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RISK OF COMPENSATION IN THE LIGHT OF HARM TO A THIRD PARTY BY AN EMPOYEE

Summary
The paper undertakes an analysis of an employer`s financial liability for damages caused by an employee to a third party. The author presents controversies which appeared in this field of law in the doctrine and judicature. An attempt was made to determine the basis and regulations that trigger the liability of the employer. The paper presents how the regime of liability changes depending on whether the employer and the victim were or were not in any relationship of obligation before the damage occurred. However, the main purpose of the paper is to focus on a situation in which the victim, called the third party, is also an employee of the employer. The contemporary literature emphasizes the fact that the employer is increasingly burdened with the risk of paying compensation due to employment relationship with the victim. In practice, it is pointed out that the risk determines the extent of the employer's compensation liability for damages. The aim of the paper is to analyze the practical significance of this risk in the scope of the employer's liability.

Key words: *compensation risk, liability for damages, employee, employer*

Introduction

There is no doubt that the Labor Law contains a lot of solutions protecting an employee as the weaker party of an employment relationship. This assumption also applies to an employee`s compensation liability for a damage caused to a third party during the employment relationship. According to Article 120 § 1 of the Labour Code,[1] when an employee causes a damage to a third party performing their duties, the employer is obliged to repair the damage. Furthermore, by virtue of §2 of this article, an employee, who caused the damage,

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[1] Journal of laws of 2016, item 1666.

bears legal liability to the employer who repaired the damage, according to provisions of Section V Chapter I of the Labour Code.

The above provision is controversial. Firstly, it is disputed whether it refers only to an unintentional damage, or whether the legal rule described in this provision also applies when the perpetrator acted intentionally. Secondly, one can pose a question what legal procedures can be applied and what is the scope of the employer's liability when an employee causes a damage to a third party. Some representatives of the doctrine indicate that this concept is ambiguous. Moreover, they emphasize that other legal procedures are applied to the employer`s liability when the aggrieved party is an employee with whom the employer, before the damage took place, had been in a relationship of obligation, whereas other procedures are applied when such a relationship had not existed. In the first case, the grounds for liability should be based on the provisions of *ex contracto,* in the second one of *ex delicto.*

The analysis of this issue leads to a statement that the employer's liability to financial compensation may be different when the victim is also an employee employed by the employer . In such a situation the liability is determined by a compensation risk whose existence is more and more stressed in the doctrine.

Some doubts appear, however, whether a damage caused in the process of performing an employee`s duties results in obligatory exclusion from the employer's liability. *Prima facie* it seems so. However, such an opinion did not gain full approval of representatives of the doctrine.

1. Personal risk as the basis of an employer's liability for damages caused by an employee to a third party

Personal risk is one of the risks that an employer must take into consideration. It is associated with proper selection of staff. B. Ćwiertniak noted that an employer, having specific legal institutions, can use them to check upon an employee's suitability for work[2]. For this reason, it is the employer who bears all consequences for the wrong selection of employees[3]. Therefore, a claim that an employee is

[2] B. M. Ćwiertniak, [in:] K. W. Baran (ed.), *Labor Law,* Warsaw 2010, p. 137
[3] Compare. L. Florek, *Labor Law,* Warsaw 2011, p. 50.

unsuitable during the work process does not entitle an employer to an arbitrary, immediate termination of the employment relationship with them. To some extent, this risk is also associated with an obligation to tolerate an employee whose services are not beneficial to the employer[4].

One of the aspects of the risk is that the employer is also liable for damages resulting from the actions of subordinate employees[5]. Non–culpable mistakes of employees committed due to their helplessness or absence of proper preparation and training, are exclusively the responsibility of the employer[6]. These are the so called 'errors of the hand or the eye'[7]. The literature emphasizes that the risk in question is not limited solely to an unintentional damage caused by an employee. J. Stelina stresses that in some cases this risk also concerns results of actions causing a damage to an employee[8].

2. The impact of intentional and unintentional fault of a perpetrator employee on the scope of their liability for damages

Article 120 of the Labour Code includes one of the most important provisions dealing with the personal risk. This provision has been effective since the entry into force of the Labor Code on January 1, 1975. Previously, the liability of an employing entity for damages caused by their employee to the third person was regulated solely by the provisions of the Civil Code[9]. Under the terms of §1 of this article only the employer is obliged to repair the damage if one of the employees while performing their duties inflicted a damage to a third person. The above provision does not constitute an independent basis for liability. It only indicates an entity passively authorized to bear liability[10].

[4] B.M. Ćwiertniak, *op. cit.*, s. 137.
[5] Ibidem
[6] See. e.g. Z. Kubot, [in:] Z. Kubot, T. Kuczyński, Z. Masternak, H. Szurgacz, *Labour Law. Outline of the lecture*, Warsaw 2010, p. 78; T. Liszcz, *Labour Law*, Warsaw 2012, p. 97; A. M. Świątkowski, *Polish Labour Law*, Warsaw 2003, p. 61.
[7] T. Liszcz, *op. cit.*, s. 97.
[8] J. Stelina [in:] J. Stelina (ed.), *Labor Law*, Warsaw 2013, p. 10.
[9] D. Skupień, *Rules of civil liability for damages caused by an employer to the third party* (in :) Z. Hajna, D. Skupień (ed.), *Problems of civil liability in France and in Poland*, Łódź 2016, p. 169.
[10] Judgment of Supreme Court of March 25, 1987, II CR 48/87, LEX No. 8817.

The legal norm resulting from this provision is designed to protect the employee against unfavourable consequences of performing work on the employer's behalf. Therefore, the employee is not directly liable to the victim. On the basis of provisions of the Labour Law the employee is only liable to the employer who had already made restitution for the damage. This peculiar 'labour immunity'[11], however, is not absolute. In practice, one can imagine situations in which the 'immunity' is waived. In the opinion of the Supreme Court, the immunity is not applicable when, due to the bankruptcy of the employer, the enterprise is unable to pay the victim a due diligence. In this case, the aggrieved worker is entitled to seek compensation directly from the perpetrator[12].

In the light of the subject matter undertaken in the paper, certain doubts arose with respect to the provision, namely whether it refers both to unintentional damage and to a deliberate act of the perpetrator. The judicature shares the opinion that it may be applied only when the damage was caused by an unintentional act[13]. Some supporters of the doctrine are in favour of the opinion that *de lege ferenda* of the analyzed provision should be given such a wording that refers only to such situations[14].

According to K. Jaśkowski and E. Maniewska, when the damage is caused intentionally, the employer is not the only entity obliged to its restitution[15]. The judicature stresses that in such a situation the perpetrator of the damage is liable to the victim on general bases regardless of the company's liability[16]. In the opinion of the author such interpretation is justifiable. The foundations of the employer's liability, in this regard, are based on the assumption that the employer is responsible for the entire enterprise[17]. According to B. Wagner, the employer is liable for a damage caused intentionally by an employee to a third party and the obligation to compensate for the damage is grounded in the provisions of

[11] Yes T. Liszcz, *op. cit.*, s. 323
[12] Judgment the Supreme Court of 11 April 2008, II CSK 618/07, LEX No. 496844
[13] Compare. SN resolution (7) of 12.6.1976, III CZP 5/76, OSNCP 1977, No. 4 item 61; Judgment of Supreme Court of 28 August 1980, IV PR 252/80, LEX No. 12675.
[14] D. Skupień, *op. cit.*, s. 180.
[15] K. Jaśkowski, E. Maniewska, *Labour Code. Commentary, T. 1*, Kraków 2006, p. 424. See Ł. Pisarczyk, *Employer's risk*, Warsaw 2008, p. 331
[16] Judgment of Supreme Court of February 2, 2011, II PK 189/10, LEX No. 811844.
[17] See P. Prusinowski, (in :) Z. Góral (ed.) *Contractual basis of employment*, Warsaw 2012, p. 52

the Labour Code[18]. D. Key has a different opinion, for a damage caused intentionally, only the employee–perpetrator shall be liable under provisions of the Civil Code[19] . The author of the paper subscribes to the opinion of B. Wagner. Thus, it should be assumed that in case of a deliberate act the perpetrator is not protected by the legal norm resulting from Article 120 of the Labour Code. Nevertheless, this does not mean that the employer is released from the obligation to pay compensation in this regard. It is reasonable to claim that the basis for such an assumption can be found in provisions describing personal risk which each employer is burdened with.

Another question should be posed here, whether the recourse liability for the damage is governed by the provisions of Labour Law or Civil Law. T. Liszcz thinks that regardless of whether the act was intentional or unintentional, the rules of liability of the perpetrator towards the employer who made a damage restitution, are described in the Labour Code[20]. If the damage was caused to a third person unintentionally, the employee is liable to the employer up to three monthly remunerations. However, should the damage be caused intentionally, the scope of the employee's recourse obligation is governed by Article 122 of the Labour Code[21], according to which the intent of the perpetrator's actions determines their full liability for the damage.

3. Employer's liability for damages caused by an employee to a third person who is not an employee of the employer

According to Article 120 of the Labour Code the victim is a third person. It can be a natural or legal person as well as another employee employed in the same company. Recently, it has been emphasized in the literature that an essential element in defining rules for the employer's liability is whether the employer had been bonded with the victim by

[18] See. B. Wagner, (in :) B. Wagner (ed.) *Labour Code. Commentary*, Gdańsk 2007, p. 484

[19] D. Klucz, *Breach of duties by an employee*, Labor Law Monitor Libraries, Warsaw 2009, p. 54.

[20] T. Liszcz, *op. cit.*, s.324.

[21] S. Koczur, *Axiology of material responsibility of an employee*, Warsaw 2016, p. 21. See also T. Liszcz, op. cit., Warsaw 2013, p. 322; W. Perdeus, (in :) K.W. Baran (ed.), *Labour Code. Commentary*, Warsaw 2014, p. 811; G. Bieńka (ed.), *Civil Code. Comment.* T.1 Obligations, Warsaw 2003, p. 402.

a relationship of obligation or not, before the damage was caused[22]. If there had been not such a relationship between the parties, the employer's liability is determined by the tort legal procedures. In this case, the employer`s liability should be determined by Article 430 of the Labour Code[23] which describes the liability of the employer for a damage caused by a subordinate due to their fault (intentional or unintentional) in performances of tasks entrusted to them. However, if the employer and the victim had been in such a relationship before the damage occurred, the employer is liable for any damage due to the contractual legal procedures. On the basis of this legal regime, according to Article 474 of the Labour Code, the employer is liable personally for any acts and omissions of workers whom they entrust performance of tasks[24].

The above assumption has a significant impact on the scope of application of Article 120 of the Labour Code. According to its content, the employer is liable if an employee caused a damage to a third person during performance of their duties, and not only if a chance of performing of these duties existed[25]. Thus, the damage must remain in a normal intra–organizational functional relationship with performances entrusted to an employee which they undertake on the basis of an employment relationship as part of performing tasks alongside with the policy of the enterprise[26]. Thereby, if the link between the damage and the work processes is broken, and the damage occurs only 'on the occasion' of performing duties, the employee *a prima facie* should be liable to tort under general rules (Article 415 of the Civil Code)[27].

It is necessary to emphasize the fact that the literature broadly describes the problem of the connection between an intentional behavior of a perpetrator and a damage caused during the work process. It was agreed that intentional actions of a perpetrator cannot remain in casual

[22] Pisarczyk, *op. cit.*, s. 330- 331.
[23] Dz. U. 2017, item 459.
[24] See. e.g. Ł. Pisarczyk, op. cit., p. 331; T. Liszcz, op. cit., p. 324; M. Zieleniecki (in :) J. Stelina (ed.), Op. cit., p. 501. Another opinion is L. Florek. According to this author, the basis of employer's liability in this area should be sought in art. 430 k.c. See. L. Florek, op. cit., p. 228.
[25] Judgment of Supreme Court (7) of 19 June 1975, V PRN 2/75, LEX No. 12356. Cf. Judgment of Supreme Court of 29 November 2013, 87/13, LEX No. 1418874.
[26] Yes. W. Perdeus (in :) K.W. Baran (ed.), Op. cit., p. 810. See also the Judgment of the Supreme Court of February 19, 1976, III PR 21/76 PiZS 1977/10/68
[27] Compare. Ł. Pisarczyk, *op. cit.*, s. 330- 331.

relationship 'with performance of the employee's duties'[28]. According to this assumption any deliberate act aimed at causing a damage cannot be qualified as caused during work processes. In the opinion of D. Skupień, work is hardly ever performed with an intention of deliberate damage[29].

In the opinion of the author of the paper, Ł. Pisarczyk is right claiming that breaking the link between the damage and work processes does not mean that the employer is no longer burdened with the risk to compensate for the damage[30]. In some cases, they may also be liable to the third party for the damage. In judiciary III PR 21/76, the Supreme Court expressed an opinion that in the light of Article 120 § 1 of the Labour Code, the employee's workplace will not be liable for damages caused on its premises by a person remaining with it in an employment relationship if the perpetrator caused the damage to another person during their work processes not only by activities exceeding the scope of their duties but beyond the scope of company performances as well[31]. The author approves of the opinion expressed by the Supreme Court that a damage caused during performing duties excludes the application of regulations, expressed in Article 120 of the Labour Code, to protect the perpetrator of a damage. In the opinion of the author this does not mean that the employer's liability is excluded[32]. Such a statement is also approved by representatives of the doctrine, who claim that intentional actions of an employee in causing a damage does not exclude liability of the employer.

The opinion expressed by Ł. Pisarczyk, that breaking the relationship between the damage and work processes not always results in excluding the employer's liability, seems to be reasoned. Such a situation takes place only when the employer's liability is based on the content of Article 430 of the Civil Code, thus, when the damage is done to a person with whom the employer does not have any relationship of obligation. Breaking the relationship with work results in a dismissal of the employer from the obligation to bear liability since the liability is

[28] Ibid., Pp. 330.
[29] Skupień, op. cit., (in :) Z. Hajna, D. Skupień (ed.), op. cit., p. 174.
[30] Ł. Pisarczyk, *op. cit.*, s. 331.
[31] See. Judgment of Supreme Court of February 19, 1976 III PR 21/76, PiZS 1977/10/68.
[32] Compare. D. Skupień, *op. cit.*, (w:) Z. Hajna, D. Skupień (red.), *op. cit.*, s. 172; D. Klucz, *op. cit.*, s. 54.

justified only when the employee acts for the benefit of the employer. In other situations in which the employer had had a relationship of obligation with the aggrieved person before the damage occurred, he or she is not released from the liability although the damage was caused in the process of performing duties. As a consequence, the employer is liable for non–performance or improper performance of a duty[33].

4. Compensation liability of an employer for a damage caused by an employee to another employee

If the victim is another employee of the same employer, one can pose a question about the regime of liability of the employing entity. The literature seems to emphasize more and more the so called compensation risk which is a part of a wider risk called a damage risk[34]. The author believes that the risk, in this regard, determines the employer's liability regime. It applies both to intentional and unintentional actions of the perpetrator.

The employing entity is obliged to compensate an employee for a damage (in kind and to a person) caused during a work process, even if the damage was not the employer's fault[35]. Ł. Pisarczyk points out that that risk occurs, in all the cases, when the employer is liable to compensate a damage to a victim bearing liability on risk principle or on the basis of objective liability[36].

When the employing entity's liability is based on the risk principle, the employer may free himself/herself from the liability through demonstrating the existence of exoneration premises. Thus, only an action of force majeure, the fault of the victim or the third person for whom the employer is not responsible, can free the employer from liability[37].

This assumption leads to the conclusion that compensation risk, in this case, is based on the principle described in the literature of Civil Law as 'clean risk'[38]. According to the above principle, liability of the debtor

[33] Ł. Pisarczyk, *op. cit.,* s. 331.
[34] Compare. ibidem, 91 and 331. See also L. Florek, op. cit., p. 50.
[35] Ł. Pisarczyk, *op. cit.,* s. 91.
[36] Ibidem s.332
[37] Ibidem, *s.* 74.
[38] A. Rembieliński, *Civil liability for a damage caused by a subordinate*, Warsaw 1971, p. 42. The principle of "clean risk" was described by A. Rembielinski in 1971. It should

occurs in isolation from the premise of guilt and unlawfulness[39]. A proof as a lack of guilt (exculpation) does not release from responsibility[40]. The only relevant matter is the result in the form of the damage[41]. Ł. Pisarczyk writes that compensation risk applies in case of an accident at a work place, occupational disease or in all those situations in which the employer's liability cannot be excluded by means of exculpation[42].

Some doubts arise when Ł. Pisarczyk mentions the second principle on which compensation risk is based. According to his opinion 'objective liability' can apply in all situations in which the employer is obligated to pay compensation only due to the fact of occurrence of a damage. However, this liability can be excluded neither as a result of specific behavior of the victim nor as a result of external factors[43]. According to the author, such cases concern mobbing, situations related to faulty termination of the employment contract or not issuing the work certificate or issuing it with an inappropriate content[44].

Thereby, it is liability for results which is similar to the principle of 'pure risk' liability. The term 'objective liability' is defined as liability on a risk basis. In the view of the author of the paper, Ł. Pisarczyk mentioning two principles on which compensation risk is embedded, does not mean the same risk principle. Such an assumption would lead to irrational results. It is rather reasonable to assume that 'objective liability' and 'risk principle' are not identical concepts in this regard. The argument for such a statement may be the fact that describing objective liability, the author does not indicate, the same happens while describing the risk rule, any exoneration premises. Therefore, it must be assumed that liability of the employing entity, in this case, is absolute.

In the above scope the assumption that an objective liability is a liability on a risk basis without a possibility of being released from it by showing exoneration reasons, one must draw attention to Article 430 of

be noted, however, that even today the doctrine accepts the existence of this principle. See. J. Kuźmicka-Sulikowska, *The principles of tort liability in the light of new trends in Polish legislation*, Warsaw 2011, p. 163.

[39] Z. Banaszczyk, *Responsibility for damages caused in the exercise of public authority*, Warsaw 2015, p. 28.

[40] M. Kaliński, *Damage on property and its repair*, Warsaw 2014, p. 123.

[41] Z. Banaszczyk, *op. cit*., s. 28.

[42] Ł. Pisarczyk, *op. cit*., s. 347.

[43] Ibidem, p.74

[44] Ibidem, p.347-348

the Labour Code. Firstly, it is liability for the result. Secondly, it is an absolute liability because there is no possibility of freeing oneself within Civil Law provisions[45].

However, it cannot be forgotten that according to the literal wording of this article the superior is liable for the damage caused by a subordinate only when the damage occurs in connection with performance of tasks entrusted to them, and not along with them[46]. Thus, breaking the relationship with work would result, similarly to a situation in which the entity is not related to a relationship of obligation with the employer, in freeing the employer from liability for the damage caused to an employee. It is not possible to forget the fact that there is a bilateral relationship between the victim employee and the employer, namely the employment relationship. If this relationship does not exist, a damage would not generally occur. In provisions describing compensation risk, similarly to provision of Article 430 of the Labour Code, the employing entity`s liability is not limited only to damages caused by an employed entity during performance of activities entrusted to them.

The notion 'work process' accepted in the doctrine is the basis for this assumption. The literature emphasizes that a damage caused during work process is not only a damage that is directly related to a performance of duties entrusted to a worker by the employee. A compensation risk also exists when the damage is caused only in a loose relationship with the work processes understood as direct execution of tasks entrusted, as well as when the damage is caused along with performing those processes (e.g. mobbing or discrimination)[47]. The foundation underlying such an assumption is that the employer is obliged to organize work processes and monitor their proper execution. The employer also bears consequences for faulty organization of those processes[48].

The above difference does not have a major impact on the scope of the civilian risk principle in Labour Law. This is due to the specifics of this branch of law. The doctrine emphasizes that this specificity justifies

[45] See. F. Błachuta, W. Bryl, S. Buczkowski, R. Czarnecki and others, *Civil Code. Commentary*, Warsaw, 1972, p. 1049. See J. Kuźmicka-Sulikowska, op. cit., p. 163.
[46] Compare. Judgment of Supreme Court of December 15, 1977, I CR 444/77, LEX No. 1671968.
[47] Compare. Ł. Pisarczyk, *op. cit.*, s. 333.
[48] Ibidem, p.290

the application of solutions different from those adopted in the law of obligations[49]. Judicature approves of an extension of the meaning of Article 430 of the Labour Code in the area of employer's liability. Gdańsk Court of Appeal stated that *compensation claims related to mobbing (...) should be claimed by an employee only from an employer who employs the victim of mobbing. The legal basis for an employer's liability for a damage caused by actions of another employee is Article 430 of the Labour Code describing liability of a superior for a damage caused to another person by a subordinate in a performance of activities entrusted to them*[50]. According to the above thesis, the employer is liable for mobbing on the basis of tort–risk principle expressed in Article 430 of the Labour Code, only if this pathological phenomenon would occur in the course of performing official duties. Mobbing always exists along with work processes and is understood as direct performance of entrusted duties being *essentialia negotii* of an employment relationship. Thus, it would be impossible to base a compensation risk on the principle of liability expressed in Article 430 of the Labour Code. Moreover, an implementation of the legal norm resulting from this article and making the employer liable for mobbing in the subject matter is possible only as a result of broadening the interpretation of Article 430 of Labour Law.

Some of the supporters of the doctrine do not approve of the opinion expressed in judiciary. D. Dorre–Konas states that due to civilian principle of guilt, described in Article 415 of the Labour Code, a mobbing perpetrator is the only person liable for it[51]. Whereas, the employer`s liability based on the principle of risk, described in Article 430 of the Labour Code, can only take place exceptionally, *(...) when*

[49] Ibidem, p. 290

[50] Judgment of the Gdańsk Court of Appeal of February 28, 2014, III APa 2/14, LEX No. 1448508.

[51] D. Dorre-Kolasa [in:] A. Sobczyk (ed.) *Labour Code. Commentary*, Warsaw 2015, pp. 487-488. M. Gersdorf and K. Rączka have little different opinion; according to them an employer bears absolute responsibility for a damage, suffered by an employee, for mobbing even if they do not commit mobbing themself and they do not know that a damage was caused by their employees. See. M. Gersdorf and K. Rączka, *Labour Law in Questions and Answers*, Warsaw 2009, p. 321. T. Liszcz and J. Semen also write about the absolute responsibility of an employer in the subject matter. See. L. Liszcz, *Employer's compensation liability towards an employee.* 2, PiZS 1/2009, p. 4; J. Semena, *Claims for mobbing described by the doctrine and jurisdiction* PiZS 5/2014, p. 2

mobbing is caused in performing specific activities towards an employee, which were entrusted to them by an employer–perpetrator[52].

The above modification of the liability principle, described in Article 430 of the Labour Code, is not the only one based on Labour Law. The assumption that liability of an employing entity, due to wording of this article, cannot be excluded or limited, was changed. The statement that an employer can free himself/herself from liability, for example, by demonstrating the existence of exoneration premises is quite widely accepted[53]. Thus, the risk rule expressed in Article 430 of the Labour Code is no longer so ruthless.This branch of law gave reasons to make the above risk principle and the principle of "clean risk" similar in meaning. It should be noted that in Civil Law only the second principle allows the employer to release from liability by demonstrating exoneration premises.

Ł. Pisarczyk, describing the compensation risk[54] on the basis of "objective liability", does not necessarily mean the risk principle described in Article 430 of the Labour Code. It seems that the author characterizes compensation risk in such a way that it shows some similarity to the civilian principle of equity. He states that the legislator used the construction of objective liability in all the cases, in which the employer breaches of certain obligations and a damage to an employee is caused in circumstances considered particularly severe to them, to justify the employer's obligation to compensate for a damage regardless of circumstances of the specific case. So, the risk of compensation is activated when disruptions, which occur in work processes, cause a damage to an employee in particularly severe circumstances[55]. Thereby, the risk in question applies when the *expressis verbis* provisions of Labour Law describe liability of the employing entity, as well as when liability is justified by the overall circumstances of the case. It should be noted that in the second case only the assessment element in the form of a negative legal judgment justifies charging an employer with the above

[52] D. Dorre- Kolasa [w:] A. Sobczyk (red.), *op. cit.*, s.487.
[53] K. Jaśkowski, E. Maniewska, *op. cit.*, s. 346-347.
[54] See. A. Pisarczyk, *op. cit.*, s. 91.
[55] Ł. Pisarczyk, *op. cit.*, s. 347.

risk[56]. Determining whether circumstances are particularly severe for the employee is always a subject to analysis by a dispute resolution body. Only reasons of rightness can justify such a solution.

Significantly important to accept the principles of equity in the above scope is the fact that there is *in abstracto* an essential disproportion of assets between parties of an employment relationship. Secondly, an employee contributes to the growth of such disproportions by working with their own hands. These both elements have significant impact on the determination of the employer's compensation liability[57]. This fact should also be taken into account in the scope of compensation risk.

Nevertheless, the importance of the principle of equity in Labour Law can, for several reasons, raise justified doubts. In Civil Law the principle in question is only of subsidiary nature[58]. It is assumed that it has been applied only after the legislator *expressis verbis* described such a possibility in law[59]. The doctrine emphasizes that in Polish law there is no general court competence to adjudicate *ex aequo et bono*[60]. It should be noted that the legislator did not refer to this principle of liability in any provision of Labour Law, Thereby, assuming that the compensatory risk is, to some extent, based on this principle would ultimately result in a breach of the *ex aequo et bono* principle.

Secondly, if one bases the employer's liability on the principle of equity one can pose a question about the scope of this liability. In Civil Law it depends on life situation of the victim, the offender's financial status and circumstances of the particular case[61]. The principle of full compensation, described in Article 361 § 2 of the Civil Code, has a relative character and describes the upper limit of indemnification[62].

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[56] See J. Iwulski, *Employer's liability for a damage caused to an employee and for violation of employee rights in the light of court decisions,* [in:] A. Świątkowski (ed.) *Studies in the field of labour law and social policy,* Krakow 1994, p. 119.

[57] Ł. Pisarczyk, *op. cit.,* p. 308

[58] Z. Banaszczyk, *Responsibility for damages caused during the exercise of public authority,* Warsaw 2015, pp. 30-31; W. Czachórski (in :), Z. Radwański (ed.) *Civil law system Volume III, part. 1, Law of obligations - general part,* Wrocław 1981, p. 526. Por. J. Kuźmicka- Sulikowska, op. cit., p.234.

[59] Compare. T. Dybowski (w:), Z. Radwański (red.), *op. cit.,* s. 206. See. J. Kuźmicka-Sulikowska, *op. cit.,* 231.

[60] M. Kaliński, op. cit., s. 133. Zob. też J. Kuźmicka- Sulikowska, op. cit., s.223.

[61] See. M. Kaliński, op. cit., p. 132.

[62] Ibidem, p.133

Thus, the scope of liability in this provision is different than the risk principle described in Article 430 of the Labour Code.

Ł. Psiarczyk, describing "objective liability", states that it charges the employer regardless of circumstances of a particular case. In this regard the author means some ruthlessness of bearing liability by the employer as part of compensation risk. Therefore, it seems justified to claim that the detachment of compensation risk from circumstances of a specific case should not have a major impact on the scope of the employer's liability for damages. Thereby, if an objective liability, mentioned by Ł. Psiarczyk, is a civilian principle of equity, the change made in this principle, regarding separating liability of the employer from circumstances of a particular case, does not result in separation of the scope of that liability from the general rule on which the principle of equity in Civil Law is based. As the result of such an assumption, the scope of restitution of a damage as part of compensation risk is determined, analogically to the civilistic principle of equity, on the basis of the employer's financial statue and life situation of the victim.

Thus, compensation risk does not always guarantee full restitution of a damage caused to an employee. Such an assumption was accepted by Ł. Pisarczyk who noticed that other damages than accidents at work and occupational diseases do not create a coherent system based on uniform axiological principles in Labour Law. Their assessment must be made taking into account an impact of particular events on a situation of parties[63]. The author also pays attention to a situation in which the compensation risk does not lead to an excessive burden on the employing entity[64].

Considering that the concept of "objective liability" describes the civilian principle of equity, one can pose a question what happens when the employer does not cover all the damage caused to the employee. It is reasonable to claim that in such a case the employee could assert their rights directly from the perpetrator of the damage on the tort 'guilty principle described in Article 415 of the Civil Code.

[63] Ł. Pisarczyk, *op. cit.*, p.354
[64] Ibidem, p.289

Conclusions

The paper shows that in practice, defining the principles of the employer's liability for a damage caused by an employee to a third party is not straightforward. First of all, by determining liability regime one should decide whether the victim had been linked with the employer by an employment relationship before the damage occurred.

It seems that an obligation to restitution of a damage is different in the case when the victim is another employee of the same employer. In such a situation, both the scope of liability (financial) of the employer and legal procedures of this liability are determined by compensation risk. It should be noted that the role of this legal instrument is becoming more and more important. It becomes one of the arguments in the discourse on the employer's complementary liability for damages. However, its practical importance is rather small now. It is not entirely clear in which cases this risk is borne by the employer. Secondly, it is impossible to state clearly on what terms the scope of the employer's compensation obligations is determined. Nonetheless, it is acceptable to include compensation risk into the set of risks, described in Labour Law, which the employer is burdened with in work processes.

Legal acts

[1.] Act of April 23, 1964, – Civil Code (Journal of laws 2017, item 459).

[2.] Act of June 26, 197. – Labor Code (Journal of laws 2016, item 1666).

Jurisdiction

[1.] Judgment of the Supreme Court (7) of 19 June 1975, V PRN 2/75, LEX No. 12356.

[2.] Judgment of the Supreme Court of 19 February 1976, III PR 21/76, PiZS 1977/10/68.

[3.] Resolution of the Supreme Court (7) of 12 December 1976, III CZP 5/76, OSNCP 1977, No. 4 item 61.

[4.] Judgment of the Supreme Court of December 15, 1977, I CR 444/77, LEX No. 1671968.

[5.] Judgment of the Supreme Court of 28 August 1980, IV PR 252/80, LEX No. 12675.

[6.] Judgment of the Supreme Court of March 25, 1987, II CR 48/87, LEX No. 8817.

[7.] Judgment of the Supreme Court of 11 April 2008, II CSK 618/07, LEX No. 496844.

[8.] Judgment of the Supreme Court of February 2, 2011, II PK 189/10, LEX No. 811844.

[9.] Judgment of the Supreme Court of November 29, 2013, 87/13, LEX No. 1418874.

[10.] Judgment of Gdańsk Court of Appeal of February 28, 2014, III APa 2/14, LEX No. 1448508.

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