several premises. So the place of work in the broader sense are the premises which comprise the employee's place of work in the stricter sense (his workbench, desk).

Whenever we speak of the employee's work performed within the scope of employment, this must comprise all connected activities which are among the preconditions of performing work. Thus if the goes to fetch material, tools, delivers the finished product, etc.

It often happens that the employee goes beyond the limits of his employment, departs from the rules governing his sphere of work. Overstepping the limits or departing from the rules, non-observance of the rules, may be the result of the employer's instuctions, or may be based on the employee's decision. The former case is actually only a seeming departure, since the sphere of work is changing — temporarily or permanently — is modified, on the basis of the employer's instructions. Thus the employee is again within the limits of his modified sphere of work, is acting in accordance with modified prescriptions.

Going beyond the sphere of work or departure from rules based on the employee's decision can be for the purpose of performing enterprise tasks, or may be in the employee's interest, i. e.. private interests.

In addition to performing duties within the scope of employment, the employee has to display a number of other activities which are not connected with his work, but arise from the fact of his being one party to employment. A variety of activities can belong here. For instance, the employee must show up periodically for medical checkup, is called to some office to have his data recorded, etc. These activities do not belong to the performance of duties in the strict sense, but are results of employment. They are necessary for preparing to do work (e. g. medical checkup) or for meeting the employer's obligations based on employment (e. g. recording of data). Thus these activities are indispensable for maintaining employment and for performing the duties arising out of employment.

Another group of the employee's activities is connected with availing himself of the services due to him on the basis of employment. This comprises activities such as taking the meal, washing, rest, going to the dispensary, collecting wages, etc. These activities make the exercise of various rights possible due to the employee on the basis of employment.

In my opinion, the activities enumerated above must be regarded as being performed on the basis of employment. Hence the employee's activities based on employment will be as follows:

— performance of duties of work stipulated in the contract of employment
— auxiliary activities necessary for performing his work (asking for tools from the store, taking over material, etc.)

— activities connected with the overstepping of the limits of assigned sphere of work, with the departure from rules,
— activities necessary for maintaining employment (showing up at the office for registration, collecting wages, showing up for medical checkups, etc.),
— making use of services due on the basis of employment (breaks, taking meals, etc.).

It should be mentioned here that the interpretation of activities consisting in the overstepping of the limits of the sphere of work and in the departure from rules governing work is open to debate both in theory and practice. Let us make a brief survey of the reasons of pertinent views.

There are views according to which activities consisting in the overstepping of one's sphere of duties are not within the scope of employment if they are wilful or criminal. These views are advocated in the literature on labour law in connection with the employee's liability for damage. But we must consider these also in connection with the employer's liability, since if these views are acceptable, their consequences must apply to the other party of employment, i. e. the employer, as well.

The view that wilful or criminal activities cannot be regarded as belongint to the scope of employment are to found mainly in the Czechoslovak[1] and Soviet[2] literature, but such opinions appear also elsewhere. There are differences of detail between these views. Opinions agree in cases of wilful criminal acts and other wilful damaging acts, but differences appear in connection with criminal acts through negligence. As concerns wilful acts, the reasons underlying these views can be summed up as follows: Any conduct can be within the scope of employment only if it is accomplished in the course of the regular performance of duties arising out of employment. Wilful criminal acts can never be part of performing work, and to abstain from them is a universal civic obligation, not an obligation arising out of employment. Nor does the employee's conduct by which he causes damage wilfully belong to the scope of employment. Namely this is in clear contradiction to the nature and purpose of activities the employee is expected to display, since his activity is aimed at achieving ends that are just the opposite of the employer's intentions. The employee is thereby placed in social circumstances which have nothing in common with his employment. He acts not as an employed person, but rather as a private person, and his activtity is not within the scope of his employment. As concerns criminal acts of neglect, the opinions are divided. Some make no distinction between wilful and negligent criminal acts, and hold the view that damage caused by a criminal act which involves the socially dangerous violation of the discipline of labour

[1] Kratochvill Z.: Náhrada škody v pracovním právu. (Praha, 1959.)
Kratochvill Z.: Nárada škody podle občauského a pracovniho prava. (Právny Obzor, 1957. 4.)
Witz K.: Závajek pracujiho k náhradé škodu zpusobone při vykomu zamestnáni. (Právnik, 1962. 1.)
Witz K.: K otzkám obsahu a ruzsahu majetková odpovednosti zamestnanee za škodu spusobanon zamestnavatali. (Stat a pravo, 1959. 5.)
Witz K.—Tomes I. Nekteré theoretické otázky kodifikace ceskoslovenského pracovniho práve. (Stat a právo, 1957. 2.)
[2] Александров Н. Г.: Трудовое правоотношение. (Moscow, 1948.)

must be compensated for in the same manner as damage caused by any other criminal act. Others regard conducts qualifyed as criminal acts through negligence as belonging to the scope of employment.

The opposite view is held by those who believe that to apply the provisions of labour law to some cases of damage and those of civil law to others, is theoretically inconsistent.[3] In the majority of cases, the pecuniary consequences of acts to be prosecuted under criminal law — e. g. stealing of materials, tools, etc. by the employee holding them on trust — are defined in labour statutes. Moreover, certain acts are qualified as crimes exactly because the employee has committed them in connection with performing his duties arising out of employment. This latter view is usually reflected by the rules of labour legislation of the socialist countries which contain provisions on liability for damage caused wilfully or by a criminal act.[4]

The views suggesting the exclusion from the scope of employment of conducts involving wilfulness or criminal acts are wrong in my opinion. The duties binding on the employee within the scope of employment cannot be divided into duties arising out of employment and general civic duties. Hence these arguments cannot serve as a basis for excluding certain conducts from the scope of employment. (But even if we were to accept them, solutions which would regard wilful criminal acts as being outside the scope of employment, but acts of negligence being within it, would be highly inconsistent. If a criminal act constitutes the violation of general civic duties, this is always valid, no matter if violaion has been wilful or negligent). What is essential here is that whenever an employee causes damage wilfully or by criminal act, the basis of his conduct is always provided by employment. By his damaging conduct, the employee violates his obligations arising from employment in any case. (E. g. his obligation to protect social property.) He actually causes damage by acting contrary to instuctions, possibly by not observing instructions. In a lawsuit where the employer pleaded that the accident was caused by his employee because the latter oversepped his sphere of duties when he started the car, the Supreme Court ruled that damage caused in the course of activities based of commission or employment always entails transgression of the employee's rightful duties, but that this circumstance in itself cannot serve as a basis for discharging the employer of his liability for damage. If this were not so, it would practically never be possible to hold the employer liable for damage caused by his employees.[5] And it will be exactly the transgression of the sphere of duties for which the employee might be held liable under disciplinary rules in addition. If this conduct were outside the scope of employment, disciplinary liability could not operate either.

The views outlined here study the problem from the fact of the employee's liability. Their untenableness appears even more clearly if the question is considered in connection with damage suffered by the employee, i. e. from the side of the employer's liability. The employer enterprise is a juristic person and its activities materialize through the activities of its employees.

[3] Каринский С. С.: Liability.
Ривин Г. С.: Материальная ответственность рабочих и служащих за ущерб, причиненний предприятно, (Виюн, Moscow 1948
[4] Nagy L.: Liability.
[5] Supreme Court Áf. II. 20 121/1957.

If we accept the above view that in case of damage caused wilfully or by a criminal act the employee's activities are not within the scope of employment, the conclusion ought to be drawn that such activitities cannot be regarded as the activities of the employer enterprise either. It might happen, for example, that the manager wilfully tears to pieces the employee's workbook at termination of employment, or places it in his drawer and is not willing to hand it out. As a result, the employee cannot find new employment for some time. In the lawsuit for damages the enterprise might then plead that the manager has commited a wilful, even criminal act, that this cannot be regarded as an activity within the scope of employment, so the enterprise cannot be held liable, and the damaged employee must turn against the manager directly. This would be clearly absurd. And the conclusions would be the same not only in such a case, but in any case of the employer's liability.

II. *The employee's social activitities*

Employees display social activities at their places of work in many cases. These activities are not the result of employment, are not duties arising from employment. The basis of these activities is membership in some social organization and the obligations involved in it, or the employee's spontaneous decision, and not the fact of omployment. (That the prerequisite of membership might be employment, present another probleme.) It follows from this that such activitities cannot be regarded as activities displayed within the scope of employment. But this general principle requires a certain correction. There may exist activities based on the membership in some social organization — e. g. trade union — which are connected with enterprise work, or with the employee's activities performed within the scope of his employment. It may happen, for instance, that, upon the invitation of the trade union committe, several employees undertake to work on their off day to complete a complicated urgent job which otherwise would not be finished in due time. This activity of these employees is not based on duties arising out of their employment. Since, however, they are working for their employer — i. e. their activity is displayed at the place of work and in the interests of the employer — it must be regarded as one within the scope of employment and the employer will be liable for damage occuring in the course of this activity.

In this connection I should like to mention cases where the employee acts on the basis of his membership in some social organization, but his activity concerns the employer. E. g. he attends the meeting of the works council upon his nomination by the trade union, or is appointed member of the concilition board. These are social organizations and the purpose of their formation is the promotion of the work of the employer enterprise. In my opinion, these activities, if performed at the place of work, must be regarded as activities within the scope of employment.

Finally, there are activities which the employee performs as the member of some social organization for accomplishing tasks set by the organization, but displays these activities at his place of work during breaks, or by short interruptions of his work. In this connection Witz takes the position that to attend to some function as member of the works unit of some social orga-

nization must be interpreted as an activity directly connected with the performance of duties of employment.[6] There is an element in this opinion that deserves consideration, namely that the work of the various social organizations set up at enterprises greatly promotes the operations of the enterprise, so their activities are connected with those of the enterprise to a certain extent. And there are certain obligations the enterprise has to meet for promoting these social activities. So this sphere of activity must be regarded as partially connected with employment.

b) *The scope of the employer's liability*

In the foregoing we have defined the types of activity which can be regarded as being within the scope of employment. The next thing to do is to decide whether it is justified to hold the employer liable for the damage suffered by the employee during any of these activities.

There are several views both in theory and practice. All agree in that they apply various criteria in drawing the dividing line between cases within the scope of employment and outside it.[7] As a whole, these criteria are rather manifold, since most of these theories try to answer not only the question of the causal nexus, i. e. belonging to the scope of employment, but at the same time wish to exclude the category of cases in which the operation of liability for damage should not be warranted.

There are several suggestions to apply as the dividing criterion the presence at the place of work. If only the place of work. If only the place of work is taken into account, then all activities of the employee's performed at the place of work must be regarded as connected with his employment. This conclusion is generally correct. But it may be objected that in many cases employees are staying at their place of work in connection with activities which are in a rather remote causal nexus with employment (e. g. sporting, movie shows, dancing), and there may be cases where this causal nexus is doubtful, e. g. in case of movie shows advertised in the newspapers and open for the public. Hence the working-place criterion alone is no sufficient aid for drawing the limits.

Another factor suggested as such a criterion is the working hours. Accordingly, any activity displayed by the employee during working hours should be regarded as being within the scope of employment. This solution has the same advantages and shortcomings as the former. It would draw into the sphere of the legal relationship of employment, solely on the basis of temporal connection, activitities not really connected with employment, while it would exclude pertinent activities if they are displayed after working hours (e. g. the employee stays voluntarily — without orders for doing overtime — at his place of work after working hours to complete some job and suf-

[6] Witz K.: Odpovednost zamestnávetele pri pracovnim uraze a nemoci z povolání. (Právnik, 1958. 2.)

[7] Weltner A.: Labour Law.

Pietrykowski J.: Zasady odpowiedzalnosci materialnej zakladu pracy wipadki w zatrudnieniu wedlug. dkr. u. dn. 25. VI. 1954. (Nowe Prawo, 1954. 9.)

Флейшиц E. A.: Basic issues.

Schlegel R.: 1. c.

fers damage or an accident during that time). Hence this factor in itself is no sufficient basis for demarcation either.

Another suggested factor is that the activity should serve the purpose of performing duties of employment. The suggestions requiring the justification of these activities, i. e. their compatibility with the employee's and the employer's interests, are similar in purport. Generally speaking, it would seem correct to regard activities useful and justified for performing the duties as being within the scope of employment. Yet, at the same time, the criterion of usefulness is not sufficient in itself for limitation. On the one hand, it would considerably narrow down the scope of the employer's liability. It often happens that some activity was not useful from the viewpoint of the employer, but it was considered as such in the employee's judgment. This difference may result from the fact that the employee had no such possibility of grasping the situation as is available to the manager. Consequently this criterion is both too narrow and too wide.

In the last analysis we may say that none of these opinions offers a satisfactory solution.

In finding a solution we must start from the premise that the employee is entitled to healthy and safe working conditions during the entire duration of his employment. This applies not only to doing work proper, but also to auxiliary activities connected with working, and to the duration of activities connected with employment, with making use of services due on the basis of employment. This right exists also during social activities displayed on the premises of the employer. Social activities displayed on the employer's premises are partially connected with the employees' rights to participate in management and in determining their working conditions. These activities are so closely connected with employment that to guarantee safe conditions — similar to working conditions proper — is justified also during these activities. This is necessary also, lest inadequate circumstances should prevent the employees from exercising their above rights. Another part of social activities promote the improvement of the employees' professional and general education, serve the improvement of their mental and physical abilities. To promote such activities is the employer's duty arising out of employment. Obviously, this comprises not only the provision of means, facilities, etc. but also of conditions under which all these can be utilized in a healthy and safe manner.

Considering all this, I believe that the attempts at finding the limits of liability by classifying activites closely and less closely connected with employment are wrong and unnecessary. The employer is under the obligation to provide healthy and safe working conditions for the duration of employment, and not only for the duration of activities within the scope of employment but also during social activities connected with employment. The next question is — and this is of consequence in respect to liability — how to define the measures the employer is obliged to take for making possible these activities, and to what extent the employer is able to exert influence for preventing damage to the employee' health and corporeal integrity. Such influence on the employee's conduct or on circumstances may happen to be limited. If the employee's activities are considered from this angle, we obtain the following picture:

a) The employer can exert such influence to the fullest extent when these activities are displayed within his premises, or outside them, but in an area over which the employer has full control, and the employee is acting within the scope of his employment as prescribed or as can be anticipated.

b) The employer's influence will be limited if the employee's activities
   — are displayed within the premises, but the employee is not doing his prescribed work, or does not display a conduct to be expected from him (e. g. starts a fight with a fellow-worker during the break);
   — are displayed within the premises but the employee or the circumstances are not under the complete control of the employer during this time (e. g. the meals in the canteen are privided and served by the catering company, or the trade union organizes an event on the premises);
   — are displayed not within the premises and not in an area under the employer's control.

In my opinion, the consequences of the limited nature of the employer's influence and control must not be drawn by excluding certain activities from the scope of employment, or by excluding liability for some activities from the outset. Either of these solutions would be too inflexible. The employer would be burdened beyond the purpose of liability, or the employee would be deprived of reparation due to him. And if, in given cases, attempts are being made in practice — out of the awareness of these shortcomings — to bridge these difficulties, this creates uncertainty of principles in jurisdiction which is most harmful for practical trends. This appears clearly from the various views outlined in the foregoing. So the solution should be to consider these circumstances, within the scope of the system of liability, when the factors of discharge of liability are to be determined, or the employee's contributory act is to be valuated.

3. The system of liability

a) The basic principles of the system of liability

Let us consider how the conclusions drawn in Part I in connection with the system of liability can be applied to damage caused by injury to health and corporeal integrity.

As concerns the causation of such damage, this brings about grave judgment. The fact of causing such damage is in itself condemnable, as it endangres human life. On the other hand, as a result of injury, the employee is often unable to work for shorter or longer periods, or cannot continue in his former profession at all. Thus his and his family's subsistence is fundamentally endangered. The employee might have to bear considerable expenses in additon, which affect his livelihood, his living standars.

These circumstances indicate not only that reparation in case of such damage is of greater than average importance, but also that the imposition of efficient sanctions is justified, considering the manner of causing damage. It follows from all this that the system of liability based on the require-

ment of increased protection must be applied to such cases beyond any doubt. The idea may be raised, too, whether it would be necessary to restrict the possibilities of discharge of liability to a narrower field than has been established in Part I. It would seem that this is necessary. But I believe that in reality we need not resort to such a method. The reason is that, both on the reparation and sanction side, other factors are acting as well, and that these amplify the effects of liability for damage.

One factor to be taken into account on the reparation side is the provisions relating to social insurance and the rehabilitation of the injured. True, the employee might be in need of medical treatment, because of injury to his health or corporeal integrity, for a shorter or longer time, he might not be able to work for a certain time, or his capacity of work may be decreased permanently. But his treatment is provided for within the scope of social insurance, and his subsistence is ensured through pecuniary benefits at the same time. The provisions of law relating to rehabilitation are helping the employee to find employment after his recovery where he can do work of full value. All this shows that the employee's and his family's subsistence is ensured, the most important expenses resulting from injury are paid by the State outside the scope of liability for damage. Considering all this, reparation to be paid by the employer has only a supplementary character, and is of no greater importance than in case of other damage suffered by employees.

In the foregoing, we emphasized the importance of sanctions. Supporting factors appear also here. One is the so-called claim for redress advanced by the social insurance system against the employer. This is a considerable sum, since it includes all services and benefits granted to the injured by the insurance system; so it completes efficiently the reformative effect of the claim for compensation raised by the injured employee. An additional supporting factor is disciplinary and criminal liability. These act not on the employer enterprise, but on the persons responsible for the causation of damage, and complete the effect of liability for damage. Further supporting factors are the provisions of law under which accidents are sanctioned in the field of the various pecuniary and moral incentives (e. g. premiums must be withdrawn in case of severe accidents, the title of outstanding factory cannot be awarded if a fatal accident has occured there in a given period, etc.). All these factors warrant the conclusion that the sanctioning aspect requires no special consideration in the field of liability for damage caused by injury to health and corporeal integrity.

As we have seen, neither the reparation nor the sanctioning aspect requires any departure from the general form defined in Part I. Consequently the possibility for discharge of liability will be given by unpreventable external cause and the exclusive, unpreventable conduct of the employee also in cases of damage caused by injury health and corporeal integrity.

The stands taken by jurisprudence and by legislation in these problems are not in agreement, as has been indicated in Part I in connection with the system of liability. The majority of Soviet writers[8] advocates the system basced on dereliction. But there are opposite views, too.[9] Legislation adopts

[8] Флейшиц Е. А.: Commentary.
Майданик Л. А.—Сергеева Н.Ю.: l. c.
[9] Nagy L.: Liability.

the position of liability based on dereliction.[10] Czeschoslovak jurisprudence[11] The situation is similar in the GDR[12] and in Hungary[13] Progress has abandoned and legislation establish the employer's liability irrespective of dereliction.[14] the principle of dereliction in the field of both jurisprudence and legislation. Even where liability is still based on dereliction, the standards for assessing the latter are objectivized to such a degree that they are actually very close to eliminating dereliction.

b) Discharge of liability

I. The employer's sphere of activity

We have concluded that discharge of liability is possible in cases of injury to health and corporeal integrity if damage has been caused by unpreventable external cause or exclusively by the unpreventable conduct of the damaged employee. The question of causes for discharge has been discussed in detail in Part I. The conclusions drawn there rekuire certain addition in respect to external causes.

When discussing the concept of external cause in Part I, we have shown that this concept must be considered from the personal, territorial and activity angles. We have found that activities to be regardes as those of the employer's do not constitute external causes for the employer in respect to the personal angle. Regarding the concept from the territorial angle, we have drawn two conclusions. One: conduct of persons staying on the employer's premises does not constitute external cause, except if these persons are staying there without the employer's permit or consent. Two: any place under the employer's supervision and control must be regraded as the employer's premises even if it is outside of the premises promer. Finally, considering the concept from the activity angle, we have found that external cause is out of the question if the cause of damage lies within the employer's operations. We have concluded in Part I. too, — and I should like to emphasize this again — that this discrimination means at the same time that in cases where the causative factor cannot be qualified as external cause, the question of unpreventability cannot be raised at all. The reason is that in such cases the causative factor is regarded as the employer's own activity. Unpreventabilitiy can be considered only where the causative factor is actually „external".

In connection with damage caused by injury to health and corporeal integrity, several problems arise in respect to the employer's sphere of activitiy. Cases may occur where the employee suffers damage — although on the employer's premises — by some activity of some external persons. It often

[10] Decision of the commission of Labour — 22. 12. 1961. — § 1.
[11] Witz K.: Odpovednost zamestnávetele pri pracovnim uraze a nemoci z povolání. (Právnik, 1958. 2.)
Witz K.—Tomeš I.: 1. c.
[12] Schlegel R.: 1. c.
98. §.
[13] Mt. 62. §
[14] Nagy L.: Liability.

happens that employees suffer damage in the course of work done outside the employer's premises. Another problem is presented by diseases, first of all occupational diseases. Let us consider these problems in detail.

II. Activities performed on the employer's premises by external persons

We have concluded that, regarding the employer's sphere of activity from the territorial angle, it cannot be interpreted as external cause if damage is done by persons who are staying on the employer's premises, except if they are staying there without the employer's permit or consent.

It may happen that certain external enterprises or organizations display activities in a certain sphere and on a regular basis on the employer's premises. The question is how the employee's damage connected with such activities is to be judged. The typical example of such activities is the case where a catering company provides and serves the meals in the canteen. The question is to what extent the employer can be held liable for damage suffered by employees during the use of the canteen. What is it that can be regarded as the employer's sphere of activity in this case?

Making use of canteen meals is an activity within the scope of employment. It follows from this that it is the employer's obligation — in addition to providing the facilities for taking meals — to create healthy and safe conditions also during the use of this service. The employer is under this obligation within a sphere which is under his influence, his power of disposal. Consequently, since the canteen is on the employer's premises, and, moreover, is usually employed for other enterprise purposes in addition, the employer is under the obligation to see that making use of these facilities implies no hazard of damage to the employees. E. g. the floor of the canteen is defective and an employee fractures his leg as a result, the employer will be liable for damage. He will be liable likewise for damage caused by furniture or equipment in the canteen (e. g. a broken chair causes injury). But the employer will not be liable for damage which results clearly from the activities of the catering company. E. g. the cook serves spoiled food, or the waiter of the catering company scalds an employee. The enterprise employing the damaged person has no control over such activities of the catering company.

The case is similar if injury is sustained at an event arranged by some external organization at the employer's premises. The activity of the employees at this event does not belong to the scope of employment. The event is not the employer's activity, it is the activity of some other organization. Yet, at the same time, it is the employer's obligaion arising from employment to support the employees' social activities. It follows from this that the employer is obliged to make room, aquipment, etc. available for such purposes. If the employer fails to fulfil this obligation as required (e. g. provides inadequate, poorely illuminated rooms, dangerous equipment) he violates his obligations as employer and will be liable for damage arising in this connection. Liability will apply to the sphere over which the employer has influence to prevent damage. If for instance, two employees start a fight in the course of a sporting event held within the premises, the employer will not be liable for the damage caused to the injured person. (Liability may possibly be imposed on the organ arranging the event.) By contrast, if a bench collapses

during a trade union meeting and employees sustain injuries, or one of them breaks his leg because of a defect in the floor, the employer will be liable since he has control over devices made available to the employees for their social activities, and is therefore under the obligation to see that the condition of these devices does not endanger the employees' health and safety. The case is similar if the shower bath in the sport establishment within the premises is defective and an employee sustains injury from hot water (the case is different if a sports association, not connected with the employer, is running the sport establishment).

III. Activities outside the employer's premises

It often happens that employees display activities within the scope of their employment but a places outside the employer's premises. If such place is under the supervision and control of the employer's premises. If, however, the place is not under the employer's power of disposal, the factors causing damage here are „external" causes, for which the employer is liable only if their effect would have been preventable.

Controversies arise in this connection in both theory and practice. Let us therefore study in more detial the activities displayed outside the employer's premise. Three types of activity are found in this sphere:

— doing work
— going to the place
— waiting, meals, etc.

Doing work outside the employer's premises can be occasional (e. g. an employee delegated there for some purpose) or on a regular basis where the employee performs his work regularly outside the employer's premises owing to the nature of such work (e. g. porter, street sweepr). As concerns the employer's liability, the type of activity during which damage occurs is irrelevant.

The difficulty in such cases arises from the fact that such working-places are not under the control of the employer. Within the maintenance of order and discipline is entirely under the employers' control. He is in the position to exercise control and supervision not only over his employees but also over outsiders coming to the premises. In this way he is able to protect the employee's health and body from injury. In case of work done outside the premises, these possibilities do not exist to the full extent. A postman may skid on slippery stairs in an apartment house, his bicycle may be damaged in the street, or the street sweeper may be knocked down by a reckless driver. To prevent such damage is hardly possible for the employer. What he could do for prevention would be to reduce working outside his premises. But this is not feasible, since this would interfere with the planned operations.

In view of these circumstances, several opinions have been formed.

One is that in such cases the employer's liability is not warranted.[15]

Another view is that it should be taken into account that a number of possibilites are available to the employer to improve conditions, even if his influence to prevent damage is limited. (The employer can give more thorough instructions, can inspect the workings places in advance, can take precaution-

[15] Марголин (c. Nagy L.: Liability.)

ary measures — e. g. white broom-sticks for street sweepers — can initiate regulations which improve the employees' situation — e. g. use of lifts for postmen, etc.). Thus holding liable the employer would have actually preventive effects. The aspects of reparation should be considered in addition. This seems to present no problem. But in reality the employee's situation is not completely safe. He might be forced to carry on long lawsuits, to go about his business far from his residence. This may be extremely onerous to him. On the other hand it may happen that compensation cannot be collected from the person causing damage, and the employee's loss will remain unrepaired. These circumstances warrant to hold the employer liable for damage in order to improve the employee's position. It is argued in addition that the employee performs his work in the employer's interest. So it is a matter of fairness that the employer should accept responsibility for damage suffered by the employee during such work, since if the latter would have done this work on the employer's premises, the employer would have been under the obligation to prevent such damage, or to be liable for it.[16]

There are also views according to which in cases where, during work outside the employer's premises, damage is caused by the enterprise to which the employee has been sen to work, the latter enterprise and the employer should be liable jointly and severally.[17]

In my opinion, a clear distinction should be made in such cases according to the causative factors of damage. If damage results from the failure of the employer to provide adequate conditions under his control (e. g. gives the employee a defective tool which causes an accident, or fails to provide protective clothing, etc.) he should be liable in the same manner as if damage had occurred on his premises. If, however, damage results from other circumstances (e. g. the employee slips on a stair while delivering a letter) the employer cannot be held liable (this case has to be judged as external cause, and it is only to be ascertained whether the employer could have prevented it).[18]

Nor are the views well-founded that liability should be invoked in such cases, by considering the employee's financial conditions. This solution would be in cotradiction with the purpose of liability. The employer would be held liable for activities for the prevention of which he had no possibility, and will not have such possibility in the future either. If we wish to improve the employee's position in such cases, this should be done outside the scope of liability, in some other way. For that matter, employees are cared for by the social insurance system in such cases (their accidents are regarded as industrial accidents in this respect) and, beyond this, they can enforce claim for compensation from the causer of accidents. Such cases are governed by the Civil Code and not by the Code of Labour. It should be noted that the circumstance that the employer is not responsible for the accident, and is not

[16] Hromada J. :Prispevok k otázke novej právnej upravy náhrady skody vzniknutej z pracovnych urazov a chorob z pvolania a náhrady nákladov liecebnej starostlivosti a dávok nemocenského pistenia a dochodkového zabezpecenia. (Právny obzor, 1960. 2.)

[17] Krofta O.: Nové predpisy o náhrade skody za pracovni urazy v hospodárském tsyku mezi podniky socialistické sektoru. (Právnik, 1958. 3.)

[18] Nagy L.: Liability.

obliged to pay compensation, does not affect his obligation to find a suitable post for his employee pursuant to the rules relating to rehabilitation.

Another problem presents itself in case of working outside the employer's premises in connection with going to the working-place and spending time there without working. The various views in this respect differ in that it is problematical whether these activities can be regarded at all as being within the scope of employment.[19]

In my opinion, if the employee is ordered to do work outside the employer's premises, then all his activities he has to display for this purpose are within the scope of his employment. This includes travelling to the working-place, as well as waiting there, taking meals, staying in a hotel. All this is necessary for performing his duties. If he suffers damage during these activities, the case is entirely similar to the one discussed above, i. e. if the delegated employee suffers damage during work. Thus the solution must be identical with the one mentioned above. The employer will be liable if he could have prevented damage.[20]

IV. Travelling to and from the place of work

Here the problem is connected with damage suffered during such travels. This activity is in the interest of performing the duties of employment, but is not yet within the scope of employment proper. Hence there exists no obligation for the employer to provide healthy and safe working conditions. And the extension of liability to this field would be again in contradiction with the purpose of liability since the employer is not able to prevent damage in this respect. The confusion arising in proctice is the result of the circumstance that under the regulations of the social insurance system damage suffered during travel to and from the place of work is qualified as an industrial accident. But this only applies to benefits due under the insurance scheme, it does not entail the employer's liability for damage.

Soviet regulations differ from the solution I have described, i. e. the employer is held liable also for damage suffered during travel to and from the place of work.[21] I think that this solution, which is otherwise at variance with the nature of liability, has been warranted by considerations of welfare. In my opinion it would have been better to compensate within the social insurance system, by rainsing the sum to be paid by insurance. Compensation by the person causing damage would mean no difficulty, wuld be even eastier to a certain extent, as the social insurance agency advances claims anyway for refunding the sums paid by it.

V. Damage resulting from causes within the employer's operation

Such causes usually comprise factors of a natural character emerging within the operations of the employer enterprise. These are effects materializing in operating machinery, devices, use of materials, etc., in their regular

[19] Ignatowicz J.: Odpowiedzalnosč materialna zakladu pracy za wypadki. (Warszawa, 1955.)
Флейшиц E. A.: Basic issues.
Eörsi Gy.: Indemnity.
Nagy L.: Liability.
[20] Mt. V. 99. §.
[21] Decision of the Commission of Labour (22. 12. 1961.)

or irregular working. These cannot be considered as external causes. So it was correctly ruled by the court that the employer enterprise had to refund lost earnings to the employee in an accident resulting from the explosion of a grinding-wheel because of a latent defect,[22] or from the blowing up of a siphon bottle in a store-room of a restaurant.[23]

In connection with causative factors arising out of operations, we must discuss the question of occupational diseases.

The term occupational disease denotes diseases which result from certain professions, jobs as a rule.

Occupational diseases arise because in certain professions, types of work, the working conditions (e. g. humid atmosphere) or the materials used (e. g. lead) are detrimental to health, may give rise to disease, and because at the present standars of technology and medicine these effects cannot be completely eliminated. So if anybody chooses such a profession, type of work, he must anticipate that the given occupational disease will affect him sooner or later, to a more or less severe degree (The problem of causal nexus appears most clearly in this connection. It is an invariable rule that the detrimental effects hidden in certain types of work — e. g. inhalation of quartz crystals — cause changes in health, silicosis in the cited case. But this rule is a conclusion drawn from a great number of cases. It materializes not in a uniform manner, but through a number of chance events. There are workers who will not be affected, or hardly affected; and there will be persons in whom the disease becomes manifest much earlier than in others. Thus occupational diseases are the result of objective circumstances. Attempts are made at reducing to a minimum, or possibly preventing altogether, such consequences by creating healthy and safe conditions of working, by taking precautionary measures in addition if necessary (protective devices, protective food, medical supervision, etc.). And if the disease arises nevertheless, it is justified in any case that society alleviate the disadantages the worker has to suffer. This principle is realized in that the employees affected enjoy the same benefits of insurance as the persons having sustained industrial accidents.

As appears from the foregoing, occupational diseases arise from factors inherent in the type of enterprise operations. Namely the causative factors are the effects of material used, of the manufacturing process specified, are the consequence of given working conditions. And if this is so, the employer should be held liable for damage — pursuant to our above conclusions — and cannot excuse himself by pleading unpreventability since the causative factors entangled are not „external" ones. Yet we are contradicting the principles of liability for damage in this way at the same time. For we would try to hold the employer liable for damage which he is not able to prevent. Consequently the institution of liability for damage could not have any influencing, reformative effect in this case.

To hold the employer liable for damage resulting from occupational disease is not warranted in my opinion. We have drawn the limit at the point

[22] Nagy L.: A dolgozót baleset folytán ért károk megtérítésére vonatkozó rendelkezés végrehajtásának tapasztalatai. (Experiences of the orders concerning to the indemnity of the damages caused by the industrial accidents.) (Munkavédelem, 1965. 12.) *Abr.*: Experiences.

[23] Nagy L.: Experiences.

where — at the given standards of technology, etc. — the possibility to prevent damage exists, and implies no disproportionate burden on society. This is not the case with occupational diseases. Compensation for damage in case of occupational disease should therefore be ensured not trough liability for damage, but by other means, within the insurance scheme first of all. (Provisions of law on the rehabilitation of employees having suffered accidents, or affected with occupational diseases, and on the employment of persons suffering from silicosis, lay down rules to this effect.) I should like to note that these conclusion apply not only to occupational diseases enumerated in social insurance regulations, but also to other diseases connected with occupation which are not yet figuring on the list (e. g. rheumatic fever in miners, diseases of the eye in welders). So our conclusion is that in laying down the rules of the employer's liability for damage the liability for occupational diseases should be excluded.[24]

The case will be different, of course, if the occupational disease arises because the employer fails to take prescribed precautionary measures (e. g. protetoctive food, exhaustors, tranfer to some other job upon meclal indication). In such a case the damage has not been unpreventable in respect to everybody, so it is justified to hold the employer liable. This will have its reformative effects. The employer's liability was established accordingly in a case where workers erecting freshly miniated parts of a bridge suffered lead poisoning, since it was found that these workers, who had never handled such material before, had not been instructed for protection, and no precautionary measures had been taken.

Certain difficulties will arise in practice also in connection with cases as mentioned above. This is the result of some uncertainty in judging the causal nexus.

The course, time of manifestation, intensity of occupational diseases vary widely with the given cases. There are instances where the disease becomes manifest only after many years have passed.

In case of an employee who had worked for a long time in several employments, all of which involved the hazard of an occupational disease, it will be very difficult to decide — in case of a disease with a long period of incubation — how far the violation of rules of labour safety at his last place of employment, where he has worked for a shorter time, has contributed to the development or severity of his disease. So it is not possible to take the same stand as in case of an industrial accident, and to declare that the employer, or one of them, is liable for the entire damage the employee has suffered. To judge the employer's liability, it has to be decided to what extent the given employer's conduct has changed the expectable course of the disease, and the employer can be held liable only for the difference that can be clearly imputed to him. For instance, if it is ascertained that the employee has become disabled ten years sooner because precautionary measures have not been taken, the employer will be liable for the difference between disability pension and former earnings for these ten years, but not for more since the employee would have been disabled after ten years anyway. To decide how far the expectable course of the disease was altered by the employer's conduct, we

[24] Mt. V. 99. § (2).

must always start from the investigation of the employee's actual circumstances (constitution, state of health, other relevant circumstances, etc.). For instance, if disability usually occurs after 25 years at a given degree of gas contamination, but takes place already after 20 years in a given case, it cannot be declared right away that the employer is obliged to pay the difference of incomes for 5 years. The employee must be examined, it must be ascertained what course the disease has taken in him, what his other circumstances have been. It may happen that the employee has a constitution stronger than the average, and was less affected by the circumstances usually detrimental to health, and the medical opinion is that disability would have occurred not sooner than after 30—35 years of work, provided the prescribed precautionary rules have been observed. But the opposite may happen, too. Thus it is always the thorough investigation of a given case that decides the extent to which the employer can be held liable. (I should like to remark that this is not a case of some inference similar to adequate causal nexus. The occurrence and course of an occupational disease is an objective process. So it must be investigated and decided how the given objective factors, the employee's constitution, absence of precautionary measures, etc. have affected, or still affect, the development of this objective process.)

Consequently, I cannot agree with the view that in case of an occupational disease the employer's liability should be discarded even if he had failed to carry out the measures prescribed for prevention. And the view cannot be accepted either that in such cases the employer should be held liable for the occupational disease, or, more exactly, for all its consequences. The correct position is that the employer is liable for damage if the failure to take the prescribed measures has affected the course of the occupational disease, but is only liable inasmuch as the employee has suffered additional damage as a result. This must be decided on the basis of investigating all concrete circumstances of the case. To reach a decision will be very difficult in many cases, and will be possible only after consulting experts. But these difficulties must not deter us from reaching decisions that are fair and just. Correct decisions can be promoted greatly if systematic records are kept on the results of medical examinations of employees exposed to the hazard of occupational disease, since on this basis it is possible to judge with fair accuracy the changes in the employee's state af health, the features and rate of development of his disease. All this will help in deciding to what extent the employer's unlawful conduct has contributed to the impairment of the employee's health.

VI. Unpreventability

In Part I, we have concluded that for judging the question of unpreventability we have to study two circumstances. One: whether adequate means and ways had been available to prevent the damaging act. Two: whether there had been time enough to put these into operation. We have concluded, too, that in evaluating these two circumstances we must start not from the actual organizational pattern, the standards of technological equipment, and prevailing conditions of the given employer enterprise, but rather from the possibilities of preventing such damage at the present standards of technology, organization, etc. in general.

These conclusions apply also to cases of damage caused to health and corporeal integrity. Accordingly, an accident cannot be considered as unpreventable if it occurred because the employer consented tacitly to the performance of a task requining special qualitication (e. g. crane operator) by an employee having no such qualification,[25] or in cases where the employee was not given adequate technological instruction for doing some work,[26] or if employees were not given instruction in labour safety.[27] Similarly, an accident cannot be regarded as unpereventable if it resulted from the fact that the employer failed to amintain order and safety in an area required for working.[28] The accident was not regarded as unpreventable in a case where the beginner, an untrained worker, cleaned a machine without stopping it first and the machine caught and crushed his hand,[29] since the accident could have been prevented by adequate supervision of work. The employer enterprise was held liable for damage in a case where a worker was welding by neglecting regulations and suffered an accident as a result, since it was found that welding in this manner was usual practice at the enterprise with the knowledge and consent of the leaders,[30] consequently the accident could have been prevented if the management would have prohibitied this wrong practice. The employer enterprise was held liable likewise in a case where the accident resulted from the use of an inadequate ladder and the handling of barrels was contrary to prescriptions,[31] and in a case where the accident resulted from the use of unfit tools, because the management was aware and tolerated these practices in both cases.[32]

The circumstance in itself that to obtain a certain tool, device, etc. encounters difficulties does not constitute an absolutely unpreventable cause. In a case where the accident resulted from the circumstance that the employee was cutting wire with shears that had short handles the court ruled that the fact that technological instructions prescribed the use of short-handled shears cannot be qualified as an unpreventable causative factor, since the employer should have tested these instructions for safe working.[33] (As a matter of fact, the technological instructions were modified after the accident.)

In Part I, I referred to the obligation that measures aimed at prevention must not be merely formal, they must be actually suitable for preventing damage by utilizing given possibilities. Accordingly, instruction of employees in the matter of safe working does not mean that the employer has done everything to prevent accidents. It is especially no escuse if instruction was only formal, or was not in itself sufficient to prevent an accident in a given case.[34]

[25] Municipal Court of Budapest 56. Pf. 31 639/1962.
[26] Municipal Court of Budapest 41. Pf. 20 756/1963.
[27] Supreme Court P. törv. II. 20 729/1962.
[28] Municipal Court of Budapest 41. Pf. 20 460/1963.
[29] Nagy L.: Experiences.
[30] Nagy L.: Experiences.
[31] Nagy L.: Experiences.
[32] Nagy L.: Experiences.
[33] Nagy L.: Experiences.
[34] Supreme Court Pf. II. 20 085/1953.

4. *The contributory act of the damaged*

a) Introduction

We have concluded in Part I that the damaged employee's contributory act is to be taken into account only in case of dereliction on his part. The Hungarian Code of Labour adopts this principle in the provisions relating to damage caused by injury to health or corporeal integrity.[35]

In connection with the employee's blameworthy contributory act, it should be noted that in cases of damage caused to health and corporeal integrity it often happens that the employee contributes to the occurrence of damage by violating precautionary regulations. It should be kept in mind here that in many cases the employee's conduct constitutes not only a violation of obligations to prevent and mitigate damage, which are binding on every citizen, but violates also the employee's duties connected with the manner of working and arising out of his employment. This must be emphasized because the principle of using less rigorous standards for judging the damaged person's contributory act — i. e. nobody can be expected to concentrate all his attention to preventing possible damage — cannot be applied to the above cases any more. It can reasonably be expected from employees to do their work in accordance with the obligations they have undertaken, pursuant to regulations and inductions. Thus, in evaluating dereliction in cases where the contributory act involves the violation of obligations arising out of employment, we must apply the same standards as to other cases of the employee's breach of duty through dereliction.

We have concluded in Part I, too, that in every case where no uniform basis of comparison is available, tue proportion of damage to be borne by the damaged persom will not be determined by evaluating the conduct of the causer and the sufferer of damage. This applies also to the cases discussed above. The employer is liable for damage caused to the employee's health and corporeal integrity, irrespective of the employer's dereliction, whereas the employee's contributory act is taken into account only in case of the employee's dereliction. Consequently, two uniform, comparable instances of conduct do not exist. It is therefore that we must appraise the degree of the employee's dereliction, and decide on this basis what proportion of the damage he has to bear, i. e. for what proportion of the damage the employer need not compensate him.

b) The sphere of contributory acts

In connection with injury to health and corporeal integrity, the employee's contributory act may materialize mainly in his failure to do everything in his power for the purpose of healthy and safe working, for removing obstacles to working, and for the purpose of working in accordance with his capability and qualification. In connection with damage caused by preventing the employee from working, we have discussed in part: the acts of neglect connected with removing obstacles to working, and making use of opportunities of working. The conclusions drawn there apply also to damage caused by injury

[35] Mt. 62. §.

to health and corporeal intgrity, but — owing to the partially different nature of the consequences of damage — some additions are necessary.

In connection with the type of damage discussed here, working is often impossible because of some defect of health or body resulting from damage. If this can be eliminated or improved by medical treatment, the damaged employee is obliged to submit himself to such treatment.[36] If the defect can be corrected by a surgical intervention or some other therapy, the damaged employee is obliged to submit himself to these. If he fails to do so, he will be entitled to compensation only inasmuch as such claim would be valid after performing the operation or therapy, e. g. he would only be able to do inferior work even after the operation. The employee cannot be obliged to submit himself to an operation that endangers life, but he can be obliged to submit himself to a simpler one. Allegation that the operation or treatment is inconvenient and painful cannot be accepted as an excuse.

The sphere of these considerations includes the problem to what extent the employee can be expected to acquire new skill or qualification by which he can do work that differs from his former employment. This problem arises especially in cases where the employee's capacity for work decreases as a result of damage suffered. In other cases , where the hindrance is usually of a temporary nature, there is no need to acquire new skill or qualification. In the former case the employee's obligation will be different, depending on the temporary or permanent character of his decreased capacity for work. In case of shorter prevention — e. g. if an accident causes decrease of capacity for 2—3 months — it cannot be expected from the employee to acquire some other qualification. This period would not suffice for doing so. But in case of permanent decrease of capacity — e. g. a waiter's leg is permanently paralyzed by an accident — the employee is under the obligation to acquire a qualification which enables him to utilize his working capacity in the most favourable manner. (This does not necessarily mean that he is obliged to complete a course of some school; training as a skilled worker, or for some administrative work — e. g. pay-roll accounting — will suffice.) Considering the fact that this is not simply a case of mitigating damage, but the obligation to share the work of society, to realize one fundamental principle of our social system, is also involved, the damaged person is under the obligation to do increased efforts for rehabilitation, for acquiring a new qualification. But, despite this, the employee can only be expected to acquire skills and qualifications of which he is actually capable and whose acquisition represents no disproportionate burden (e. g. an aged person cannot be obliged to graduate from a scholl af higher education). As concerns the removal of obstacles of working, I should like to remark that if this entails expenses these must be counted in when the damage is assessed.

Concerning the utilization of opportunity to work, or the failure of utilization, the case will be different according to thue temporary, protracted, or permanent character of the hindrance.

Hindrance is of temporary character if the hindering circumstances are likely to cease in a few weeks, or a few months at the latest. Cases in which the working capacity is likely to return to normal in such a short time belong

[36] Supreme Court Pf. II. 20 085/1953.

to this category. Concerning the obligation to enter employment, the conclusions reached in connection with damage caused by prevention from work have full validity in such cases.

If, however, the hindrance is lasting — cases of protracted or pernament decrease of working capacity belong here — the situation will be different. Here we must keep in mind that our State grants the right to work to all citizens. But, at present, the means of production are not developed sufficiently, and the qualification standards of the employed population are not comprehensive enough, so this means at present and in general that some kind of employment is ensured to every citizen, but this is not employment corresponding to the employee's qualification in every case. Hence the citizens cannot possibly demand to be employed according to their qualifications in every case; it also follows from this that nobody is entitled to draw benefits at the cost of society — and compensation, if paid by the State, is such a benefit — for a long time only because he is not able to find a post that suits his acquirements.

Society imposes increased requirements on persons whose working capacity is decreased for a long time, or permanently. This requirement is that such a person must adapt himself to the changed situation and make efforts to share the work of society accordingly in the future. The other aspect of this requirement is that society should give substantial help in finding the best suited employment for such a person. This conclusion means that in case of protracted or permanent decrease of working capacity, the obligation to find employment is of a much wider scope than has been discussed in the precending chapter in connection with withholding the work-book and other similar damage. The only limit on the obligation to find employment is the case if the employee — in view of his state of health, including the need of medical care — is not able to accept certain types of employment (he has the right, at the same time, to demand within the scope reparation any measure or training which makes him fit for working.)

The degree to which working capacity is decreased is a substantial yardstick for judging the obligation to find employment. To determine the degree of decreased capacity is a medical task first of all. It should be kept in mind, however, that the medical finding is of an informative character only, gives a basis of departure, and may not be applied mechanically. The reason is that medical judgment considers principally the physiological aspect, whereas in employing liability for damage, in considering the obligation to find employment, the decrease of working capacity is allawys appraised in relation to a given sphere of work, a given occupation. A slight defect of hearing resulting from an accident is usually interpreted as a minor decrease of working capacity, but the valution will be different in case of a musician and a blacksmith. Similarly, the loss of both legs is usually considered as a severe decrease of working capacity, still it will be appraised differently in case of an accountant and a waiter in respect to find employment.

5. Compensation

a) The legal regulation

We have concluded in Part I that the principle of compensating for damage in full is dominating in the field of the employer's liability. This applies also to damage caused by injury to health and corporeal integrity.

The conclusions drawn in Part I in connection with the principles of compensation are directive also in cases of damage of the above type, but require some addition because of the nature of such damage, especially in respect to expenses and incomes lost.

b) Damage suffered

I. Material damage

Reduction of the employee's available means can occur also in cases of injury to health and corporeal integrity. This usually consits in the damage or loss of clothing or other belongings in the course of an accident.

In calculating the amount of such damage, Hungarian legislation acts in accordance with the principles presented in Part I Accordingly, the consumer price valid at the time of assessment of damage must be taken into account for compensation. Exception to this rule is if the employee is able to obtain the things in question at a lower price on the basis of a preferential purchase scheme of enjoyed at the employer. If damage occurs to used things, the amount of dagame must be assessed by taking into account depreciation.[37]

If damage caused to things can be repaired without resulting in a reduction of value, the repair cots must be compensated.[38]

II. Expenses and outlays

A very wide range of expenses and outlays may emerge in connection with damage to health and corporeal integrity. First to be mentioned in this group are expenses connected with the restoration of health. Medical and hospitalization expenses must be refunded in this sphere. It ought to be noted in this connection that if the damaged employee receives social insurance benefits or insists on his discharge from hospital despite medical opinion.[39] The will not be entitled to charge such expenses. The mere circumstance that somebody is in need of medical treatment because of a damaging act does not warrant to request treatment other than is usually due to employees under social insurance. The less so, since today medical treatment afforded under the social insurance scheme offers the best possibilites for an early recovery. Nor is it permissible to sharge payments not based on legal obligation, such as non-obligatory fees and presents given to doctors and nurses.[40] When charging justified and necessary medical expenses, the actually chargeable and charged fees of consulation and treatment must be taken as the basis.

[37] Order of the Ministry of Labour [2/1964. (IV. 3.) Mü. M.]
[38] Order of the Ministry of Labour [2/1964. (IV.3.) Mü. M.]
[39] Supreme Court P. törv. 21 003/1957.
[40] Supreme Court Pf. II. 23 337/1955., P. 21 758/1960.

During treatment — including the period of hospitalization — an improved diet may become necessary, which results in additional expenses. Juidicial practice is not uniform in this respect. Some decisions have taken into account these expenses at assessing the amount of damage. Some have not, arguing that hospital feeding makes any completion unnecessary. In my opinion, allowing such expenses should be possible if improved diet has been given upon medical advice.

Expenses of hospitalization include expenses incurred with seeing the patient during the time of hospitalization.

Such expenses can be harged if visiting of the sick employee is warranted by his condition or by other circumstances (long hospitalization, personal affairs requiring urgent talks, etc.). Judicial practice reflects this view. In one case the court has found the staying of the wife at the place of hospitalization until danger to life was over[41] or the parents' stay at the place of their boy's fatal accident[42] was found warranted ton. The costs of justified telephone inquiries, made instead of visits, can also be charged.

Not only hospital charges, but also additional expenses incurred by home nursing must be taken into account. Obviously, only to the extent they were necessary, and if no hospitalization was available. The question has come up several times in practice whether expenses of nursing can be charged only if a person has been hired, or also if nursing is done by the spouse or some other family member. Expenses connected with nursing a helpless person are allowed in judicial practice even if nursing is done by the spouse. But the principle that only actual expenses or loss can be charged must be observed also in such cases. It follows from this that for refunding such expenses the basis should not be the fees which would have been paid to a professional nurse in lack of a family member, but how the nursing family member could have utilized his or her working capacity if there had been no need for doing the nursing.

Judicial practice is not entirely uniform in cases where nursing is not done by the spouse, but by a family member who is not employed. In my opinion, if the nursing family member had not been employed before, it should be considered whether such member has lost some income because of having to do nursing. Thus in case family members, who had been working in the household only and had no income of their own, expenses cannot be charged for nursing.

Taking into account the family member's loss of earnings would seem to appear as if the claim of a third party were involved, a case of incomes lost, and not expences of nursing. But this is only seemingly so. We have to depart from the premise that the sick person must pay the costs of nursing in some way or other. Hence if nursing is done by a family member, this member's loss of earnings must be refunded. So this is always the damaged person's claim.

Home nursing of the injured, or his subsequent condition may require a special diet. Additional expenses arising with this must be taken into account when assessing the damage.

[41] Supreme Court Pf. II. 22 007/1953.
[42] Supreme Court Pf. II. 20 293/1953.

Home nursing of the injured may require more laundering and bedding. Additional expenses can be charged.

During the disease it may become necessary to transport the patient for treatment, for the doctor or the therapist to travel to the patient's home. The expenses incurred here must be taken into account when assessing the damage. This is the case even if it turns out — at a later examination — that the presence of the doctor or therapist (e. g. for removing the plastering) would not have been necessary.[43]

The injured person may be in need of some therapeutical aid. Such expenses can be charged — included expenses of periodic repair provided the injured had not received the required device free of charge under the insurance system. There are even instances of judicial practice where additional claims were allowed for the sake of the injured person's comfort. E. g. the court did not consider as exaggerated the claim for two pairs of orthopedic shoes every year, ruling that it is necessary for the injured person to have a change of shoes.[44] Judicial practice expresses the principle of the best possible restoration of health most forcefully. This is manifest also in the circumstance that the courts do not apply distribution of damage in respect to the costs of therapeutical aids.

As a consequence of the damaging act, the injured person may incur additional expenses not only in the field of treatment, but also in connection with everyday life, connected with his state of health, his physical condition resulting from the damage suffered. It happens very often that the injured has to rely on help for certain activities which he used to perform himself. E. g. working the garden, doing household work, etc. It may happen in such cases, too, that these duties are attended to not by a hired person, but by some family member. The same rules apply to the charging of such expenses as have been discussed in connection with nursing.

Additional expenses may been incurred in connection with heating and lighting, since the injured is staying at his home all the day, or because his condition requires an increased room temperature, or the use of some equipment consuming more electric current. It appears from judicial practice that in cases where the injured person is unable to participate in social, cultural life because of his bodily defect resulting from the accident (e. g. has lost both legs) it is considered as justified to purchase for him a television set and to charge these costs to the person having caused the damage, since the disadvantages resulting from damaging act can be eliminated to a certain extent only in this way.

Additional house-rent may have to be paid in cases where the nature of the injury sustained (e. g. infectious disease) makes necessary the isolation of the patient, not to keep him together with other family members, but in a separate room.

Disease — especially hospitalization — may result in additional expenses if compared to the usual outlays of the family. E. g. the wife is under hospital treatment, and the husband may not be able to run the household smoothly, has to take meals at a restaurant, or to buy conserves, all of which usually result in additional costs. The care and provision of children may be

[43] Supreme Court Pf. II. 20 075/1953.
[44] Supreme Court Pf. III. 22 813/1956.

hindered for the same reason. This can be only remedied by hiring a help, or by placing the children in a créche or nursery, or a similar place. All these additional expenses can be charged. (Like in case of saving because of hospital board, the sums by which the costs of feedling the children at home are reduced because of their keeping elsewhere, must be deducted from the amounts chargeable. Such expenses can be charged also if the maintenance of children encounters difficulties because the mother has to see her injured husband at the hospital. If children kept outside the home are visited by the parent, the expenses incurred also belong the amount of damage.

Additional travel expenses may be necessary as a sequence of damage. These emerge principally in case of some bodily defect. For instance, an employee has suffered injury of his leg thus far he used to go to work partly walking, partly by tramway or bus, but now he has to travel by bus over the entire distance. Or somebody used to go to work by bicycle, but suffered an injury of his leg, as a result of which he has to mount a bicycle engine which involves costs such as fuel, etc. The case is similar if an employee loses his legs and is given or obtains a suitable powered vehicle.

Expenses may be incurred with instruction and learning. If the injured employee had pursued studies during his employment and, because of his disease or bodily defect he can continue them only by employing a private teacher, such expenses must be taken into account when the damage is assessed. The case is similar if the injured employee begins learning because he will not be able to do his former work as a result of his bodily defect. But such expenses cannot be charged if the employee can perform the duties of his particular employment without such learning.

III. Savings

We have indicated in Part I that if the person suffering damage is freed from some usual ontlay as a result of suffering damage, this must be taken into acount as saving. This conclusion applies also to the cases discussed here. One example is the absence of travel expenses to the place of work in case of a person becoming invalid. A similar case emerges if the employee used to hire a help for the care of his children but having become invalid, is staying at home and cares for his children himself. (This applies only if invalidity does not prevent him from doing so.)

Saving may emerge also if the injured is in a hospital. During the time of hospitalization he will save costs of board. This saving must be deducted from hospital charges taken into account at assessing the damage, i. e. the amount of damage must be reduced by the costs of board saved. In doing so the departure must be not from the part of hospital charges that cover feeding, but the sums the injured has saved, or could have saved, actually. In calculating these savings, the procedure may not be always the same, savings must not be determined mechanically as a certain proportion of hospital charges. Namely the possibility of saving depends on the circumstance whether or not the injured person 's household was maintained during hospitalization, how large the family is, what the circumstances of the household are. The possibility of saving is reduced if the household was maintained. Judicial practice adopts the position in case of persons with a family that the fact that the injured receives board in the haspital represents no particular savings.

I should like to call the attention to the fact once more that — as follows from the principle of preventing and mitigating damage — if damage can actually be mitigated by some saving or in some other way, the injured is under the obligation to avail himself of this opportunity. If he fails to do so although he could have done it, this will be imputed to him pursuant to the rules governing the damaged person's contributory act. In such case the sums that could have been saved, or the income that could have been gained, must be regarded as though they had been saved or received actually. Hence only reduction of means in addition to these can be considered as belonging to the amount of damage.

c) Incomes lost

I. The sphere of incomes lost

In Part we have concluded that incomes lost consist of increase of means, future incomes, of which the damaged person is deprived because of damage suffered. This principle is adopted also in Hungarian legislation. Hence, in accordance with the conclusions drawn in Part I, the category of incomes lost comprises the following:

— loss of earnings due on the basis of employment, including spare-time work and secondary occupation, but not including allowances due only if work is actually performed;

— incomes received outside employment, including incomes from activities protected by copyright, and incomes received by the employee as rent or hire, or on the basis of some other legal relationship.

II. Earnings lost

In determining earnings lost, it must be considered in every case what the damaged person has lost as a consequence of damage. Damage caused by injury to health and corporeal integrity prevented the employee from continuing in his employment in the circumstances prevailing so far. Consequently, in determining the amount of earnings lost, we must start from the earnings which have been due to the employee until the damaging event took place. The assumption is warranted that if the damaging event had not taken place, the employee would have drawn the same earnings uninterrupted.

In cases of damage we are discussing now, the employee in not able to continue his former work usually for a very long time, possibly even permanently. This requires that in calculating the earnings lost we must proceed in a most circumspect manner. This warrants to take into account earnings received for a longer period of time. Under Hungarian legal provisions, earnings received during twelve calendar months must be taken as the basis.[45] In my opinion, Hungarian regulations seem to be appropriate. Fluctutations of earnings are more or less compensated during one year. To take as a basis a period longer than one year would not be advisable, because during such a long period several changes may occur (changes in the scope of work, general raise of wages, changes of place of work, etc.)

[45] Order of the Ministry of Labour [2/1964. (IV. 3.) Mü. M.]

which would render the calculation of average earnings difficult, and would lead to unreal results in many cases.

For calculating earnings lost, the month in which the circumstance entailing the claim to compensation has occurred must be considered as the current month. This is usually the time at which injury to health for corporeal integrity has occurred, e. g. the month in which the employee has suffered the accident. But different cases may occur. E. g. if the decrease of the employees working capatity is not manifest immediately after the accident, and he suffers no damage as a result, and this decrease becomes manifest only after some time. (E. g. the employee is hit on his head during loading, but this has apparently no serious consequences, so he is not placed on the sick-list. After a few months, however, equilibrium disturbances emerge, the employee must be placed on the sick-list, his working capacity decreases, he can do his former work no longer.) In this case the current month will be the month in which the employees damage resulting from the decrease of his working capacity occurred.) I should like to emphasize that this example is not a case in which the employee's disease has not yet devedoped, and so it is not possible to determine the degree to which his working capacity has decreased. In such a case damage has been caused, only the assessment of damage takes some time. In the case mentioned here, recovery takes place after the accident — he was possibly not at all unable to work — and the decrease of working capacity becomes manifest only later, in causal nexus with the accident.)

III. *Incomes received outside employment*

In Part I we have concluded in connection with asessing damage that in case of several employments or other legal relationships existing in addition to employment, all incomes lost must be taken into account when assessing damage. Incomes not realizing in a second, or further employment, or some other legal relationship, can be taken into account for determining compensation for a period of time beyond the duration of these relationships only if these incomes have been of a regular character. It is a requirement in any of these cases, too, that a causal nexus must exist between the damaging act and the loss of income occurring fithin the scope of other employments or legal relationships.

These conclusions apply also to the types of case discussed now.

IV. *Considering the degree of decrease in working capacity*

In the case of earnings lost, damage consists in expectable incomes that are lost as a result of damage suffered. Consequently, the upper limit of compensation to be enforced as earnings lost is the income the employee can possibly draw from his employment (as we have seen, the amount is determined on the vasis of the average of a longer period). In case of damage caused by injury to health and corporeal integrity, there is another resttriction within this limit for determining the earnings lost. This is the consideration of the degree to which the employee's working capacity has decreased. The degree of decrease is determined for this purpose. The underlying principle is that the employee actually is able to work to the deg-

ree of his working capatity which has been left intact. So the causer of damage will not be liable for this proportion of the working capacity. Consequently, only that part of the former average earnings can be considered as earnings lost, which is proportionate to the degree of decrease in working capacity.

It should be mentioned that Soviet legislation makes a distinction between professional skill and general working capacity in determining the degree of decrease in working capacity. The former is the determination of the degree to which the injured person has lost his working capacity required for his special trade or profession. The latter is he degree to which working capacity in the general sense — the working capacity of an ordinary person — ha been lost. (E. g. if a violinist of the opera house loses the little finger of his left hand, the decrease of his professional working capacity will be 100 per cent, as he will be no longer able to continue in his art. On the other hand, his general working capacity is hardly affected, as the loss of the little finger of the left hand is usually no obstacle to entering employment and doing work.) Accordingly, Soviet statutes make a distinction on the basis of the two types of decrease in working capacity when amounts claimable as earnings lost are to be determined.[46]

Chechoslovak provisions of law are different.[47] Sums to be granted as earnings lost cannot be higher than would be due to the employee as the highest disability pension under the social insurance scheme.

Hungarian statutes make no reference to the consideration of the degree to which working capacity is decreased. Considering, however, the fact that in earlier practice the courts determined compensation for damage to health and corporeal integrity by taking into account the degree of decrease, and that in actions for damage under civil law this practice is still followed, the requirement of taking into consideration also the degree of decrease is given due consideration in present judicial practice, even after the recent statutory regulation.

Restriction according to the degree of decrease in working capacity does not always lead to statisfactory results in practice.

On the one hand, the degree of decrease is inaccurate as a basis for decision in two respects. First, it is not quite certain that the decrease of working capacity is actually of such an extent as reflected by the medical opinion. The loss of one leg represents a considerable decrease of working capacity in general; yet in case of an accountant it hardly affects the performance of his work proper. Second, the inaccuracy of determining decrease may have the opposite effect. It very often happens in case of a higher degree of decrease that — although some of the working capacity has been left intact theoretically — it is almost impossible for the person concerned to do any work because of his other severe bodily infirmities. Actually, intact working capacity suffiees in many cases for no more than for the person concerned to see after himself. This is reflected also by judicial practice which regards cases of 20—30 percent intact working capacity — especially at older age — as the practical disablity of the person concerned.

[46] Decision of the Commission of Labour (22, 12, 1961.)
[47] 150/1961. Sb.

On the other hand, it should be taken into account, too, that the determination of the degree of decrease in working capacity, i. e. the determination of the degree to which working capacity has been left intact, is by no means a guarantee for the injured to get some employment which is really in accordance with his defect. So this would have the effect to reduce the liability of the causer of the damage to a certain extent, and to place additional burden on the injured person, who is in a difficult position anyway. The case is different, of course, if there exist provisions of law which promote in such cases, even make compulsory, the suitable employment, retraining, etc. of the injured person.

Summing up what we have discussed above, to attach the compensation for earnings lost to the degree of decrease in working capacity is wrong and unnecessary in my opinion. The causer of damage should compensate for the earnings lost, no matter to what degree the employee's working capacity has been lost. Decrease of working capacity should be considered from quite another angle, in the appraisal of the employee's obligation to find employment. This may serve as a basis for determining whether the injured person has done everything to be expected from him in order to find employment. But even within this scope, this would be but one — although most important — help in reaching correct decisions.

V. *Considering incomes received after suffering damage*

aa) *The sphere of incomes to be taken into account*

In Part I, we have concluded that in determining earnings lost, the incomes which reduce the employee's loss must be taken into account as reducing factors. We have shown that these incomes can be divided into three groups: wages received within the scope of employment, incomes drawn from other legal relationships, and benefist received under the social insurance scheme. All these conclusions apply also to damage caused by injury to health and corporeal integrity.

bb) *Allowances received within the scope of employment*

We have concluded in Part I that if the employee is able to utilize his working capacity after his recovery, the wages received by him must be taken into account, and only the loss appearing after such deduction must be compensated for as earnings lost. We also have seen that there are two exceptions — or, more correctly, only seeming exceptions — to this general rule.

One is where — although there in no actual working — earnings lost are not compensated for because, for example, non-working was the result of the employee's conduct, or no possibility to work existed, and the employee suffered no damage as a result.

The other exeption is the case where the employee makes his income by extraordinary performances.

In connection with the type of damage we are discussing now, we must study the latter question in detail, since it is of high practical importance and the solutions applied have give rise to many a controversy.

As appears from the positions taken in both theory and practice, the fol-

lowing reasons would seem to justify to disregard or to restrict the consideration of earnings drawn from extraordinary performance:

a) if working capaticy decreases to a considerable degree, it cannot be expected from the injured — especially not at older age — to find employment or to work; if he would do so nevertheless, this must be regardes as an extraordinary performance;

b) in addition to those belonging to category *a)*, it may be assumed reasonably that everybody whose working capacity is decreased has to make greater efforts to do work, to provide for his subsistence, than a healthy person;

c) it must not serve the advantage of the causer of damage if the injured person draws a higher income by extraordinary performance or by acquiring new skills, or if earnings rise in general in comparable jobs.

The question is, what truth is there in these ideas? Let us first consider the problem of the invalids. It is a fact, also supported by judicial practice, that persons who suffered a severe decrease of their working capacity often encounter difficulties in finding employment and in doing work. But, even so, this cannot be stated with general and invariable validity today — as is reflected clearly also by examples taken from judicial practice — and will be even less characteristic of the future. The case is obviously different if regarded in dependence upon the particular occupation, the character of the bodily defect, the family circumstances, etc. of the employee, as to find employment will be more difficult for a person doing hard physical work, less difficult for a brain worker, etc. In considering this problem, we must start from the conclusion that the decrease of working capacity is always relative in two respects. On the one hand, it is always related to general medical experience. On the other, it is in relation to the employee's position, circumstances. Working conditions, under which work of full, or nearly full, value can be performed, can be found for any person who has suffered decrease of his working capacity. This applies not only to cases where special professional capacity is decreased, but also to cases of decrease in general working capacity. The social aim is to ensure for everybody the opportunity to participate in the work of society. This requirement arises not only because it is of advantage to society to have few people who are in need of support. What is of primary importance here is that no one should feel himself slighted as a useless member of society because he is not any more able to work. If we keep in mind that work is increasingly becoming a necessity of life, we may say that such a feeling might be even a worse disadvantage than the pecuniary loss. Namely the latter might be remedied by the family members even if no compensation is granted, but if somebody is left helpless and is not able to do his share of work, there is no remedy. (Actually, complete reparation of damage would be accomplished if the injured is brought into a position where he becomes able of work at 100 per cent. The costs implied must obviously be borne by the causer of damage.) It is a fact that — at present — all preconditions are not yet ensured to give every person who suffered a decrease of his working capacity that kind of employment or work at which his decreased capacity plays no role; yet there are numbers of opportunities all the same, and with mechanization, progress of technology, rise of cultural standards, there will be ever more. Any regulation that might induce people

to be inactive today, when it is exactly the love of work that should be increased, is basically wrong. Hence any regulation, which would grant compensation in case of disability without investigating the actual opportunities of doing work, should be rejected as wrong. As has been referred to briefly in the foregoing, the opportunity to work shows a most varied picture depending on the nature of the defect of disease causing the decrease of working capacity, on the age and bodily condition of the injured person, the character of his occupation and qualification, the possibilities to acquire new skills and qualifications. The medical opinion can serve as a basis in this respect. But as concerns medical opinion, i. e. the medical determination of the degree to which working capacity is decreased, it should be considered that medical finding is essentially based on the physiological aspect, and that the deliberation whether a decrease of working capacity has occurred, and, if so, to what degree, is conditional on this aspect. So the doctor only considers some of the viewpoints I have outlined in the foregoing. Hence his opinion is only a helping criterion, but cannot be a decision in itself. Generalizations, percentage determinations drawn from judicial practice can only serve as auxiliary bases for the same reason. All these are helpful in appraising the proofs emerging in a given case and displaying a most manifold nature, as I have shown in the foregoing.

The suggestion that reckoning in of earnings should be restricted in cases where the injured employee draws a higher income by having acquired new skills, should be given careful consideration. Indeed, if the efforts of the injured person to acquire new skills, quailification or other knowledge would have the effect that his income does not increase, or increases insignificantly, because in view of his higher earnings he would be deprived partially or altogether of the annuity granted as compensation, this would deter him in many cases from further training that means additional work. Thus the reasons adduced are correct in this respect. So it would seem justified that the injured person should receive compensation for a while also in cases where his incomes rise because he has acquired new skills or a qualification of higher degree. The period of time for which such compensation should be granted might vary with the time devoted for acquiring the new qualification, but should be not longer than the time actually spent with training.

As concerns the increase of intensity of work, contracting to do work detrimental to health, these seem indeed to be extraordinary performances in view of which the annuity ought not to be reduced. I believe, however, that in reality it would not be proper to appreciate these. Work detrimental to health, or the increase of intensity of work, might be an excessive burden even on a healthy person. It may be even more harmful to a disabled person, or one with decreased working capacity. Hence it would seem better to reject this suggestion despite its seeming advantages lest it encourage to do such work. The objection might be that the causer of damage would enjoy undeserved advantage in such a case, and that the employee would be prevented from improving his living conditions. The reply may be that the livelihood of the working population — including people of decreased working capacity — is being served by more and more opportunities, and that if anybody avails himself of the opportunity to acquire new qualification in addition, he will usually find suitable employment without imperiling his reduced health. True,

the causer of damage might come off somewhat better in this case, but this would be not too significant, as he would have to bear the costs of a possible acquisition of new aulification. And, what is most important, we must ensure the protection of people's health — be it against their intentions. Despite what has been said here, it should be permissible for a certain period to dis regard the total incomes drawn in this way if, for instance, the person concerned had no other possibility than to accept such work.

As concerns the suggestion to extend the concept of extraordinary performance to cases where the employee's wages are raised in general, this seems to be acceptable. Or, more correctly, the idea in itself is good, only it should be realized not within the scope of extraordinary performance.

The extrem vacillation experienced today in connection with judging extraordinary performance can be ascribed not only to the highly varied character of the given situations. Two points of view render such judgment especially inconstant. One is that both jurisprudence and judicial practice try to relax the inflexibility resulting from the percentile determination of the decrease of working capacity in this way. The solution I have suggested would have the effect that the percentile determination of the decrease of working capacity would cease to be the basic determinant of the earnings lost, especially as concerns their upperr limit, and that the degree to which working capacity is decreased would become one basis for judging the injured person's conduct in respect to his obligation to find employment; consequently the above factor of vacillation could be eliminated. In this way the percentile determination would lose its present dominating role, and there would be no need for correcting its shortcomings by occasional extensions — or probably restrictions — of the conpect of outstanding working performance. The other factor giving rise to uncertainty and vacillation is the circumstance that the expenses designed for eliminating the disadvantages resulting from damage are very often sneaked in the bag of extraordinary performance. The rulings in judicial practice, as well as the reasons given for theoretical suggestions, have repeatedly pointed out that persons whose working capacity is decreased have always greater difficulties in menaging the affairs of everyday life, in maintaining social relations, than healthy people, even if they find employment in which they attain their former incomes. And this requires not only greate efforts, but also additional outlays, and it is the latter hat must be covered by the income drawn from extraordinary performance which is therefore not to be taken into account. As appears from the reasoning, certain additional expenses are incurred here in fact. These, i. e. their actual amount, must be determined and made part of the compensation, not as earnings lost, but rather as actual outlays. There is, of course, no special difficulty in paying for such expenses in monthly instalments rather than in one sum. Moreover, if the amount cannot be determined exactly, general damage can be assessed instead. The essence is that this should be damage suffered, and not profit lost. This distinction has practical consequences, too. Namely if the injured person attains higher incomes after some time, the amount allowed as earnings lost can be reduced or discontinued. But amounts allowed for additional outlays may not be reduced in such a case. (They can be reduced if no such additional expenses are incurred any more because the condition of the injured is improving. But this may be the case irrespective of extraordinary performance.)

I believe that if these two factors, wich at present disturb the consistent appraisal of extraordinary performances considerably, would be eliminated according to my suggestion, the vacillations experienced now could be eliminated for the most part, and the disregard of earnings drawn from extraordinary performance would be effected as fits the purpose, and within reasonable limits.

d) *Consideration of subsequent changes*

I. *Changes in the state of health, employment and earnings*

We have concluded in Part I that if after the assessment of compensation changes occur in the damaged person's state of health or circumstances, both the damaged and the causer of damage may request modification of the compensation, its raising or reduction. This conclusion applies also to the type of case discussed here. Hungarian statutes also contain provisions to this effect. They state at the same time that if the increase of the employee's wages is the results of acquiring a new or higher qualification, this increase can only be taken into account after one year has passed since the acquisition of the qualification.

II. *Compensation due to juvenile employees.*

Determination of earnings lost in case of juvenile employees is substantially connected with the preceding set of questions. This, too, will represent a problem only in case of lasting decrease of working capacity. Namely the juvenile employee's working capacity is not yet fully developed. His earnings are smaller at the time the damage is suffered than they would be at his adult age. If the general principle were applied that the damaged person is not entitled to compensation for earnings lost if he earns as much as at the time he suffered damage, the juvenile employees would be deprived of compensation at adult age in most cases. And this would be unjust in many cases, since as a result of their decreased working capacity they often will earn less than other employees in comparable jobs. Consequently, compensation can only be determined with a temporary validity in such cases. Final assessment can only be made after the age of full earning capacity has been attained.

In my opinion, the correct solution would be to set the age of full earning capacity uniformly at 18 years. Rules governing the protection of juvenile workers also draw the limit at the age of 18. Below this age the young person is still in the developmental stage, so it would be utterly wrong to take such young age as the basis for determining a final amount of compensation. It is equally proper that if the injured person is learning to get some qualification at this age, the decision concerning his compensation should be reached only after he has acquired this qualification. But I should like to draw the attenion to the fact that in such cases the injured person will not always be at disadvantage compared to employees in similar jobs. So — in many cases — this should not be an assessment of earnings lost, but rather payment for additional, periodically recurring outlays, possibly in the form of an annuity.

CONTENTS

Part I

General Principles of liability for damage caused within the scope of employment

Felelős kiadó: Dr. Kovács István
Megjelent 400 példányban 15 (A/5) ív terjedelemben
Kézirat a nyomdába érkezett: 1968. július hó.
Készült: Linó szedéssel, íves magasnyomással az MSZ 560-59
és az MSZ 5603-55 szabványok szerint.
68-6000 — Szegedi Nyomda Vállalat

A SZEGEDI JÓZSEF ATTILA TUDOMÁNYEGYETEM ÁLLAM- ÉS JOGTUDOMÁNYI KARÁNAK E SOROZATBAN ÚJABBAN MEGJELENT KIADVÁNYAI

Tomus X.

Fasc. 1. Búza László: *A nemzetközi jogi normák kialakulásának útja (A fejlődésnek az ENSZ alapokmányában meghatározott iránya a békés egymás mellett élés s a jószomszédi és baráti együttműködés szellemében)* (Szeged, 1963.) 49 l.

Fasc. 2. Maday Pál: *Falusi tisztségviselők hivatali eskülje a gyulai uradalomban* (Szeged, 1963.) 29 l.

Fasc. 3. Horváth Róbert: *Kossuth haladó gondolatai a londoni egyetemen tartott elméleti közgazdaságtani előadásaiban* (Szeged, 1963.) 34 l.

Fasc. 4. Nagy Károly: *A nemzetközi szerződések hiteles értelmezése* (Szeged, 1963.) 34 l.

Fasc. 5. Pólay Elemér: *A stipulatio szerepe az erdélyi viaszostáblák okirat-anyagában* (Szeged, 1963.) 34 l.

Fasc. 6. Bíró János: *Kollégiumok a római Dáciában* (Szeged, 1963.) 33 l.

Fasc. 7. Both Ödön: *A beszámítást kizáró és a büntetést megszüntető okok Szeged város reformkori büntetőjogában* (Szeged, 1963.) 128 l.

Tomus XI.

Fasc. 1. Господин Желев: *Народное представительство в народной Республике Болгарии* (Сегед, 1964.) стр. 52.

Fasc. 2. Georges Antalffy: *Probèmes nouveaux de la théorie du droit dans l'évolution de la démocratie socialiste* (Szeged, 1964) 74 l.

Fasc. 3. Besenyei Lajos: *Az építési szerződések néhány elvi és gyakorlati problémája* (Szeged, 1964.) 35 l.

Fasc. 4. Papp Ignác: *A szocialista demokrácia elemei mezőgazdasági termelőszövetkezeteinkben* (Szeged, 1968.) 28 l.

Fasc. 5. Nagy Károly: *Az állam idő előtti elismerése és a beavatkozás a nemzetközi jogban* (Szeged, 1964.) 32 l.

Fasc 6. Tóth Árpád: *A kivételes hatalomról szóló 1912. évi LXIII. tc. létrejöttének előzményei 1868-tól a századfordulóig* (Szeged, 1964.) 32 l.

Fasc. 7. Horváth Róbert: *Berzeviczy Gergely közgazdasági és népességi tanai* (Szeged, 1964.) 34 l.

Fasc. 8. Bólya Lajos: *A biztosító és kényszerítő intézkedések rendszere a büntető eljárásban* (Szeged, 1964.) 63 l.

Fasc. 9. Pólay Elemér: *Az eladói kellékszavatosság szabályozása a preklasszikus római jogban* (Szeged, 1964.) 75 l.

Tomus XII.

Fasc. 1. Buza László: *A nemzetközi jog fejlődése a felszabadulás óta* — Szilbereky Jenő: *A Magyar Népköztársaság jogrendszerének fejlődése* (Szeged, 1965.) 48 l.

Fasc. 2. Horváth Róbert: *Konek Sándor professzor (1819—1884) elméleti statisztikai munkássága és a magyar polgári statisztikai elmélet alakulása* (Szeged, 1965.) 66 l.

Fasc. 3. György Antalffy: *L'État socialiste et la théorie marxiste de l'État et du droit* (Szeged, 1965.) 94 l.

Fasc. 4. Pólay Elemér: *A censori regimen morum és az ún. házi bíráskodás* (Szeged, 1965.) 43 l.

Fasc. 5. Bárdosi István: *A perbeli egyezség és a perjogi alapelvek kapcsolata* (Szeged, 1965.) 18 l.

Fasc. 6. Bérczi Imre: *Az újítói jog néhány gazdasági és jogi problémája* (Szeged, 1965.) 23 l.

Tomus XIII.

Fasc. 1. Antalffy György: *Az állam és társadalmi szervek viszonyának újabb állam- és jogelméleti problémáiról* (Szeged, 1966.) 115 l.

Fasc. 2. Bárdosi István: *A polgári peres és nem peres eljárás viszonya, különös tekintettel a fizetési meghagyásos eljárásra* (Szeged, 1966.) 20 l.

Fasc. 3. Bíró János: *Kollégiumok Aquincumban* (Szeged, 1966.) 20 l.

Fasc. 4. Horváth Róbert: *Sur quelques problèmes essentiels de la démographie contemporaine hongroise: L'interdépendance théorique de l'économie et de la démographie et la question de la planification de la main-d'oeuvre* (Szeged, 1966.) 15 l.

Fasc. 5. Pető István: *A terhelt jogi helyzete a magyar büntető eljárásban* (Szeged. 1966.) 21 l.

Fasc. 6. Ruszoly József: *A Szegedi Nemzeti Bizottság részvétele a demokratikus államhatalom gyakorlásában (1944. december—1945. január)* (Szeged. 1966.) 29 l.

Fasc. 7. Szentpétery István: *Általános vezetéselméleti koncepciók* (Szeged, 1966.) 38 l.

Fasc. 8. Tóthné Fábián Eszter: *A szállítási szerződések szankciós rendszere* (Szeged, 1966.) 54 l.

Tomus XIV.

Fasc. 1. Georges Antalffy: *Chapitres choisis de l'histoire des idées politico-juridiques de l'Antiquité et du Moyen-Age* (Szeged, 1967.) 60 l.

Fasc. 2. Bíró János: *Az „actio fiduciae" és alkalmazási köre a praeklasszikus jogban* (Szeged, 1967.) 31 l.

Fasc. 3. Dobó István: *A hűtlen és hanyag kezelés kérdései a termelőszövetkezetekben* (Szeged, 1967.) 41 l.

Fasc. 4. Horváth Róbert: *A statisztika fejlődése Franciaországban és annak magyar tanulságai* (Szeged, 1967.) 126 l.

Fasc. 5. Martonyi János: *A diszkrecionális mérlegelés kérdései* (Szeged, 1967.) 54 l.

Fasc. 6. Nagy Károly: *Az állam elismerése a mai nemzetközi jogban* (Szeged, 1967.) 128 l.

Fasc. 7. Elemér Pólay: *Die Sklavenehe und das römische Recht* (Szeged, 1967.) 84 l.

Fasc. 8. Tóth Árpád: *A kivételes állapot intézményének kialakulása néhány burzsoá állam jogrendszerében* (Szeged, 1967.) 19 l.

Tomus XV.

Fasc. 1. János Martonyi: *La protection du citoyen dans les procédures administratives* (Szeged, 1968.) 39 l.

Fasc 2. Balázs József: *A bűnügyi statisztika elméletének első felmerülése és kialakulása a statisztikai tudományban* (Szeged, 1968.) 22 l.

Fasc. 3. Horváth Róbert: *Magda Pál (1770—1841) a statisztikus és társadalomtudós* (Szeged, 1968.) 26 l.

Fasc. 4. Nagy Károly: *A kormány elismerése a mai nemzetközi jogban* (Szeged, 1968.) 91 l.

Fasc. 5. Papp Ignác: *A demokrácia elméleti és gyakorlati kérdései a termelőszervezetekben* (Szeged, 1968.) 136 l.

Fasc. 6. Ruszoly József: *A választási bíráskodás Magyarországon a két nemzetgyűlés idején (1920—1926)* (Szeged, 1968.) 48 l.

Fasc. 7. Veres József *A termelőszövetkezeti tagok munkaügyi jellegű jogvitái* (Szeged, 1968.) 32 l.

Fasc. 8. György Antalffy: *Le concept de la souveraineté dans la théorie générale de l'État et du droit* (Szeged, 1968.) 27 l.

Fasc. 9. István Szentpéteri: *The Development of Interpretation of Bureaucracy* (Szeged, 1968.) 36 l.

Fasc. 10. László Nagy: *The employer's liability for damage caused within the scope of employment on the Hungarian Labour law* (Szeged, 1968.) 144 l.